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KEY TITLES

Give the formal parts of pleadings in each particular jurisdiction, furnishing the method of making the forms in the other titles of general application. Thus, to adapt the New York complaint, Form No. 4999, to use in California, turn to the Key Title COMPLAINTS, and substitute the formal parts of the California complaint as given in Form No. 5919 for the formal parts in Form No. 4999, and the complaint becomes good for California. In the same manner, this form may be used in other jurisdictions. Again, take the Michigan bill, Form No. 5638; to adapt this bill to use in another jurisdiction, as for example in the District of Columbia, turn to Form No. 4268 in the Key Title BILLS IN EQUITY and substitute the formal parts there given for the formal parts in Form No. 5638. In like manner, any declaration, as for instance the Illinois precedent, Form No. 6875, may be readily transformed into a declaration for use in another jurisdiction by referring to the Key Title DECLARATIONS for the formal parts. The Key Titles in the first six volumes are AFFIDAVITS, ANSWERS, BILLS IN EQUITY, COMPLAINTS, CRIMINAL COMPLAINTS, DECLARATIONS, DEMURRERS.

ENCYCLOPÆDIA

OF

FORMS AND PRECEDENTS

FOR

PLEADING AND PRACTICE, AT COMMON LAW, IN EQUITY, AND UNDER THE VARIOUS CODES AND PRACTICE ACTS.

EDITED BY
WILLIAM MACK AND HOWARD P. NASH

UNDER THE SUPERVISION OF
JAMES COCKCROFT,
AUTHOR OF
The American and English Encyclopædia of Law
AND THE
Encyclopædia of Pleading and Practice.

VOL. VI.

NORTHPORT, LONG ISLAND, N. Y.,
JAMES D. COCKCROFT.
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DEATH BY WRONGFUL ACT.

By Joseph R. Long.

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I. CIVIL ACTIONS.[1]

1. Statutes — *Generally.* — For statutes providing generally for the recovery of damages for death caused by the wrongful act, omission or negligence of another see as follows:

Alabama. — Civ. Code (1886), § 2589.

Arizona. — Rev. Stat. (1887), §§ 2145, 2155.

Arkansas. — Sand. & H. Dig. (1894), §§ 5911, 5912.

California. — Code Civ. Proc. (1897), § 377.

Colorado. — Mills' Anno. Stat. (1891), §§ 1509–1511.

Connecticut. — Gen. Stat. (1888), §§ 1008, 1009.

Delaware. — Rev. Stat. (1893), p. 788, c. 31.

District of Columbia. — 23 U. S. Stat. at Large, p. 307, c. 126.

Florida. — Rev. Stat. (1892), §§ 2342–2344.

Georgia. — 2 Code (1895), §§ 3828, 3829.

Idaho. — Rev. Stat. (1887), § 4100.

Illinois. — Starr & C. Anno. Stat. (1896), c. 70, pars. 1, 2.

Indiana. — Horner's Stat. (1896), § 284.

Iowa. — Code (1897), § 3443.

Kansas. — Gen. Stat. (1889), § 4518.

Kentucky. — Stat. (1894), § 6.

Louisiana.—Laws (1884), No. 71, p. 94.

Maine. — Stat. (Supp. 1895), c. 81, §§ 1, 2.

Maryland. — Pub. Gen. Laws (1888), art. 67, §§ 1–4.

Michigan. — How. Anno. Stat. (1882), §§ 8313, 8314.

Minnesota. — Stat. (1894), § 5913,

Mississippi. — Anno. Code (1892), § 663.

Missouri. — Rev. Stat. (1889), §§ 4426, 4427.

Montana. — Code Civ. Proc. (1895), § 579.

Nebraska. — Comp. Stat. (1897), §§ 2503, 2504.

1. Notice of Claim.[1]

Nevada. — Gen. Stat. (1885), §§ 3898, 3899.

New Hampshire. — Pub. Stat. (1891), c. 191, §§ 8–13.

New Jersey. — Gen. Stat. (1895), p. 1188.

New Mexico. — Comp. Laws (1897), §§ 3213–3220.

New York. — Birds. Rev. Stat. (1896), p. 834.

North Carolina. — Code (1883), §§ 1498–1500.

North Dakota. — Rev. Codes (1895), §§ 5974–5979.

Ohio. — Bates' Anno. Stat. (1897), §§ 6134, 6135.

Oklahoma. — Stat. (1893), § 4313.

Oregon. — Hill's Anno. Laws (1892), § 371.

Pennsylvania. — Const., art. 3, § 21; Pepp. & L. Dig. (1894), p. 3231–3235.

Rhode Island. — Gen. Laws (1896), c. 233, § 14.

South Carolina. — Rev. Stat. (1893), §§ 2315, 2318.

South Dakota. — Dak. Comp. Laws (1887), § 5499.

Tennessee. — Code (1896), §§ 4025–4029.

Texas. — Const., art. 16, § 26; Rev. Stat. (1895), § 3017 *et seq.*

Utah. — Rev. Stat. (1898), § 2912.

Vermont. — Stat. (1894), §§ 2451, 2452.

Virginia. — Code (1887), §§ 2902–2906.

Washington. — 2 Hill's Anno. Stat. (1891), § 703.

West Virginia. — Code (1887), c. 103, §§ 5, 6.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 4255, 4256.

Wyoming. — Rev. Stat. (1887), §§ 2364*a*, 4364*b*.

Death of Minor Child. — For statutes giving a right of action for the death of a minor child see as follows:

Alabama. — Civ. Code (1886), § 2588.

California. — Code Civ. Proc. (1897), § 376.

Colorado. — Mills' Anno. Code (1896), § 9.

Idaho. — Rev. Stat. (1887), § 4099.

Indiana. — Horner's Stat. (1896), § 266.

Iowa. — Code (1897), § 3471.

Montana. — Code Civ. Proc. (1895), § 578.

Oregon. — Hill's Anno. Laws (1892), § 34.

Utah. — Rev. Stat. (1898), § 2911.

Washington. — 2 Hill's Anno. Stat. (1891), § 139.

Action Against Common Carrier. — In several states special statutes have been enacted, giving a right of action against a common carrier for death caused by wrongful act, etc.

Arizona. — Rev. Stat. (1887), § 2145.

Colorado. — Mills' Anno. Stat. (1891), § 1508.

Maine. — Stat. (Supp. 1895), c. 52, § 22.

Massachusetts. — Pub. Stat. (1882), c. 73, § 6; c. 112, §§ 212, 213; Stat. (1886), c. 140.

Michigan. — How. Anno. Stat. (1882), § 3391.

Missouri. — Rev. Stat. (1889), § 4425.

New Mexico. — Comp. Laws (1897), § 3213.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 3235, § 5.

South Dakota. — Dak. Comp. Laws (1887), § 5498.

Texas. — Rev. Stat. (1895), § 3017.

Death of Miner. — In several states a right of action is given for death occasioned by wilful violation of or failure to comply with the acts providing for health and safety of persons employed in mines.

Illinois. — Starr & C. Anno. Stat. (1896), p. 2728, par. 14.

Missouri. — Rev. Stat. (1889), § 7074.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 3150, § 348.

Employers' Liability Acts. — In several states a right of action against a master for the death of a servant is given by what are known as the Employers' Liability acts.

Alabama. — Civ. Code (1886), §§ 2590–2592.

Colorado. — Mills' Anno. Stat. (Supp. 1896), §§ 1511*a*–1511*e*.

Indiana. — Acts (1893), c. 130.

Massachusetts. — Stat. (1887), c. 270.

1. Claim Against County — Iowa. — Under the *Iowa* statute (Code (1897), § 3528), providing that no action shall be brought against any county on an unliquidated demand until the same has been presented to the board of supervisors and payment demanded, a claim in these words:

"The County of *Webster*, in the State of *Iowa*, to *Martha Dale, Administratrix of Estate of James Dale*, Deceased:

For damages for loss of life of *James*

Form No. 6803.

(Precedent in Budd *v.* Meriden Electric R. Co., 69 Conn. 277.)[1]

To the *Meriden Electric Railroad Company*, a railway corporation operating an electric railroad running through *Pratt* street, in the town of *Meriden*, *Connecticut:*

Please take notice that *Daniel R. Budd*, of said *Meriden*, administrator of the estate of *Mizee E. Budd*, deceased, claims damages against said company for injuries inflicted upon the person of the said *Mizee E. Budd*, caused by the negligence of said corporation and its employees, resulting in the death of the said *Mizee E. Budd.* The injuries were inflicted on the *30th* day of *August*, A. D. 1*895*, at about *quarter past four* o'clock in the *after*noon, and at a place upon the railroad track of said corporation on *Pratt* street, about *one hundred and ten* feet northerly of the crosswalk at the intersection of *Pratt* and *Camp* streets in said *Meriden.* The cause of the injuries was that said corporation had negligently omitted and refused to equip and provide the electric car, which the said company was operating and propelling at said time and place, with any fender or other appliance for the safety of human life and limb, and the negligence and carelessness of the motorman in charge of said car, in managing and operating said car, and in his allowing and causing said car to strike, throw down, and run over and upon the said *Mizee E. Budd*, then an infant of the age of *twenty-one months*, while she was crossing said *Pratt* street; thereby injuring, mutilating, and crushing her, and causing her death. By said injuries both legs and both feet of the said *Mizee E. Budd* were crushed and broken, her right hip was crushed, and her perineum was cut open nearly to the spine, death resulting within *three* hours. The above claim and statement is made as nearly as the same can now be ascertained.

[*Daniel R. Budd.*

Sept. 3, 1*895.*][2]

Form No. 6804.

(Precedent in Brick *v.* Bosworth, 162 Mass. 337.)[3]

Dale by falling from the bridge across the *Des Moines* river, at *Lehigh*, in said county, in *September*, A. D. 18*84*, by reason of the negligence of said county, $*10,000*," verified by plaintiff's attorney, is sufficient. Dale *v.* Webster County, 76 Iowa 370.

1. It was held in this case that the notice is sufficient as to the nature of the injury if it gives a general description which will reasonably apprise the defendant of its general character. As to the necessity of a notice, consult statutes cited *supra*, note 1, p. 2.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. This notice was held sufficient under Mass. Pub. Stat. (Supp. 1888), c. 270, § 3. Consult also list of statutes cited *supra*, note 1, p. 2; and see Beauregard *v.* Webb Granite, etc., Co., 160 Mass. 201, wherein a notice under this same statute, reciting that an employee was killed "by a stone being precipitated upon him from your derrick as a result of your negligence, and of the negligence of some person for whose negligence you are liable," was held sufficient.

[*Holyoke, Dec. 7th*, 1892.

To *George L. Bosworth*, Esq.,
Dear Sir:][1]

You are hereby notified that on the *eighth* day of *November*, 1892, my husband *Jeremiah J. Brick*, while in your employ, was instantly killed or died without conscious suffering. The place where my said husband was instantly killed or died without conscious suffering was between *Cabot* street and the railroad of the *Connecticut River Railroad Company*, near the *Connecticut* River in said *Holyoke*, and at the place where a new mill was being erected, supposed to belong to the *Riverside Paper Company* of said *Holyoke*. The cause of the death of my said husband was the falling of a derrick upon him on account of the same being improperly or insecurely fastened.

[*Bridget M. Brick.*][1]

2. Complaint, Declaration or Petition.[2]

1. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. Requisites of Complaint, Petition or Declaration. — **For formal parts** of a complaint, petition or declaration in a particular jurisdiction consult the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS.

For statutes relating to actions for death see *supra*, note 1, p. 2.

Appointment as Administrator. — As to the necessity of alleging the plaintiff's appointment as administrator, etc., where the action is brought by the personal representative of the deceased, see, generally, the title EXECUTORS AND ADMINISTRATORS, 8 Encycl. of Pl. and Pr. 650.

Defendant's Corporate Existence. — As to the necessity of alleging the corporate existence of a defendant corporation, see the title CORPORATIONS, 5 Encycl. of Pl. and Pr. 52.

Must Come Within Statute — *Generally.* — The complaint or petition must state all the facts requisite to bring the case within the statute, and if it does this it is sufficient. Allerton *v.* Boston, etc., R. Co., 146 Mass. 241, 34 Am. & Eng. R. Cas. 563; Barker *v.* Hannibal, etc., R. Co., 91 Mo. 86; Kennayde *v.* Pacific R. Co., 45 Mo. 255; Dulaney *v.* Missouri Pac. R. Co., 21 Mo. App. 597; Brown *v.* Harmon, 21 Barb. (N. Y.) 508.

Parties Having Prior Right to Sue. — Where the first right to sue is given by statute to persons other than the plaintiff, the nonexistence, desertion, etc., of such persons must be alleged, or it must otherwise appear that the plaintiff has a right to bring the action. St. Louis, etc., R. Co. *v.* Yocum, 34 Ark. 493, 6 Am. & Eng. R. Cas. 617; Duvai *v.* Hunt, 34 Fla. 85; Perry *v.* Georgia R., etc., Co., 85 Ga. 193; Louisville, etc., Consol. R. Co. *v.* Lohges, 6 Ind. App. 288; Missouri Pac. R. Co. *v.* Barber, 44 Kan. 612, 44 Am. & Eng. R. Cas. 523; Barker *v.* Hannibal, etc., R. Co., 91 Mo. 86; Dulaney *v.* Missouri Pac. R. Co., 21 Mo. App. 597.

See also Brennan *v.* Molly Gibson Consol. Min., etc., Co., 44 Fed. Rep. 795; McIntosh *v.* Missouri Pac. R. Co., 103 Mo. 131.

Emancipation of Infant. — Where the right of action to recover for the death of a minor child depends upon the emancipation of the infant, an averment of his emancipation is essential, and an allegation that at the time of his death the decedent was not, and for two months theretofore had not been, in the service of his parents, or either of them, is not sufficient to show an emancipation. Berry *v.* Louisville, etc., R. Co., 128 Ind. 484, 48 Am. & Eng. R. Cas. 531.

Unmarried Infant. — Where a right of action is given to a parent to recover for the death of his unmarried minor child, a petition failing to allege that the deceased was unmarried states no cause of action. Dulaney *v.* Missouri Pac. R. Co., 21 Mo. App. 597; Sparks *v.* Kansas City, etc., R. Co., 31 Mo. App. 111; McIntosh *v.* Missouri Pac. R. Co., 103 Mo. 131.

Where Deceased Might have Recovered if Death had Not Ensued. — Under a

statute giving a right of action in cases where the deceased might have maintained an action if death had not ensued, it is not necessary to allege that the defendant's default was such that the deceased would have been entitled to recover therefor, where the facts averred sufficiently show such right. Philadelphia, etc., R.Co. *v.* State, 58 Md. 372, 10 Am. & Eng. R. Cas. 792; Lima Electric-Light, etc., Co. *v.* Deubler, 7 Ohio Cir. Ct. Rep. 185. But in such case a complaint alleging that the death of the deceased was instantaneous is fatally defective, since no right of action could have accrued to the deceased under these circumstances. Belding *v.* Black Hills, etc., R. Co., 3 S. Dak. 369, 52 Am. & Eng. R. Cas. 624; Illinois Cent. R. Co. *v.* Pendergrass, 69 Miss. 425.

Negativing Employment. — Where the statute gives a right of recovery provided the deceased was not an employee of the defendant, it is not necessary to allege that the deceased was not in the employment of the defendant, this being a matter of proof. Louisville, etc., R. Co. *v.* Smith, 87 Ky. 501.

Allegation that Action was Brought in Due Time. — It is not necessary that the plaintiff should allege that the action has been brought within the period limited by the statute. Chiles *v.* Drake, 2 Metc. (Ky.) 146. See also Hill *v.* New Haven, 37 Vt. 501. But this is a necessary allegation where the question as to who shall have the right to sue depends upon the time within which the action is brought. Hamilton *v.* Hannibal, etc., R. Co., 39 Kan. 56.

Previous Criminal Prosecution. — In *Georgia*, in an action for death by wrongful act, where the tort complained of amounts to a felony, the plaintiff must allege that he has prosecuted the defendant in a criminal action as required by section 2970 of the code or show an excuse for not doing so. Allen *v.* Atlanta St. R. Co., 54 Ga. 503; Chick *v.* Southwestern R. Co., 57 Ga. 357.

But where a suit was brought in *Georgia* for a homicide which occurred in *South Carolina*, in which state no such prosecution is required as a condition precedent to a recovery in a civil action, it was held that such prosecution was not necessary in *Georgia* and need not be alleged. South Carolina R. Co. *v.* Nix, 68 Ga. 572.

Pleading Statute — *Generally.* — Where the declaration or complaint contains averments of facts sufficient to bring the case within the statute, it is not necessary, in an action brought under a domestic statute, that the statute should be referred to in express terms. Kennayde *v.* Pacific R. Co., 45 Mo. 255; White *v.* Maxcy, 64 Mo. 552; Brown *v.* Harmon, 21 Barb. (N. Y.) 508; Westcott *v.* Central Vermont R. Co., 61 Vt. 438; Morrisey *v.* Hughes, 65 Vt. 553.

Of Other States. — But where the action is based on the statute of another state, the existence of such statute is a necessary allegation. Selma, etc., R. Co., *v.* Lacy, 43 Ga. 461; Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, 38 Am. & Eng. R. Cas. 165; Jackson *v.* Pittsburgh, etc., R. Co., 140 Ind. 241; Hyde *v.* Wabash, etc., R. Co., 61 Iowa 441, 15 Am. & Eng. R. Cas. 503; Vanderwerken *v.* New York, etc., R. Co., 6 Abb. Pr. (N. Y. Supreme Ct.) 239; Gurney *v.* Grand Trunk R. Co., (Supreme Ct.) 37 N. Y. St. Rep. 557; Debevoise *v.* New York, etc., R. Co., 98 N. Y. 377, 25 Am. & Eng. R. Cas. 335; O'Reilly *v.* New York, etc., R. Co., 16 R. I. 388, 42 Am. & Eng. R. Cas. 50; Nashville, etc., R. Co. *v.* Sprayberry, 9 Heisk. (Tenn.) 852; Hobbs *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 873.

Alleging Breach of Duty — *Generally.* — The plaintiff must allege a wrongful act, neglect or default on the part of the defendant as the cause of the death of the deceased. Holton *v.* Daly, 106 Ill. 131. But a general allegation of the defendant's negligence, together with a statement of the circumstances under which the injury was caused, is sufficient without specification of the particular acts of negligence complained of Louisville, etc., R. Co. *v.* Jones, 83 Ala. 376, 34 Am. & Eng. R. Cas. 417; Walsh *v.* Western R. Co., 34 Fla. 1; Duval *v.* Hunt, 34 Fla. 83; Chicago, etc., R. Co. *v.* Blank, 24 Ill. App. 438; Andrew *v.* Chicago, etc., R. Co., 45 Ill. App. 269; Indianapolis, etc., R. Co. *v.* Keeley, 23 Ind. 133; Huntington County *v.* Hoffman. 134 Ind. 1; New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192; Chiles *v.* Drake, 2 Metc. (Ky.) 146; Louisville, etc., R. Co. *v.* Case, 9 Bush (Ky.) 728; Rogers *v.* Hughes, 87 Ky. 185; Brick *v.* Bosworth, 162 Mass. 334; Sullivan *v.* Missouri Pac. R. Co., 97 Mo. 113, 38 Am. & Eng. R. Cas. 79; Pope *v.* Kansas City Cable R. Co., 99 Mo. 400, 43 Am. & Eng. R. Cas. 290; Le May *v.* Mis-

souri Pac. R. Co., 105 Mo. 361; Parker *v.* Providence, etc., Steamboat Co., 17 R. I. 376; Preston *v.* St. Johnsbury, etc., R. Co., 64 Vt. 280; Criswell *v.* Pittsburgh R. Co., 30 W. Va. 798, 33 Am. & Eng. R. Cas. 232; Fitts *v.* Waldeck, 51 Wis. 567.

But while it is not necessary in a declaration to set out in minute detail all the facts that tend to establish the negligence complained of, yet it is requisite to allege sufficient facts to point out the wrongful act of commission or omission that constitutes the negligence relied on for recovery. Duval *v.* Hunt, 34 Fla. 85; Shelton *v.* Louisville, etc., R. Co., (Ky. 1897) 39 S. W. Rep. 842, 2 Am. Neg. Rep. 362; Addison *v.* Lake Shore, etc., R. Co., 48 Mich. 155, 15 Am. & Eng. R. Cas. 512; Conley *v.* Richmond, etc., R. Co., 109 N. Car. 692, 52 Am. & Eng. R. Cas. 490; Miller *v.* Coffen, 19 R. I. 164; Wilson *v.* New York, etc., R. Co., 18 R. I. 491; Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. (Va.) 805. Thus a complaint alleging that the plaintiff's intestate "was, by the wrongful act, neglect and default of the defendant, slain and killed," without stating the facts constituting the alleged negligence, is fatally defective. Conley *v.* Richmond, etc., R. Co., 109 N. Car. 692, 52 Am. & Eng. R. Cas. 490. So also a declaration alleging that the defendant "so carelessly and improperly drove and managed" an engine and train of cars that it struck and killed the decedent, without showing in what such carelessness and impropriety consisted, is too general. Chicago, etc., R. Co. *v.* Harwood, 90 Ill. 425.

Sufficient Allegations. — A general averment that the defendant, by her agents and servants, did carelessly and negligently run over the deceased, is sufficient without stating the particular acts constituting such negligence. Indianapolis, etc., R. Co. *v.* Keeley, 23 Ind. 133.

In an action for causing the death of a passenger by collision, an averment in the complaint that the "defendant negligently conducted itself in and about the carrying of plaintiff's intestate" is broad enough to cover the omission of any duty which the carrier owed to the passenger, including the employment of competent, skilful and lawful servants. Kansas City, etc., R. Co. *v.* Sanders, 98 Ala. 293, 58 Am. & Eng. R. Cas. 140.

A declaration by plaintiff as administrator of his deceased wife, which charges that the defendant was in occupation of a brewery and office, and a passage leading thereto from the public street, used by defendant for the reception of customers in his trade of a brewer, which passage was the usual means of access from the office to the street; yet the defendant wrongfully and negligently permitted a trap door in the floor of the passage to be and remain open without being properly guarded and lighted; and the wife, who had been in the office as a customer of defendant, and otherwise in defendant's business, and was lawfully passing along the passage on her return from the office to the street, fell through the aperture caused by the trap door being and remaining open and not properly guarded and lighted, whereby she was killed; sufficiently charges the defendant's duty and breach. Chapman *v.* Rothwell, El. Bl. & El., 168, 96 E. C. L. 168.

Insufficient Allegation. — In an action against the owners of a mine, if the complaint avers that the injury was caused by the negligence and want of skill of the engineer, and that the superintendent had full power to control the working of the mine, and employ and discharge all the workmen at his discretion, it must also allege that defendants were negligent in employing the superintendent, or it does not state a cause of action. Collier *v.* Steinhart, 51 Cal. 116.

Wilful Neglect — *Generally.* — Where a right of recovery is given by statute in case of loss of life by the wilful neglect of another, an allegation of wilful negligence is essential. Lexington *v.* Lewis, 10 Bush (Ky.) 677. But it is not necessary to use the exact language of the statute. Equivalent words may be employed. Lexington *v.* Lewis, 10 Bush (Ky.) 677. Nor is it necessary to state the facts constituting the wilful neglect. Rogers *v.* Hughes, 87 Ky. 185. And see Chiles *v.* Drake, 2 Metc. (Ky.) 146.

It is not sufficient, however, to charge the defendant's negligence as "gross," "wanton," "reckless," or "careless," these words not being equivalent to "wilful." Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. Rep. 823; Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398, 25 Am. & Eng. R. Cas. 550; Jacobs *v.* Louisville, etc., R. Co., 10 Bush (Ky.) 263; Lexington *v.* Lewis, 10 Bush (Ky.) 677; Hansford *v.* Payne, 11 Bush (Ky.) 380.

Wilful injury and simple negligence cannot be alleged in the same count. Verner *v.* Alabama, G. S. R. Co., 103 Ala. 574.

Negligence of Agents and Employees. — The negligent acts of the defendant may be charged as having been performed through agents and employees, and an averment that the "defendant, by its agents and employees acting under the orders of its superintendent and foreman," committed the wrongful act resulting in the death of the deceased, sufficiently charges the negligent act of the defendant. Hoosier Stone Co., *v.* McCain, 133 Ind. 231.

An allegation that the defendant, a railroad company, did the negligent or careless act which caused the decedent's death, or omitted the diligence which would have prevented it, is equivalent to an allegation that the decedent's co-employees were guilty of such negligence, and is sufficient. Central R. Co. *v.* Crosby, 74 Ga. 737. But where it is positively alleged that the acts and omissions complained of were by the defendant, it will not be presumed that they were those of a fellow-employee of the decedent. Brown *v.* Central Pac. R. Co., 68 Cal. 171. See also Hildebrand *v.* Toledo, etc., R. Co., 47 Ind. 399.

Defendant's Misconduct Must be Averred Directly. — The complaint must state all the facts requisite to bring the case within the statute, and a mere inferential charge of misconduct or negligence on the part of the defendant is not sufficient. There must be a positive allegation, not only of the acts, but of the qualifications, if any, prescribed by the statute. Thus where, in an action under the *New York* act of 1847, to recover damages of the defendants for causing the death of the plaintiff's intestate by their wrongful act, neglect or default, the complaint charged that on, etc., the defendants possessed and occupied, as a granary for storing grain for the use of their brewery, the loft of a building which had been negligently, carelessly and improperly constructed, and was by reason thereof unfit, from weakness, for the business to which the defendants applied it, of which they had notice; that they had deposited an unusual quantity of barley in the loft, more than the outer wall could bear, in consequence of its weak and insecure state and improper construction, whereby the wall was pressed out and fell upon an adjoining shop belonging to and used by H. & Co., in which the deceased was then at work, and that he was killed by the fall of said wall, "owing to the carelessness, negligence and fault of the defendants in using said building in its weak and insecure state, and in overloading the same;" it was held that the complaint was defective; the only improper act, negligence or default directly averred being in the construction of the building, without any allegation that the defendants then owned the building; but it was further held that this was a defect which was cured by verdict. Brown *v.* Harmon, 21 Barb. (N. Y.) 508.

That Death was Result of Defendant's Default. — The complaint must show that the death complained of was the result of the negligent acts charged. Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 57 Am. Rep. 120, 27 Am. & Eng. R. Cas. 88.

But in an action by an administrator to recover for the death of his decedent, alleged to have been caused by defendant's negligence, where the negligence complained of consisted of — (1) the constructing and maintaining its track in the street of a city so that the rails and a portion of the ties were above the surface of the ground; (2) the failure to keep a flagman at a crossing, as required by an ordinance; (3) wrongfully and negligently running its locomotive and cars along the street without any brakeman on the forward end of the train, so that the decedent's horse became frightened, causing her carriage to strike the elevated rails, so that she was thrown in front of the train and killed; it was held that the complaint stated a cause of action, although it did not appear precisely how the death resulted from the negligence charged. Johnson *v.* St. Paul, etc., R. Co., 31 Minn. 283, 15 Am. & Eng. R. Cas. 467.

Passive Neglect. — An action cannot be maintained under R. I. Pub. Stat. (1882), c. 204, § 20, for the death of a person where the defendant is charged with a mere passive neglect or omission of duty, and hence a declaration states no cause of action which merely shows that the defendants negligently omitted sufficiently to shore up the roof of their mine, in consequence of which the plaintiff's intestate was killed by the fall of a mass of graphite. Myette *v.* Gross, 18 R. I. 729.

Surplusage. — If the declaration con-

tains general allegations in proper form showing the defendant's negligence, and also allegations specifying the particulars, which are defective, the latter not being repugnant to the former, the declaration is not thereby rendered bad, for the special allegations may be stricken out as surplusage. Preston *v.* St. Johnsbury, etc., R. Co., 64 Vt. 280.

Annexing Newspaper Account of Accident. — Where the petition contains a complete statement of the plaintiff's case, it is both superfluous and unauthorized to annex thereto a copy of a newspaper containing an account of the accident. Comitez *v.* Parkerson, 50 Fed. Rep. 170.

Negativing Contributory Negligence — *Generally.* — An averment that the deceased was not guilty of contributory negligence is, in general, unnecessary.

Alabama. — Columbus, etc., R. Co. *v.* Bradford, 86 Ala. 574, 38 Am. & Eng. R. Cas. 214.

Mississippi. — Hickman *v.* Kansas City, etc., R. Co., 66 Miss. 154, 38 Am. & Eng. R. Cas. 183.

Missouri. — O'Connor *v.* Missouri Pac. R. Co., 94 Mo. 150, 32 Am. & Eng. R. Cas. 61.

New York. — Melhado *v.* Poughkeepsie Transp. Co., 27 Hun (N. Y.) 99.

Virginia. — Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. (Va.) 805.

West Virginia. — Criswell *v.* Pittsburgh, etc., R. Co., 30 W. Va. 798.

But in several states the rule is otherwise, and it must be alleged and proved that the deceased was not guilty of contributory negligence.

Indiana. — Indianapolis, etc., R. Co. *v.* Keeley, 23 Ind. 133; Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228; Hildebrand *v.* Toledo, etc., R. Co., 47 Ind. 399; Indiana, etc., R. Co. *v.* Greene, 106 Ind. 279, 25 Am. & Eng. R. Cas. 322.

Iowa. — Patterson *v.* Burlington, etc., R. Co., 38 Iowa 279.

Maryland. — State *v.* Baltimore, etc., R. Co., 24 Md. 84.

See generally on this subject the title CONTRIBUTORY NEGLIGENCE, 5 Encycl. of Pl. and Pr. 1.

Sufficient Negation. — A general averment that the deceased was free from fault or negligence is sufficient unless overcome by specific averment of facts showing contributory negligence. Louisville, etc., R. Co. *v.* Hanning, 131 Ind. 528; Louisville, etc., Consol. R. Co. *v.* Lohges, 6 Ind. App. 288.

In an action against a railroad company for the death of the plaintiff's intestate caused by his falling into a culvert constructed by the defendant under its track in a city street, and negligently left open and uncovered by the defendant, an averment in the complaint that the deceased fell into the culvert "while exercising due and reasonable care and without fault or negligence on his part," sufficiently alleges that he was not guilty of contributory negligence. Toledo, etc., R. Co. *v.* Brannagan, 75 Ind. 490, 5 Am. & Eng. R. Cas. 630.

Insufficient Negation. — In an action against a railroad company for causing the death of plaintiff's intestate by running over him, an averment in the complaint that the deceased "was at the time lawfully on the track of said railroad" is not sufficient to show that he was not guilty of contributory negligence. Indianapolis, etc., R. Co. *v.* Keeley, 23 Ind. 133.

Petition Showing Contributory Negligence. — In an action against a railroad company for the death of the plaintiff's husband, the material portions of the petition were as follows:

"That, while *Herman Aufdenburg* was a passenger on defendant's train of cars on the *ninth* day of *February*, 18*92*, as aforesaid, he, with the knowledge and consent of defendant, through its servants, officers, agents and employees managing and conducting and operating said steam locomotive and train of cars, left the passenger car in which he was then and there conveyed, and, with the consent and full knowledge and permission of defendant, he climbed upon the top of a box freight car, it being a part of defendant's mixed train of freight cars together with said passenger car, and the defendant, by and through its agents, servants, and employees as aforesaid, negligently and carelessly, unskillfully and with criminal intent, started said train of cars, well knowing deceased to be in his dangerous position upon the top of said box car, and continued to run said train along said branch railroad, so that the deceased, without his fault, was suddenly and violently thrown from the top of said car onto the track of said railroad and under the cars and train, by means and by reason of which the wheels of said cars and train ran upon and over the body and limbs of the said *Herman Aufdenburg*, so that he was thereby injured, and

from the injuries received as aforesaid did then and there die; which killing occurred near the trestle number *22*, about —— miles from the town of *Gordonville* on said branch railroad; that the defendant could have prevented such killing by the exercise of proper care after the deceased climbed upon the top of the said box car, and by and through its agents, officers, servants and employees, managing and conducting said train carelessly, negligently, and with criminal intent, failed and refused to prevent the killing of deceased. That the said injury, from which the said *Herman Aufdenburg* died, as aforesaid, resulted from and was occasioned by the negligence, unskillfulness, criminal intent, and default of the defendant by and through its officers, agents, servants, and employees, while running, conducting, managing, and operating the said steam locomotive and train of cars at the time and place, in the manner hereinbefore set out." It was held that the plaintiff had no cause of action, as the deceased was guilty of contributory negligence in occupying a place of obvious peril, and this even though he did so at the order of the conductor. Aufdenberg *v.* St. Louis, etc., R. Co., 132 Mo. 505, 3 Am. & Eng. R. Cas. N. S. 323.

In an action against a railway company to recover damages for the death of a passenger, a petition alleging that the deceased, while riding on defendant's road, put his arm out of the car window and that it was struck by one of the timbers of a tunnel, was held bad on demurrer, as showing contributory negligence. Clark *v.* Louisville, etc., R. Co., (Ky. 1897) 39 S. W. Rep. 840, 2 Am. Neg. Rep. 360

In an action against a railroad company to recover for the death of the plaintiff's intestate, a complaint showing that the deceased, in company with others, was voluntarily riding on a hand-car on defendant's track, in the night-time, and thus was killed in a collision with a train, is bad as showing contributory negligence. Ream *v.* Pittsburgh, etc., R. Co., 49 Ind. 93.

Where, in an action against a railroad company for causing the death of the plaintiff's decedent, the complaint alleged that it was the duty of the deceased, as an employee of the defendant, to take care of its cars in a certain yard, and that, seeing an unattended car upon a track in such yard approaching another car, so that it would collide with the latter unless it was arrested, the deceased, in order to prevent such collision, and "without fault or negligence on his part," undertook to climb upon the top of the approaching car by an outside ladder thereon, and that while he was so climbing the two cars collided, causing the injury, it was held that the court could not on these averments determine that the deceased was guilty of negligence. Kelly *v.* Chicago, etc., R. Co., 50 Wis. 381, 2 Am. & Eng. R. Cas. 65.

Existence of Beneficiaries—*Generally.*—The damages to be recovered being generally a mere indemnity for the loss sustained, according to the weight of authority, there must be an allegation of the existence of persons entitled to claim such indemnity.

Arkansas.—Little Rock, etc., R. Co. *v.* Townsend, 41 Ark. 382, 21 Am. & Eng. R. Cas. 619.

Connecticut.—Lamplear *v.* Buckingham, 33 Conn. 237.

Illinois.—Chicago, etc., R. Co. *v.* Morris, 26 Ill. 400; Conant *v.* Griffin, 48 Ill. 410; Quincy Coal Co. *v.* Hood, 77 Ill. 68; Holton *v.* Daly, 106 Ill. 131; Chicago, etc., R. Co. *v.* Logue, 47 Ill. App. 292.

Indiana.—Indianapolis, etc., R. Co. *v.* Keeley, 23 Ind. 133; Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48; Stewart *v.* Terre Haute, etc., R. Co., 103 Ind. 44, 21 Am. & Eng. R. Cas. 209; State *v.* Wolford, 11 Ind. 392.

Kansas.—Missouri Pac. R. Co. *v.* Barber, 44 Kan. 612, 44 Am. & Eng. R. Cas. 523.

Michigan.—Walker *v.* Lake Shore, etc., R. Co., 104 Mich. 606.

Minnesota.—Schwarz *v.* Judd, 28 Minn. 371; Barnum *v.* Chicago, etc., R. Co., 30 Minn. 461, 15 Am. & Eng. R. Cas. 513; Johnson *v.* St. Paul, etc., R. Co., 31 Minn. 283, 15 Am. & Eng. R. Cas. 467; Sykora *v.* Case Threshing Mach. Co., 59 Minn. 130.

Montana.—Serensen *v.* Northern Pac. R., Co., 45 Fed. Rep. 407.

Nebraska.—Warren *v.* Englehart, 13 Neb. 283; Burlington, etc., R. Co. *v.* Crockett, 17 Neb. 570.

New Jersey.—McGlone *v.* New Jersey R. etc., Co., 37 N. J. L. 304.

New York.—Lucas *v.* New York Cent. R. Co., 21 Barb. (N. Y.) 245; Safford *v.* Drew, 3 Duer (N. Y.) 627.

Ohio.—Dunhene *v.* Ohio L. Ins., etc., Co., 1 Disney (Ohio) 257.

South Carolina. — Conlin *v.* Charleston, 15 Rich. L. (S. Car.) 210; Lilly *v.* Charlotte, etc., R. Co., 32 S. Car. 142.

Tennessee. — East Tennessee, etc., R. Co. *v.* Lilly, 90 Tenn. 563; Louisville, etc., R. Co. *v.* Pitt, 91 Tenn. 86.

Vermont. — Westcott *v.* Central Vermont R. Co., 61 Vt. 438; Geroux *v.* Graves, 62 Vt. 280.

Washington. — Northern Pac. R. Co. *v.* Ellison, 3 Wash. 225.

Wisconsin. — Woodward *v.* Chicago, etc., R. Co., 23 Wis. 400; Wiltse *v.* Tilden, 77 Wis. 152; Topping *v.* St. Lawrence, 86 Wis. 526.

But in several states an allegation of the existence of beneficiaries is held unnecessary.

Alabama. — Alabama, etc., R. Co. *v.* Waller, 48 Ala. 459; Columbus, etc., R. Co. *v.* Bradford, 86 Ala. 574, 38 Am. & Eng. R. Cas. 214.

Kentucky. — See East Tennessee Telephone Co. *v.* Simms, (Ky. 1896) 36 S. W. Rep. 171.

Nevada. — Roach *v.* Consolidated Imperial Min. Co., 7 Sawy. (U. S.) 224.

North Carolina. — Warner *v.* Western North Carolina R. Co., 94 N. Car. 250, 25 Am. & Eng. R. Cas. 432.

Virginia. — Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. (Va.) 431; Matthews *v.* Warner, 29 Gratt. (Va.) 570; Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. (Va.) 394.

West Virginia. — Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 370. *Compare* under act of 1863, Baltimore, etc., R. Co. *v.* Gettle, 3 W. Va. 376.

The names of the beneficiaries need not be set out. Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48; McGlone *v.* New Jersey R., etc., Co., 37 N. J. L. 304; Westcott *v.* Central Vermont R. Co., 61 Vt. 438. But in several cases it has been stated that the better practice seemed to require that the names of the persons to be benefited should be set out. Indianapolis, etc., R. Co. *v.* Keeley, 23 Ind. 133; Baltimore, etc., R. Co. *v.* Gettle, 3 W. Va. 376.

In an action under the *West Virginia* statute (Code, c. 103) to recover damages for causing the death of a party, the declaration is not demurrable simply because it names the wife and children of the deceased and avers that the damages claimed accrued to them; such averments will be treated as surplusage. Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 370, *distinguishing* Baltimore, etc., R. Co. *v.* Gettle, 3 W. Va. 376.

Negativing Existence of Beneficiaries Not Named. — It is sufficient to allege the existence of certain beneficiaries without denying the existence of others not named. Missouri Pac. R. Co. *v.* Barber, 44 Kan. 612, 44 Am. & Eng. R. Cas. 523; Southern Cotton Press, etc., Co. *v.* Bradley, 52 Tex. 587.

Allegations of Loss — *Generally.* — A general averment of loss is ordinarily sufficient without setting out the particular items or circumstances affecting such loss. Orman *v.* Mannix, 17 Colo. 564; Barnum *v.* Chicago, etc., R. Co., 30 Minn. 461, 15 Am. & Eng. R. Cas. 513; Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613.

Pecuniary Injury. — In several states, where the action is for the recovery of pecuniary loss only, it must be alleged and proved that the death of the deceased resulted in pecuniary loss. Hurst *v.* Detroit City R. Co., 84 Mich. 539; Charlebois *v.* Gogebic, etc., R. Co., 91 Mich. 59; Orgall *v.* Chicago, etc., R. Co., 146 Neb. 4; Kelley *v.* Chicago, etc., R. Co., 50 Wis. 381, 2 Am. & Eng. R. Cas. 65; Regan *v.* Chicago, etc., R. Co., 51 Wis. 599.

But it is not essential to allege pecuniary loss in so many words; thus, in a suit by a widow as administratrix to recover from a corporation damages for negligently causing the death of her husband, a petition alleging that the deceased left seven minor children, who were wholly dependent upon him for support and maintenance, is not open to the objection that it fails to aver facts showing that the wife and next of kin sustained pecuniary injuries, within the meaning of Neb. Comp. Stat. (1893), c. 21. Kearney Electric Co. *v.* Laughlin, 45 Neb. 390.

So, also, averments in a complaint showing that the deceased was a laboring man, working for defendant, without any allegation that he was receiving any compensation for his labor, and that he left no widow, but left a child three years old, sufficiently show that such child suffered pecuniary damage by the father's death. Kelley *v.* Chicago, etc., R. Co., 50 Wis. 381, 2 Am. & Eng. R. Cas. 65.

Under some statutes it is held that an allegation of pecuniary loss is unnecessary.

England. — Chapman *v.* Rothwell, El. Bl. & El. 168, 96 E. C. L. 168.

Illinois. — Barron *v.* Illinois Cent. R. Co., 1 Biss. (U. S.) 412. See also Railroad Co. *v.* Barron, 5 Wall. (U. S.) 90.

a. Where Death is Caused by Defective Appliances.[1]

Indiana. — Korrady *v.* Lake Shore, etc., R. Co., 131 Ind. 261. The law will imply pecuniary loss to the wife and child of the deceased, who was employed and receiving wages at the time of his death, and such loss need not be alleged. Louisville, etc., R. Co., *v.* Buck, 116 Ind. 566, 38 Am. & Eng. R. Cas. 152.

Montana. — Serensen *v.* Northern Pac. R. Co., 45 Fed. Rep. 407.

Ohio. — Johnston *v.* Cleveland, etc., R. Co., 7 Ohio St. 336.

New York. — Kenney *v.* New York Cent., etc., R. Co., 49 Hun (N. Y.) 535.

Washington. — Atrops *v.* Costello, 8 Wash. 149.

Loss of Child's Services. — Where the only right of action for the killing of a minor child is for the loss of services, averments showing such loss and the plaintiff's right to the services are essential. Bell *v.* Wooten, 53 Ga. 684; Allen *v.* Atlanta St. R. Co., 54 Ga. 503; Bell *v.* Central R. Co., 73 Ga. 520; Smith *v.* East, etc., R. Co., 84 Ga. 184; Perry *v.* Georgia R., etc., Co., 85 Ga. 193; Pennsylvania Co. *v.* Lilly, 73 Ind. 252, 4 Am. & Eng. R. Cas. 540.

It is held in *California* that where the loss of services is a natural and necessary sequence of the death, it need not be specially averred. Morgan *v.* Southern Pac. Co., 95 Cal. 510, 54 Am. & Eng. R. Cas. 101.

Adult Child. — In an action for damages for the death of an adult child, there must be an allegation that he supported or contributed to the support of the plaintiff, or that there was some expectation of pecuniary benefit to be derived by the plaintiff from the services of the deceased; and an allegation that the plaintiff, "as his sole surviving parent, has been damaged $*10,000* actual damages," is insufficient. Winnt *v.* International, etc., R. Co., 74 Tex. 32.

Loss of Pension. — No allegation of the loss of a pension due to the death of the deceased is necessary to admit proof thereof as an element of damages. Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613.

Funeral Expenses. — In several states it is held that funeral expenses must be specifically charged if a recovery is sought therefor. Gay *v.* Winler, 34 Cal. 153; Sykora *v.* Case Threshing-Mach. Co., 59 Minn. 130; See Roeder *v.* Ormsby, 13 Abb. Pr. (N. Y. Supreme Ct.) 334.

Loss of Support. — In an action by adult children for the death of their mother, averments that the deceased contributed to the support of each one of the plaintiffs, and cared for them in sickness, etc., with an expectation of a continuance of such benefits, are sufficient without a specific allegation of the nature of the aid extended to each. San Antonio, etc., R. Co. *v.* Long, 87 Tex. 148.

Plaintiff's Pecuniary Condition. — In an action by a parent for the death of an adult son, the plaintiff's pecuniary condition may properly be alleged to show the reasonable expectation of pecuniary assistance from the deceased, but not for the purpose of increasing the amount of damages. International, etc., R. Co. *v.* Kindred, 57 Tex. 491, 11 Am. & Eng. R. Cas. 649.

Joinder of Counts. — It is held in *Vermont* that an administrator may join a count for damages done his intestate during his life by the negligence of the defendant with a count for damages accruing to the widow and next of kin of the intestate on account of his death resulting from the defendant's negligence. Ranney *v.* St. Johnsbury, etc., R. Co., 64 Vt. 277; Preston *v.* St. Johnsbury, etc., R. Co., 64 Vt. 280.

1. Death Caused by the Explosion of Defective Boiler. — In Helm *v.* O'Rourke, 46 La. Ann. 178, the petitioner alleged that the defendants were indebted to her individually, and as tutrix of her minor child, in the sum of twenty thousand dollars, "for this, that on or about the *16th* day of *May*, 18*91*, while petitioner's husband, *Frank M. Helm*, was working at the furnace where he was employed in the boiler works of the aforesaid firm of *Edward & James O'Rourke*, in this city, he was called from said work by *Edward O'Rourke*, a member of said firm of *Edward & James O'Rourke*, to witness the testing of a boiler, which upon his arrival exploded, and he was thrown many feet distant and struck by many fragments of said boiler, and so injured, notwithstanding the best of medical skill and care, as to cause his death, after suffering *seven* days great pain and agony, on or about the *23d* of *May*, 18*91*. * * *

That petitioner's husband was guilty of no fault, but that all the injuries, suffering, agonies, death and damages aforesaid were caused solely by the carelessness, imprudence, gross negligence, fault and want of skill of the aforesaid firm of *Edward & James O'Rourke*, and *Edward* and *James O'Rourke* individually. That said boiler was old, rejected and condemned before the purchase of the same by the said defendant firm of *Edward & James O'Rourke*, and was not only unsafe, but utterly unfit for use, as they well knew, and which petitioner's husband did not know," etc. This petition was held sufficient.

In Long *v.* Doxey, 50 Ind. 385, the complaint, omitting the formal parts, charged that "the defendant was the owner and operating a steam heading factory, the propelling power for the machinery in which said factory being steam, which was generated in a boiler composed of iron; that said boiler was composed of defective and insufficient iron, and other material, and was defectively and insufficiently made and constructed, and was old, decayed, and worn to unfitness for use; that, on the day last named and on certain days before that day, defendant had notice of the defectiveness and unfitness of said boiler for generating steam for said machinery with safety, and was frequently warned that the same was dangerous, and could not be used with safety; that with full knowledge of all these facts and of the danger of using said boiler in said factory, the defendant carelessly, and negligent of the safety of the persons in his employment in said factory, on the day and year aforesaid, wrongfully and negligently employed one *Stephen Sullivan*, who was then and there the minor and only son of the plaintiff, and was aged about *sixteen* years, to work in said factory by the said defendant; that at the time of said employment, concealing from the plaintiff and from the said *Stephen* the dangerous condition of said boiler and the dangerous and hazardous character and nature of said employment and of the risks taken therein, and for the purpose of making large profits of said employment, as he did on the labor of said *Stephen*, put and placed him in, and compelled him to engage in avocations about said factory, where he was exposed to the danger of said boiler explosion, without his knowledge or consent; that, on the day last named, while said machinery was being so run, the said boiler, without any fault on the part of said *Stephen*, but by reason of the defects therein, exploded, and by said explosion said *Stephen* was instantly killed, without any fault on his part, and without any unnecessary exposure on his part, or any misconduct whatever; wherefore plaintiff is injured," etc. The trial resulted in a verdict for the defendant, but the judgment was reversed on the question of instructions and the case remanded for a new trial.

In Fitts *v.* Waldeck, 51 Wis. 567, the complaint was held to state a good cause of action. The complaint alleged the death of John Schantin, the plaintiff's intestate, leaving surviving him a widow and two minor children; the due appointment and qualification of the plaintiff as administrator of his estate; that defendants were partners in the ownership and operation of a distillery; that the deceased was in their employment as a fireman, and that it was his duty as such to be in and about the boiler rooms in said distillery, and as the cause of his death: "That the said *John Schantin* was then and there performing the duties of his said employment as such fireman, and, in so doing, exercised due care and caution, and was without fault or negligence on his part; that while the said *John Schantin* was so performing his said duties as fireman, one of the employees of said defendants, named *Frank Kroeger*, and who was, and for *six* weeks had been, in the employ of said defendants as engineer of, and in and about said distillery, was engaged in running, operating and managing the engine and boilers in said distillery; and that the said *Frank Kroeger* so recklessly, negligently and carelessly ran, operated and managed the said engine and boilers, and performed his said duties as such engineer so unskilfully and in so reckless and negligent a manner, that one of the boilers in said distillery exploded, and the said distillery was shattered and destroyed, and the said *John Schantin* was, without fault or negligence on his part, and by reason of the explosion of such boiler as aforesaid, violently and forcibly thrown and raised from the place where he then was, and was bruised and crushed by the falling timbers and debris of the distillery, so shattered and destroyed as aforesaid, by means of which the said *John Schantin* was greatly bruised,

(1) A Bridge.[1]

wounded and injured in his person, and suffered great pain and agony of body, and, after a short time, owing to such injuries, so received as aforesaid, the said *John Schantin*, on the said *15th* day of *June*, A. D. 18*80*, languished and died;" and further, "that the said *Frank Kroeger*, so running, operating, and managing the said engine and boilers, and so in the employ of the said defendants, was an unfit and unsuitable person, and wholly incompetent to perform the duties for which he was employed, and which he was allowed and permitted to perform; and that the said defendants, and their agents and servants, were informed of and well knew the said unfitness and incompetency of the said *Frank Kroeger* at and before the time the said injury was inflicted upon the said *John Schantin* as aforesaid, and that the said defendants retained the said *Frank Kroeger* in their said service and employ as such engineer after such knowledge as aforesaid; and that, in the exercise of reasonable care and prudence in the conduct of their said business, the said defendants, and their said agents and servants, ought to have known of the unfitness and incompetency of the said *Kroeger* for the employment and business in which he was engaged for the defendants as aforesaid, and which he was allowed and permitted to perform."

For another form see Ballard *v.* Hitchcock Mfg. Co., 71 Hun (N. Y.) 582; and for a complaint for death caused by explosion of locomotive boiler see *infra*, Form No. 6821.

1. Defective Approach. — In an action against the board of commissioners of a county for the death of the plaintiff's intestate through the negligence of the defendant in not placing barriers along approach to a county bridge, the complaint, which was in two paragraphs, set forth the circumstances of the injury in the first paragraph as follows: "That the death of *John Sharp* was caused by the carelessness and negligence of the defendant in not keeping in proper repair, and not putting up proper barricades at the approach or embankment at the south end of the bridge across the *Salamonie* river, at a point where it was the duty of the defendant to maintain, and keep in repair, a bridge at the town of *Warren*, *Huntington* county, and State of *Indiana*, aforesaid, owing to the said want of barricades, the said *John Sharp*, without any fault or negligence on his part in attempting to drive upon said embankment and across said bridge, and without any carelessness, negligence, or fault on his part, one of the horses fell, owing to the carelessness of the defendant in allowing a steep and abrupt ascent from the embankment to the bridge, causing a sudden jolt when the wheels struck the bridge, and the wagon, being heavily laden, ran backwards and down the embankment, thereby mangling and crushing said *John Sharp*, and thereby causing his death."

The second paragraph charged the manner of the injury thus: "That at the south end of said bridge defendant filled in and threw up a large embankment as a part of said bridge as an approach thereto, about *eighteen* feet wide, and on each side of which there is a steep descent averaging a depth of about *twenty* feet. That said embankment was not properly guarded by any barricade whatever, and that upon said day the deceased, for the purpose of conveying a load of logs across said bridge, carefully and without any negligence, carelessness or fault on his part, did drive upon said embankment, when, accidentally, and without any fault, carelessness, or negligence on his part, one of the horses attached to said wagon fell, and owing to the steep grade, said wagon ran backwards, he, the said *Sharp*, sitting upon the load and striving to save his wagon from running over the embankment, but being unable to do so on account of the embankment not having any barricades whatever. That owing to the carelessness and negligence of the defendant in not properly barricading and protecting said approaches, and without any fault or negligence on his part, said wagon and load ran down and over the embankment, and fell upon said *Sharp* and caused his death, all owing to the carelessness and negligence of the defendant, and without any fault, carelessness or negligence on the part of the deceased."

It was held the averments in each paragraph of the complaint were sufficient to show actionable negligence on the part of the defendant. Huntington County *v.* Huffman, 134 Ind. 1.

Form No. 6805.[1]

(*Caption and commencement as in Form No. 5931.*) That the defendants now are, and at the time of the happening of the grievances hereinafter mentioned were, officers of the municipal corporation of the city of *East Portland*, in the said county of *Multnomah*, duly elected and qualified as such, and constituting what is called the *board of trustees* of said city; and that they and each of them had accepted said office and entered upon the duties thereof; that by the charter of said city it was the duty of said defendants, as such officers, to keep the streets of said city in good order and repair and safe for travel; that among other streets is the street known as *Fourth* street, which extends over a deep ravine, and is projected over the same by means of a bridge and trestles; that the said street was much traveled over and used by the citizens of said city, and other persons, so much so, that the duty of the defendants to keep the said street in good order and repair and safe for travel became and was a matter of public and general concern. That on the day hereinafter mentioned the said bridge became and was insecure and unsafe for the passage and travel of passengers over and upon it. That the said defendants at the time of and long prior to the accident hereinafter mentioned, were notified and were aware of the unsafe and insecure condition of said bridge, but the said defendants, wilfully disregarding the duties of their said office of *board of trustees*, wilfully, negligently and carelessly suffered and permitted the said bridge to remain unsafe and insecure, and without proper protection, or notice to citizens or travelers against accident.

That on the *fourth* day of *August*, 1*880*, the plaintiff's daughter, *Eva Rose Rankin*, was lawfully passing along and over the said bridge, and wholly unaware of danger, was accidentally, and without fault or negligence on her part, precipitated through the planking or roadway of said bridge, down among the trestles thereof, and into the water at the bottom of said ravine, whereby the said *Eva Rose Rankin* received great bodily injury, by reason of which she then and there died. That by reason of the premises the plaintiff has been damaged in the sum of *five thousand* dollars.

Wherefore plaintiff demands judgment (*concluding as in Form No. 5931*).

(2) Hoisting Apparatus.[2]

Private Bridge — Duty to Repair. — In an action against a canal company for negligently causing the death of a child, the plaintiff's intestate, which lost its life by falling through the defective railing of a private bridge erected by the company, a petition which failed to show that the company was under a legal obligation to the public to keep the bridge in repair was held defective. Louisville, etc., Canal Co. *v.* Murphy, 9 Bush (Ky.) 522.

1. This form is substantially the same as the complaint held sufficient in Rankin *v.* Buckman, 9 Oregon 253. For other forms see Wabash *v.* Carver, 129 Ind. 552; State *v.* Cecil County, 54 Md. 426. And consult note 2, p. 5, *supra*.

2. **Precedent.** — In Madden *v.* Occidental, etc., Steamship Co., 86 Cal. 445, the plaintiff's amended complaint alledged: "That on the *eighteenth* day of *October*, A. D. 18*86*, the said *Patrick Madden* was an employee of the said defendant, employed by it and for it, on the lower deck next above the lower hold of the ship *Belgic* (one of said

Form No. 6806.

(Precedent in Daley *v.* Boston, etc., R. Co., 147 Mass. 102.)[1]

[*Daniel A. Daley, as administrator of the estate of Thomas Daley, deceased,* against *The Boston and Albany Railroad Company.*] *Suffolk, Sup* Ct. Plaintiff's Declaration.][2]

And the plaintiff says that on the *twelfth* day of *September*, 1*885*, the defendant was a railroad corporation operating a railroad in said *Boston*; that said corporation was then and there engaged in its business and work of unloading coal from the hold of a vessel on to the defendant's wharf and into the defendant's cars on its railroad tracks; that the said business of removing said coal from said vessel into the defendant's cars was then and there in, and a part of,

ships), at the mail dock or wharf in the said *city and* county of *San Francisco*, as a laborer, assisting to load said ship by stowing cargo; that on the said *eighteenth* day of *October*, A. D. 1*886*, and while said *Patrick Madden* was engaged at said work, on said lower deck of the ship, as such laborer, *four* bales of cotton goods, each bale firmly packed so as to form a solid body, weighing from about *180* to *250* pounds avoirdupois, were, by means of a sling manufactured of rope, hoisted and worked by block and tackle and operated by steam-power, transferred from said dock or wharf to the main deck of said ship, at the hatchway known and designated as hatchway No. *5*, the said sling, block, and tackle being parts of the machinery and appliances provided by the defendant for the use of its laborers employed by it in the business and work of loading said ship *Belgic*; that said *four* bales should have been, by means of said machinery and appliances, carefully lowered to and stowed on said lower deck of said ship, but because of the insecurity and unsuitableness of said sling, and because of the negligence of the defendant in failing to provide and maintain a safe and suitable sling, which insecurity, unsuitableness, and negligence were unknown to or by said *Patrick Madden*, said sling parted, and *two* bales of cotton were violently precipitated from the main deck of said ship, down said hatchway No. *5*, to the place on said lower deck, where said *Patrick Madden* was engaged in his work, a distance of from *eighteen* to *twenty* feet below said main deck, and one or both of said *two* bales, containing cotton cloth, as aforesaid, violently struck the said *Patrick Madden*, without his fault or negligence, producing a fracture of the cervical vertebra, which pressed on the spinal cord, and also producing an injury of the chest and a fracture of some of his ribs, and said *Patrick Madden* was thereby otherwise greatly bruised and injured; and also, by means of the premises, the said *Patrick Madden* became and was sick, sore, lame, and disabled, and so remained and languished for the space of *four* days, and until the *twenty-second* day of *October*, A. D. 1*886*, when, by reason and as the result of said injuries, and by reason of the premises and of the negligence of the defendant, the said *Patrick Madden* died."

A nonsuit was granted in this case for the reason that there was no evidence of negligence on the part of the defendant.

1. This is the first count in plaintiff's amended declaration in an action brought under Mass. Pub. Stat. (1882), c. 112, § 212, as *amended* Mass. Stat. (1883), c. 243, in which a verdict for the plaintiff was sustained.

For another form drawn under these sections see Dacey *v.* Old Colony R. Co., 153 Mass. 112, in which case, however, the plaintiff was not permitted to recover, the death of the deceased being caused by the negligence of a fellow-servant, and being, therefore, not within the statute. See also Madden *v.* Occidental, etc., Steamship Co., 86 Cal. 445 (*supra*, note 2, p. 15); Woodbury *v.* Post, 158 Mass. 140; Drea *v.* Carrington, 32 Ohio St. 595.

Consult note 2, p. 5, *supra*.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

its business of operating its railroad, and that for the said work and business the defendant furnished and had in use a certain hoisting apparatus, consisting in part of an engine, a fall of rope, and large iron buckets; that said *Thomas Daley* was then and there an employee of the corporation, and at work in the hold of said vessel, in said work and business of said corporation; and that on said day, by the negligence and carelessness of said defendant in not furnishing and having then and there a safe, suitable, and proper apparatus, especially a strong, safe, and proper rope for said work and business, but in having and furnishing a weak, unsafe, damaged, and improper rope, which broke, thereby causing a heavy iron bucket loaded with coal to fall upon said *Thomas Daley* while at work as aforesaid, and being in the exercise of due care, he the said *Thomas Daley* was killed. The said *Thomas Daley* left no widow, but did have and leave *six* children; and this plaintiff makes and brings this claim in this suit for the use of said children, according to the statute in such case provided.

[*J. B. Richardson*, Plaintiff's Attorney.][1]

Form No. 6807.[2]

New Jersey Supreme Court of the *first* day of *September* in the year of our Lord eighteen hundred and *seventy-nine.*

State of *New Jersey*, } ss.
Hudson County. }

The New York, Lake Erie and Western Railroad Company, a body corporate, the defendants in this suit, were summoned to answer unto *Linsly Rowe*, administrator of the goods and chattels, rights and credits, which were of *Jacob Leikowsky*, deceased, at the time of his death, who died intestate, in an action of tort; and thereupon the said plaintiff by *Bedle, Muirheid & McGee*, his attorneys, complains:

For that whereas the said defendants heretofore, to wit, on the *first* day of *January*, eighteen hundred and *seventy-nine*, at the time of committing the occurrence hereinafter mentioned were carriers of passengers and freight, both on land and on water, and as such were the owners of certain railroads and the rolling stock thereon, and certain lighters and other vessels for the transportation of freight upon the water, and as such carriers, the said defendant, undertook to, and did, carry certain articles of freight, to wit, two smoke-stacks, one tank, two boilers and other merchandise of great weight, to wit, of the weight of *ten* tons to *The Standard Oil Company*, from some place, to this plaintiff unknown, to the wharf of the said *The Standard Oil Company*, at *Constables Hook* in the city of *Bayonne* in the county of *Hudson* aforesaid, to be then and there delivered to the said *The Standard Oil Company*, to wit, on the day and year last aforesaid, at *Jersey City*, in the county of *Hudson* aforesaid.

And the plaintiff further saith that the said merchandise was so transported by the said defendants on a certain lighter or vessel called the "*Dennis Valentine*," which vessel was rigged with a mast

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.
2. Consult note 2, p. 5, *supra*.

and backstays and turnbuckle rods, guys and gaff, and sundry other tackle, machinery and rigging, for the purpose of transportation and unloading of freight. And the plaintiff further saith that on the delivery of said freight to the said *The Standard Oil Company*, it became and was necessary to transfer the said freight from the deck of said lighter to the wharf of said company, and the plaintiff avers that it was the duty of the said defendants to provide competent, sufficient, strong and safe machinery for the purpose of such transfer, and that it was the duty of said defendants to provide machinery sufficiently strong so that the lives and limbs and health of those necessarily in the vicinity of said machinery would not be endangered thereby, to wit, at *Jersey City* aforesaid.

And the plaintiff further shows that the said machinery, especially the said boilers, were of great weight, to wit, of the weight of *twenty thousand* pounds, each, and that in view of the great weight of the said boilers it became and was the duty of the said defendants to use extra precautions in and about the moving and unloading of said boilers, and to have machinery thoroughly and undoubtedly sufficient to transfer the same without injuring the safety of persons necessarily in the vicinity, to wit, at *Jersey City* aforesaid, on the day and year aforesaid.

And the said plaintiff further saith that the said *Jacob Leikowsky*, deceased, in his lifetime, to wit, on the day and year last aforesaid at *Constables Hook*, to wit, at *Jersey City*, aforesaid, was then and there employed as a laborer by the said *The Standard Oil Company*, and as such and being in the lawful pursuit of his said employment, was then and there standing and being upon the wharf of the said *The Standard Oil Company*, at *Constables Hook*, to wit, at *Jersey City* aforesaid, and then and there was lawfully engaged in and about his business as such servant and laborer of the said *The Standard Oil Company*, and without any negligence on the part of the said *Jacob Leikowsky*, the said defendants by their servants and agents, then and there so negligently transferred and moved the said smoke-stacks, tanks, boilers and other freight from the deck of the said lighter "*Dennis Valentine*" to the said wharf, and used such insufficient, weak and unsound machinery in and about such transfer, and the said lighter "*Dennis Valentine*" and her machinery, to wit, her backstays, turnbuckle rods, masts, gaffs and guys and other machinery were so weak and insufficient for the purpose of making such transfer, that in the transfer of one of the said boilers from said lighter to said wharf one of the guys of said vessel broke, and thereupon the mast of said vessel broke in many places, to wit, in three parts, and fell, and with it the gaff and tackle and other machinery of said vessel, and in falling struck the said *Jacob Leikowsky*, deceased, in and upon his head, body and limbs, and he then and there received divers, to wit, *twenty* mortal wounds in and about his head, body and limbs, and was then and there greatly hurt, injured, rent and torn, by means whereof the said *Jacob Leikowsky* on the said *first* day of *January*, eighteen hundred and *seventy-nine*, at *Constables Hook*, to wit, at *Jersey City* aforesaid, died, which said wounds, bruises and death were caused by the negligence of the said defendants and their servants

and employees solely, and not by, from or through the negligence of the said *Jacob Leikowsky*, deceased, in any respect whatsoever.

By means whereof *Maria Leikowsky*, who is the widow, and *Jacob Leikowsky* and *Michael Leikowsky*, who are the infant children and next of kin of said *Jacob Leikowsky*, now deceased, sustained great loss and damage, to wit, *ten thousand* dollars, whereby and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff as administrator as aforesaid and personal representative of the said *Jacob Leikowsky*, deceased, for the exclusive benefit of the said *Maria Leikowsky*, the widow, and the said *Jacob Leikowsky* and *Michael Leikowsky*, the children and next of kin, of said *Jacob Leikowsky*, deceased, as aforesaid.

And whereas, also, the said defendant heretofore, to wit, on the *first* day of *January*, eighteen hundred and *seventy-nine*, at *Bayonne*, to wit, at *Jersey City*, aforesaid, were possessed of a certain lighter or vessel known as the "*Dennis Valentine*," which said vessel was loaded with certain freight, to wit, two smoke-stacks, one tank, two boilers, and other machinery of great weight, to wit, of the weight of *one hundred* tons, and by their servants and employees, then and there unloaded and were unloading said freight and machinery on a certain wharf then and there being, to wit, *The Standard Oil Company's* wharf, and in such unloading transferred and were transferring the said machinery from the deck of said vessel to said wharf.

And the plaintiff avers that the said boilers were of great weight, to wit, of the weight of *twenty thousand* pounds each, and he saith that it then and there became and was the duty of the said defendants to have strong, competent and sufficient tackle, gaffs, guys, and other machinery on and in connection with said vessel for the hoisting and transfer of said boilers, and other freight and machinery from the said vessel to the said dock, to wit, at *Jersey City* aforesaid, on the day and year aforesaid.

And the said plaintiff further saith that the said *Jacob Leikowsky*, now deceased, was then and there a laborer in the employ of the said *The Standard Oil Company*, and in the pursuit of his said employment as such laborer was then and there, being on the said dock, in the neighborhood of the said vessel "*Dennis Valentine*," and employed in and about his work as he lawfully might be, and that the said defendants by their servants and agents then and there, to wit, on the day and year aforesaid, at *Jersey City* aforesaid, in unloading said machinery and the said two boilers, unloaded the same so negligently and used such weak, insufficient, incompetent and unsound machinery, guys, turnbuckle rods, masts, hoisting tackle and other machinery that the same broke in many, to wit, in twenty places and fell upon the said *Jacob Leikowsky*, deceased, and then and there hit, cut, bruised, rent and tore the said *Jacob Leikowsky*, deceased, in and about his head, body and limbs, and caused many, to wit, *twenty* mortal wounds in and upon the head, limbs and body of the said *Jacob Leikowsky*, deceased, by means whereof the said *Jacob Leikowsky* then and there died, to wit, on the day and year last aforesaid, at *Jersey City* aforesaid, which said wounds, bruises and death were caused by the negligence of the

said defendants and their servants, employees and agents solely and not by the negligence of the said *Jacob Leikowsky*, deceased, by means whereof *Maria Leikowsky*, who is his widow, and *Jacob Leikowsky* and *Michael Leikowsky*, who are the infant children and next of kin of said *Jacob Leikowsky*, now deceased, sustained great loss and damage, to wit, *ten thousand* dollars, whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff as administrator as aforesaid and personal representative of the said *Jacob Leikowsky*, deceased, for the exclusive benefit of the said *Maria Leikowsky*, the widow, and the said *Jacob Leikowsky* and *Michael Leikowsky*, the children and next of kin of said *Jacob Leikowsky*, deceased, as aforesaid.

And whereas, also, the said defendants heretofore, to wit, on the day and year last aforesaid, at *Bayonne*, to wit, at *Jersey City* aforesaid, were possessed of a certain lighter or vessel called the "*Dennis Valentine*," with which vessel they were accustomed to transfer by water and deliver heavy freight, and which for the purpose of such deliveries was rigged with a mast, gaff, guys, and other machinery.

And this plaintiff in fact says that on the day and year last aforesaid said defendants by their employees and agents were with said vessel at the wharf of *The Standard Oil Company* in *Bayonne*, to wit, at *Jersey City* aforesaid, with a load of heavy freight to be then and there delivered to said *The Standard Oil Company*, to wit, two smoke-stacks, one tank, two boilers, and other machinery of great weight, to wit, of the weight of *one hundred* tons.

And in unloading said freight it was necessary to swing or transfer the same from said vessel through the air to said wharf, and for that purpose it was necessary to have very strong, sound and sufficient hoisting tackle and machinery. And the plaintiff avers that the said defendants were then and there bound to have and provide such strong, sound and sufficient hoisting tackle and machinery for purpose aforesaid, of all which said defendants then and there, to wit, on the day and year last aforesaid, at *Jersey City* aforesaid, had notice.

Yet the plaintiff avers that the said defendants, well knowing the premises, instead of having and providing such strong, sound and sufficient machinery and hoisting tackle for the purpose aforesaid, provided and had weak and insufficient machinery and hoisting tackle therefor, and machinery and hoisting tackle that was not sound, but which had recently prior thereto been broken, and which had been unskilfully and improperly repaired and mended, and which was not fit or proper for the purpose aforesaid, of all which the defendants then and there had notice, to wit, on the day and year aforesaid, at *Jersey City* aforesaid.

Yet notwithstanding the weakness, unsoundness and insufficiency of said machinery and hoisting tackle, the said defendants well knowing the premises, then and there, to wit, on the day and year last aforesaid, at *Jersey City* aforesaid, undertook to unload said freight from said vessel to said wharf as aforesaid, and did succeed in unloading a part thereof, to wit, two smoke-stacks, one tank and one of said boilers, but while in the act of unloading the other of said

boilers said machinery and hoisting tackle broke in many, to wit, *twenty* places, and fell to said wharf, and then and there in falling hit the said *Jacob Leikowsky*, now deceased (who was then and there lawfully being, engaged at his lawful and usual occupation, as he might lawfully be and do), in and upon the head, body and limbs of him the said *Jacob Leikowsky*, now deceased, and inflicted many mortal wounds in and upon the body, head and limbs of said *Jacob Leikowsky*, now deceased, whereby he was grievously hurt and wounded and by means whereof the said *Jacob Leikowsky*, now deceased, afterwards, to wit, on the day and year aforesaid, at *Jersey City* aforesaid, died, which said wounds, bruises and death were caused by the negligence of the said defendants, their agents and employees, and not by the negligence of said *Jacob Leikowsky*, now deceased.

By means whereof *Maria Leikowsky*, the widow, and *Jacob Leikowsky* and *Michael Leikowsky*, the children and next of kin of said *Jacob Leikowsky*, deceased, sustained great loss and damage, to wit, *ten thousand* dollars, whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff as administrator as aforesaid and personal representative of the said *Jacob Leikowsky*, deceased, for the exclusive benefit of the said *Maria Leikowsky*, the widow, and the said *Jacob Leikowsky* and *Michael Leikowsky*, the children and next of kin of said *Jacob Leikowsky*, deceased, as aforesaid.

And the said plaintiff brings into court here the letters of administration of *Robert McCague, Jr.*, the *surrogate* of the county of *Hudson*, which give sufficient evidence to the said court here of the grant of administration to the said plaintiff as aforesaid, the date whereof is a certain day and year therein mentioned, to wit, the *fifteenth* day of *August* in the year eighteen hundred and *seventy-nine*.

Bedle, Muirheid & McGee,
Attorneys for Plaintiff.

Form No. 6808.

(Precedent in Geroux *v.* Graves, 62 Vt. 281.)[1]

[(*Commencement.*)][2] In a plea of the case, for that the plaintiff's intestate, the said *Moses Geroux*, on the *6th* day of *October*, 1887, at said *Colchester*, was in the employ of the defendant, hired by him to work in his quarry, quarrying stone and removing large stones therefrom, and that by virtue of said employment of the plaintiff's intestate by the defendant it became and was the duty of said defendant to furnish said plaintiff's intestate a safe, suitable and

1. This form is plaintiff's amended declaration. The original declaration is also set out in the reported case. In speaking of the original declaration, the court said that, in a suit by an administrator for the neglect of the defendant, resulting in the death of plaintiff's intestate, the declaration should allege either that the intestate left next of kin, in which event it would be a suit for their benefit, or that he lived a time after the injury, when it might be for the benefit of his estate. Consult also note 2, p. 5, *supra*.

2. The declaration in *Vermont* is inserted in the original writ. The commencement and conclusion are consequently the same as the commencement and conclusion of the writ. For forms of attachment writs in *Vermont* see *ante*, Forms Nos. 2821, 2822.

well constructed derrick, to be used by him in said quarry. Yet the defendant, disregarding this duty, on said *6th* day of *October*, 1*887*, carelessly and negligently and wrongfully gave to the plaintiff's intestate to use in said quarry, in the course of his said employment, a derrick which was unsafe and unsuitable for said work, and which was not properly constructed, nor provided with guy ropes sufficient for said work and which was insufficient in several other ways, insomuch that it greatly endangered the lives of the men who used it; all which was unknown to the plaintiff's intestate, and all which was then and there fully known by the defendant. And the plaintiff avers that while the said intestate was in the careful and prudent use of said derrick, in said quarry, in the course of his said employment by the defendant, on said *6th* day of *October*, 1*887*, and within *two* years prior to the bringing of the suit, said derrick fell, by reason of its insufficiency and defectiveness aforesaid, and struck the plaintiff's intestate aforesaid, and killed him; whereby and by reason of all which an action hath accrued to the plaintiff against the defendant.

And the plaintiff further says that at the time of the death of said intestate, *Moses Geroux*, the said *Moses Geroux* had no wife living and no issue living, that he had a father, named *Moses Geroux*, born in the year 1*831*, and a mother, named *Zoa Geroux*, born in the year 1*833*, said father and mother being the next of kin of the plaintiff's intestate, which said father and mother survive the said plaintiff's intestate and are still living, and this suit is brought and prosecuted for the benefit of the said father and mother agreeably with and by virtue of section 2139 of the Revised Laws of the state of *Vermont*.

All which is to the damage of the plaintiff the sum of $*10,000*, for the recovery of which, with just costs, this suit is brought. [(*Conclusion.*)] [1]

(3) Mining Apparatus.

(*a*) *Cage.*

Form No. 6809.[2]

State of *Colorado*, County of *Lake*. } ss. In the *District* Court of the *Fifth* Judicial District, sitting within and for the County of *Lake* and State of *Colorado*.

Mary Tenney, *widow of Charles Tenney*, plaintiff,
against
David H. Moffatt, *Jr.*, *Jacob J. B. Dubois*, *H. A. W. Tabor and James G. Blaine*, defendants. } Complaint.

The plaintiff complains and alleges:

That on the *eighteenth* day of *January*, A. D. 1*886*, defendants were the owners of the "*Maid of Erin*" lode mining claim, situate in *California* mining district, county of *Lake* and state of *Colorado*. That the defendants were on the aforesaid mentioned date and long prior thereto engaged in sinking a shaft and prosecuting other work and

1. See *supra*, note 2, p. 21.

2. This form is taken from the files in Moffatt *v.* Tenney, 17 Colo. 189, in which case the plaintiff recovered. Consult note 2, p. 5, *supra*.

labor thereon for the purpose of developing and exploring the same, and had in the prosecution of said work on or before the day and date aforesaid sunk a shaft on said premises known and called the "*Maid of Erin*" shaft to a depth of about *six hundred* feet, and were then the owners of said shaft, machinery, apparatus and appliances, of the guides and timbers therein and of a certain cage operated by steam in said shaft, and by said defendants used and employed in hoisting mineral and other material as well as the employees of the defendants from and out of said shaft, and for letting their employees down said shaft and into the lower workings and bottom thereof, and at the time of committing the grievances hereinafter mentioned were engaged in the further sinking of said shaft and prosecution of work thereon and therein.

That on the day and year last aforesaid, to wit, on the *eighteenth* day of *January*, A. D. 1*886*, *Charles Tenney*, deceased, the then husband of *Mary Tenney*, the plaintiff, was in the employ of said defendants in and upon said shaft, and at work as their employee in the capacity of an ordinary miner, at and for the sum of *three* dollars ($*3.00*) per day; that it then and there became and was the duty of said defendants to provide a good, substantial, safe, secure and suitable cage, machinery, and all the necessary apparatus and appliances, and also to keep and maintain their said shaft in good repair and order and the timbers thereof and the guides therein used in such good repair and order as to protect the lives of said *Tenney* and his co-laborers in the further sinking of said shaft as aforesaid and the prosecution of work therein, and to afford said *Tenney* and his co-laborers safe means of ingress into said shaft and egress therefrom as occasion might require. That said defendants, instead of using that care and skill which ordinary prudence would dictate, conducted themselves so carelessly, negligently and unskilfully in the selection and procurement of machinery, timbers and guides to be used in said shaft in failing and neglecting to provide the usual and necessary safeguards for the use of and to protect the lives of their employees and in the further development of their property as aforesaid, and by and through the carelessness, negligence and default of said defendants, they provided, used and suffered to be used unsafe, defective and insufficient cages, machinery, apparatus, appliances, timbers and guides in said shaft upon said premises, and failed, neglected and refused to supply and provide the usual and necessary safeguards, of which said defective and unsafe cage, machinery and deficient apparatus and appliances and defective timbering and guides, defendants had due notice and of which the said *Charles Tenney* had no notice or knowledge, yet said defendants continued to use and kept in operation said cage, guides and machinery when and long after they knew the same were unsafe, insufficient and defective, and failed to provide the usual and necessary safeguards as aforesaid, whereby and through which carelessness, negligence and default the said *Charles Tenney* lost his life.

Plaintiff further alleges that on the *eighteenth* day of *January*, A. D. 1*886*, the said shaft upon which said "*Maid of Erin*" mine had reached a depth of about *six hundred* feet as aforesaid and the

defendants were then and there using in said shaft, for the purposes aforesaid, a certain cage constructed with catches, commonly called safety catches, thereto attached and with springs operating and controlling the same; that the said defendants had constructed in said shaft and were then using therein two uprights, commonly called guides, for the purpose of guiding or controlling the movement of said cage.

That said *Tenney*, the deceased, in the regular course of his employment and duties as a miner, and at a certain level in said shaft known as and called the *five hundred* foot level boarded and got into said cage for the purpose of going to work at a station or level about *fifty* feet below the said *five hundred* foot level of said shaft; and immediately thereupon and whilst the said *Tenney* was in said cage and whilst the said cage machinery, appliances and apparatus operating and controlling the same, and the guides belonged to and were in the use and service of the defendants in said shaft and premises, the said cage by reason of the unsafeness, defectiveness and insecurity of the machinery, apparatus, appliances and guides controlling the movement of the same, then and there being used by the defendants in their said shaft, without any fault, carelessness or negligence upon the part of said *Tenney*, and through the wilful carelessness, negligence and default of the defendants as aforesaid, was precipitated with said *Tenney* therein down said shaft a distance of about *fifty* feet below the said *five hundred* foot level thereof with such force and violence that the said *Tenney* was struck thereby upon his head and body with such force and violence by said cage, and with such force and violence thrown against the same and said shaft, as to produce thereby a mortal wound which then and there caused the death of said *Tenney*, without any fault, carelessness or negligence upon his part.

Plaintiff further alleges that she was the lawful wedded wife of *Charles Tenney*, deceased, at the time of his death, and is now his widow; that he was her sole and only support, and by his death, caused by the carelessness, negligence, recklessness and default of the defendants, she has been damaged in the sum of *five thousand* dollars (*$5,000.00*).

Wherefore, plaintiff demands judgment for the sum of *five thousand* dollars (*$5,000.00*) and for costs of suit.

Thomas, Parsons & Lyles,
Attorneys for Plaintiff.

(*Verification.*)[1]

(*b*) *Roof.*

Form No. 6810.

(Precedent in Buckalew *v.* Tennessee Coal, etc., Co., 112 Ala. 148.)[2]

1. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

2. This complaint is drawn under Ala. Civ. Code (1886), § 1013. With reference thereto the court by Head, J., said: "The wrongs set forth in the first, second and third counts, as constituting the causes of action, and those set forth in the fourth, fifth and sixth counts, are of different natures. In the first class, the facts alleged show trespasses by the

[(*Caption as in Form No. 5907.*)] [1]

First Count. The plaintiff claims of the defendant *twenty thousand* dollars as damages for that heretofore, on, to wit, *16th* day of *November*, 1*893*, defendant was running and operating a certain coal mine, known as *Shaft Number One*, at or near *Pratt City*, in *Jefferson* county, *Alabama*;* and, in or about the running thereof compelled plaintiff's intestate, who was a convict, to be in said mine; that the roof of said mine over the place where plaintiff's intestate was compelled to be as aforesaid, defendant negligently caused or allowed to be or remain insecure and liable to fall, and by reason thereof said roof, or a part thereof, did fall and crush to death plaintiff's said intestate.

Second Count. (*Commencing as in first count, and continuing down to* *) and, in or about the running and operation thereof compelled plaintiff's intestate, who was a convict, to be in said mine; that, while plaintiff's intestate was in said mine as aforesaid, defendant, through its agent, to wit, one *George Miller*,* negligently caused a part of the roof of said mine, at the place where the plaintiff's said intestate was, to fall upon him and crush him so that he died by reason thereof.

Third Count. (*Commencing as in second count, and continuing down to* *) recklessly and wantonly or intentionally caused a part of the roof of said mine at the place where plaintiff's said intestate was, to fall upon him and crush him so that he died by reason thereof.

Fourth Count. (*Commencing as in first count, and continuing down to* *) that on said day plaintiff's intestate was a convict for a short term, and had been leased or let by the proper authorities to defendant, and on said day was being worked as such convict by defendant in said mine under the superintendence of one *George Miller*;* that *George Miller* was an unfit person in whom to trust such superintend-

defendant upon the person of the intestate, causing his death, for which, had death not ensued, he could have maintained the action of trespass. This results from the allegation that defendant compelled intestate to be in the mine — there being no allegation of facts showing that it was a lawful compulsion. The circumstance that the most material damage sustained resulted from negligence of the defendant, or its servants, did not change the nature of the actionable wrong committed by the defendant. It was the infliction of the unlawful imprisonment which constituted the wrong; and the fact that inflicting it, and by reason of its infliction, the intestate was subjected to conditions which cost him special injury, cannot alter the nature of the wrong. It was not material what the character of those conditions was, whether negligent or otherwise. Their existence, causing special injury by reason of being, by the unlawful imprisonment, subjected to them, whatever their nature, aggravated the wrong and enhanced damages, had the injured party survived; and, causing death, cooperated with the trespass to give the statutory right of action to the personal representative. The fact that the intestate is described as a convict does not affect the counts. It is, as stated, mere *descriptio personæ*; necessary to be proved, however, because alleged. With these considerations, it is clear, the first, second and third counts of the complaint are good. The fourth, fifth and sixth counts, had the injured party survived, and were suing for the damages, show actions on the case. * * * It is obvious that each of these counts is good under the statute." The court further held that there was no misjoinder of counts on account of the different natures of the wrongs charged.

Consult, generally, note 2, p. 5, *supra*.

1. The matter to be supplied within [ ] will not be found in the reported case.

ence, in that he was incompetent or careless, and defendant was negligent in trusting said *Miller* with superintendence as aforesaid; and in consequence thereof said *Miller* caused a part of the roof of said mine to fall upon plaintiff's said intestate and crush him so that he died by reason thereof.

Fifth Count. (*Commencing as in fourth count, and continuing down to**) that said *George Miller* was intrusted by defendant with superintendence, and in the exercise of such superintendence he, said *George Miller*,* negligently caused or allowed a part of the roof of said mine to fall upon plaintiff's said intestate and crush him so that he died by reason thereof.

Sixth Count. (*Commencing as in fifth count, and continuing down to**) recklessly and wantonly or intentionally, caused or allowed a part of the roof to fall upon plaintiff's said intestate and crush him so that he died by reason thereof.

[(*Conclusion as in Form No. 5907.*)][1]

Form No. 6811.

(Precedent in Cherokee, etc., Coal, etc., Co. *v.* Britton, 3 Kan. App. 298.)[2]

[(*Caption as in Form No. 5917.*)][1]

And now comes the plaintiff, *Simon Britton, administrator of the estate of William James*, deceased, and by leave of the court first had and obtained files this, his amended petition, and says: That on the *22nd* day of *October*, 1*889*, he was duly appointed by the *probate* court of *Crawford* county, *Kansas*, administrator of the estate of said *William James*, deceased, and immediately qualified and entered upon his duties, and is now acting as such; that the said *William James* was of the age of *21* years when he died; that his said death occurred on or about the *19th* day of *July*, 1*889*; that the said *William James* died unmarried, intestate, leaving surviving him his father and mother and *eight* brothers and sisters, all of whom are residents of *Roanoke*, *Woodford* county, *Illinois*, and are in poor and indigent circumstances in this, that they have no real or personal property or other investment from which any income is or might be derived; that the whole of said family were dependent for support upon the earnings of the said *William James* and one other son, both of whom were employed at manual labor; [that the father of the decedent was an invalid soldier of the late civil war and drew a small pension from the government of the United States of $*8* per month, but has been unable to do any work whatever during the past *five* or *six* years, and since the commencement of this action has died;][3] that said *William James* previously to his death contributed all of said earnings to the sup-

1. The matter to be supplied within [ ] will not be found in the reported case.

2. A judgment in favor of the plaintiff in this case was reversed by the court of appeals, which held that certain special findings of fact were inconsistent with the general verdict of the jury and contrary to the evidence.

Consult, generally, note 2, p. 5, *supra*.

3. The words enclosed by [ ] were stricken out as redundant and irrelevant.

port of said family and they had a reasonable expectation that he would continue to do so had he lived; that said *William James* at the time of his death and previously thereto was employed by the defendant in its mine at *Frontenac*, *Kan.*, as a driver, and his services were reasonably worth the sum of $*2* per day. Plaintiff says that he is a resident of the state of *Kansas*, and is an uncle of the said *William James*, deceased. Plaintiff further says that the said defendant, the *Cherokee & Pittsburg Coal and Mining Company*, is a corporation duly organized and incorporated under the laws of the state of *Kansas*, and at the time of the injury received by the said *William James* and his death, and for a long time previously thereto, was the owner of and operated a coal mine at *Frontenac*, in *Crawford* county, *Kansas*, known as *Frontenac Mine No. 1*; that on the *19th* day of *July*, 1*889*, while the said *William James* was in the employ of the defendant in said mine as a driver, and the said defendant so carelessly, negligently and unskilfully conducted and operated its said mine that a large rock fell from the roof of said mine upon the said *William James*, bruising, crushing and injuring him internally, and in his back, legs, arms, and sides, so that by reason thereof he, the said *William James*, lingered in great bodily pain and agony for the space of *two* hours, when he died. Plaintiff further says that the carelessness, negligence and unskilfulness of defendant consisted in this, that it knowingly employed careless and unskilful servants and miners in said mine, whose names are to plaintiff unknown; that it did not properly construct, timber or support the roofs of the side and main entrances and passageways of said mine where said injury occurred, nor secure the same in a workmanlike manner so as to render them safe for persons passing along beneath them. Plaintiff further says that said *William James* at the time he received his said injury was in good bodily health, and was regularly engaged in his business as a driver in said mine and was without fault or negligence on his part. Plaintiff says that he, as administrator of the estate of said *William James*, deceased, and *Sarah James*, the mother of decedent, and the *eight* brothers and sisters of decedent, have suffered damage by his death in the sum of $*10,000*.

Wherefore plaintiff, as such administrator, demands judgment against the said defendant in the sum of $*10,000*, his damages so as aforesaid sustained, for the benefit of the heir and next of kin of the said *William James*, deceased, and for costs of this action.

[(*Signature and verification as in Form No. 5917.*)][1]

b. Where Death is Caused by Fall of Defective Water Tower.

Form No. 6812.

(Precedent in Rigdon *v.* Temple Water Works Co., 11 Tex. Civ. App. 543.)[2]

[(*Caption and commencement as in Form No. 5934.*)] [1] That the *Temple Water Works Company*, during the year 1*890*, and prior to the *25th* day

1. The matter to be supplied within [ ] will not be found in the reported case.

2. This petition was demurred to on the ground that the facts averred showed that the deceased was guilty of

of *October*, 1890, caused to be erected a water tower, in *Temple*, *Texas*, for the purpose of storing water therein; said water tower being about *twenty* feet in diameter and about *one hundred and fifty* feet in height. That said water tower was badly planned, the height being too great for the diameter, the same being from this defect liable to fall. That said water tower was contracted to be constructed of material which was not sufficiently strong, and in a manner of workmanship which would not withstand the weight of its foundation and the pressure on the sides that would be necessary to hold the quantity of water that would be contained therein when full; that said water tower was constructed by careless and unskilled workmen under the supervision of *W. E. Thomas* and the *Temple Water Works Company*, which defendants well knew as the same was being constructed; that said water tower was constructed of poor, inferior and insufficient material of rock and cement and mortar in the foundation, and steel and iron and rivets on its sides, which defendants well knew at the time of and as the same was being constructed. And plaintiffs allege that by reason of the defects aforesaid, at *3* o'clock *A.* M., of *October 25*, 1891, said water tower then being filled with water, and containing about *275,000* gallons, fell over and threw said water out, which rushed in a torrent upon the home of *O. T. Rigdon* and your petitioners, capsizing and crushing the same, and throwing a burning lamp, filled with oil upon one *O. T. Rigdon*, the oil being spilled upon his clothing and set afire from the lighted lamp, by which means said *O. T. Rigdon* was fatally burned, and from the effects of which he that day died also; and the goods and effects of the said [*Mary*] *Rigdon*, your petitioner, consisting of clothing, furniture and other personal property of the value of *five hundred* ($*500.00*) dollars, were totally destroyed by crushing and by fire, the effect of water resulting from the insufficient workmanship and material used in the construction of said water tower. And your petitioners further allege that said *O. T. Rigdon* was the husband of your petitioner, *Mary Rigdon*, and the father of your petitioners, *Ethel Rigdon* and *Ora Frank Rigdon*; that all of your petitioners depended upon said *O. T. Rigdon* for their support and maintenance, and the said children for an education. That said *O. T. Rigdon*, at the time when said fatal injury occurred, was a man in the prime of manhood, a skilled man, and earned at the time of his death and for a long time preceding at the rate of *one hundred and ten* ($*110.00*) dollars per month. * * *[1] That by the said violent death of said *O. T. Rigdon*, caused by defend-

contributory negligence in permitting a lighted lamp to remain over him, also that the damages claimed were remote and speculative, but the court held otherwise.

Consult also note 2, p. 5, *supra*.

1. At this point the petition contained an allegation as follows: "That your petitioner *Mary Rigdon* is a woman not strong physically, and poorly able to earn her living and that of her children. That *Ethel Rigdon* and *Ora Frank Rigdon* are infants of tender years; *Ethel Rigdon* being but *three* years old at the time of her father's death, and *Ora Frank Rigdon* was born shortly after her father's death. That by the death of said *O. T. Rigdon* plaintiffs have been left in poverty. *Mary Rigdon* has been with great difficulty able to obtain a poor support for herself and her said children." The court held that these averments were surplusage and should have been stricken out, but that the petition was not rendered bad by their presence.

ant's gross carelessness and negligence as above stated, *Mary Rigdon* has been damaged in the sum of *twenty-five thousand* (*$25,000.00*) dollars, and *Ethel Rigdon* in the sum of *ten thousand* (*$10,000.00*) dollars, and *Ora Frank Rigdon* in the sum of *ten thousand* (*$10,000.00*) dollars; and thereby defendants became bound and promised to pay to plaintiffs the sums of money above specified, yet to pay the same or any part thereof defendants have wholly failed and refused, although demanded so to do; wherefore plaintiffs pray that defendants be duly cited to appear and answer this petition by delivering a copy of the citation, as the law prescribed, to *George E. Wincox* and also to *Otto K. Burwitz*, secretary of said corporation, and to *W. E. Thomas*, and that on final hearing plaintiffs have judgment, *Mary Rigdon* for the sum of *twenty-five thousand* (*$25,000.00*) dollars, and *Ethel* and *Ora Frank Rigdon* each for the sum of *ten thousand* (*$10,000.00*) dollars, and for such other and fuller relief as plaintiffs may in law and equity be entitled to, and as in duty bound will ever pray.

[(*Signature of attorney as in Form No. 5934.*)] [1]

c. Where Death is Caused by Grounded Electric Wire.

Form No. 6813.

(Precedent in Texarkana Gas, etc., Co. *v.* Orr, 59 Ark. 216.)[2]

[(*Caption as in Form No. 5909.*)][1]

Comes the plaintiff, *Thos. Orr*, *administrator*[2] *of the estate of Edward Wallace*, *deceased*, and, complaining of the defendant, the *Texarkana Gas & Electric Light Company*, a corporation existing under and by virtue of the laws of the State of *Arkansas*, states that on the *23d* day of *August*, 1*891*, defendant owned, maintained and operated in the city of *Texarkana*, *Arkansas*, a system of electric lights, and that, by means of wires, the electric current was carried over, upon and along the streets of *Texarkana*, *Arkansas* — from the power house to the various points of service in said city; that, during the night of

1. The matter to be supplied within [ ] will not be found in the reported case.

2. On the trial of this case a verdict was rendered for the plaintiff, which judgment was affirmed by the supreme court. With reference to the sufficiency of the complaint, two questions were raised by the appellate court; first, as to an objection that the plaintiff should have sued as administrator instead of merely denominating himself as such, and should have shown his official character by a proper profert of his letters of administration. The court held that the objection was raised too late on appeal, and was not then available. The second point considered was with reference to the beneficiary. The court held that the suit must be regarded as an action for the benefit of the decedent's estate, and, viewed in this light, the complaint, which lays damages for the death of the deceased, would be bad on demurrer, since damages for decedent's death, when recovered, are in *Arkansas* no part of the assets of the estate. But as the case on the trial was treated as a claim of the plaintiff as one for the injury to the deceased in his lifetime, that is for the pain and suffering he endured from the moment he was stricken until the moment of his death—which was legitimate — the appellate court would treat it in the same way, and consider the complaint as amended to correspond with the proof. For substance of another form see Stillman *v.* Brush Electric Light Co., 92 Hun (N. Y.) 504.

the *22d* of *August*, 1*891*, or early on the morning of the *23d* of *August*, 1*891*, said company's wires became disabled and out of repair, and, being either broken or disengaged from their fastenings, fell to the ground upon the sidewalk and crossing in the city of *Texarkana* at the intersection of *Broad* street and *Pine* street in said city, and said defendant negligently permitted said wire to remain so grounded and lying upon said street crossing from about *12:30* o'clock *A.* M. until after daylight in the morning, when said street was thronged with passers-by; that the deceased, *Edward Wallace*, while passing along said street about or a little after daylight, had his attention called to said obstruction lying upon said crossing, and being ignorant of the character of said wire, and presuming, and having a right to presume, that defendant would not permit a live wire to remain under the feet of passers-by upon so crowded a thoroughfare, took hold of same to cast it aside out of the way of pedestrians, and was killed by the powerful current with which said wire was at the time charged. And plaintiff alleges that deceased came to his death by the gross negligence and wanton misconduct of defendant, its agents and employees, and that deceased came to his death without fault on his part and to the damage of his estate[1] in the sum of *twenty thousand* dollars. Wherefore plaintiff prays damages in the sum of *twenty thousand* dollars, and his cost in and about this cause expended.

[(*Signature of attorney as in Form No. 5909.*)][2]

d. Where Death is Caused by Platform Projecting Over Highway.

Form No. 6814.

(Precedent in Cahill *v.* Layton, 57 Wis. 601.)[3]

[(*Caption and commencement as in Form No. 5937.*)

That (*Here aver death of Shea and appointment of plaintiff as administrator, as in Form No. 5940.*)

That said defendants are copartners doing business in said city of *Milwaukee* under the firm name and style of *Layton & Co.*, and as such copartners had for many years last past used and kept, and were still using and keeping, lot *6*, in the south half of block *87*, in the *fourth* ward of the city of *Milwaukee*, and the brick building and structure thereon.][4]

That said block lies on the east side of *West Water* street, between *Fowler* street on the south and *Clybourn* street on the north (all of which said streets are public highways in said city), and extends from said *West Water* street to the edge or dock-line of *Milwaukee* river, and has a public alley, which is also a public highway, extending through the middle thereof from said *West Water* street to the said dock-line of said river; and that for many years last past all the proprietors and occupants of lots and parts of lots in the south half of said block *87*, including the said defendants, have maintained a

1. See *supra*, note 2, p. 29.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. This complaint was held to state a good cause of action. Consult, generally, note 2, p. 5, *supra*.

4. The words enclosed by and the matter to be supplied within [ ] will not be found in the reported case.

roadway extending along the dock-line of said river from the east end of said *Fowler* street to the east end of said alley, thus at all times affording to all said occupants and proprietors, and their agents and servants, and to the public in general, access for teams and wagons to the rear ends of all the various buildings situated on said half-block, and also a passage along said dock-line of said river to said *West Water* street, either by way of said alley or by way of said *Fowler* street, as the case might be; and that for many years last past, and particularly on the said *6th* day of *October*, 1*880*, the said roadway last above mentioned was, and has been, constantly used as a drive-way for teams and vehicles of all kinds, and more especially for teams employed in and about the business of occupants of said half-block in which it is located as aforesaid; and that for many years last past, and particularly on said *6th* day of *October*, 1*880*, the said defendants well knew that said roadway was so constantly used for the passage of teams and vehicles as aforesaid by any and all persons having any occasion therefor.

That on said *6th* day of *October*, 1*880*, and for a long time prior thereto, the said defendants kept and maintained a large platform, made of timbers, joists and planks, over and across the said roadway above mentioned, extending from the rear or east end of the brick building occupied by them as aforesaid, to the dock-line of said river, so as to completely cover and span the said roadway, at an elevation above said roadway such that a team of horses and a wagon of ordinary height could be driven under it along and upon said roadway without hindrance, but not sufficiently elevated to admit of the passage of a teamster or driver sitting upon such wagon, and by reason of the premises said platform then and there was, and for a long time had been, dangerous to persons driving teams upon and along said roadway, of which said dangerous position and condition of said platform the said defendants were well aware on said *6th* day of *October*, 1*880*, and for a long time prior thereto.

That on said *6th* day of *October*, 1*880*, the said *John Shea*, deceased, was employed by Messrs. *Plankinton & Armour*, occupants of premises in said half-block adjoining the said premises occupied by said defendants, to drive a team in hauling pork to or from the rear end of the store of said *Plankinton & Armour* in said half-block; that late in the evening of said last-mentioned day, to wit, after it had become dark, the said *John Shea*, while so in the employ of *Plankinton & Armour*, as aforesaid, and while the said defendants so kept and maintained the said platform over and across the said roadway as aforesaid, was lawfully driving a team of horses, drawing a common freight wagon loaded with pork in barrels and other goods, upon and along said roadway going northward, and unaware of said nuisance and dangerous obstruction of the road, intending to drive to said *West Water* street by way of said alley, he, the said *John Shea*, then and there riding on the wagon and guiding his horses; that while he, the said *John Shea*, was then and there so driving said team of horses and loaded wagon as aforesaid, with due care and diligence upon and along said roadway, he was by motion of said wagon suddenly and without any previous warning or notice, with great force and vio-

lence, driven and forced against the south edge of said overhanging platform, so that said platform collided with his head and breast and threw him backward upon the barrels in said wagon, whereby he was so greatly hurt, bruised and crushed that in consequence thereof he died within an hour after the said collision.

That the said defendants, at the time of said collision and accident, had omitted and neglected to keep or have, at or about said platform, any light or other signal to indicate the existence of said platform, and to warn persons lawfully passing over said roadway with teams and wagons of any danger of such collision, and that said collision, and the death of said *John Shea*, was caused wholly by the fault and neglect of the defendants in keeping and maintaining said platform over said roadway in the position and in the manner aforesaid, and without signal, barrier, or warning of any kind, they then and there well knowing the danger to which persons driving teams along said roadway were thereby exposed; that at the time of his death the said *John Shea* was a strong, able-bodied, healthy man, about *nineteen* years of age, and was the principal means of support and source of subsistence for his parents and younger brothers and sisters, his father being then crippled, and disabled to support his family; that by reason of the death of said *John Shea*, caused by the wrongful act and negligence of the defendants as aforesaid, his said parents have sustained damage to the amount of *$5,000.*

Wherefore, by reason and force of the statute, this plaintiff demands judgment against the said defendants for *$5,000*, besides the costs of this action.

[(*Signature and verification as in Form No. 5937.*)] [1]

e. Where Death is Caused by Shooting.[2]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Not in Self-defense.** — Under the *Kentucky* statute (Stat. (1894), § 4) providing that "the widow and minor child or children (or either or any of them) of a person killed by the careless, wanton or malicious use of firearms, * * * not in self-defense," may have an action, etc., a petition to recover for such killing must allege that the killing was not in self-defense. Becker *v.* Crow. 7 Bush (Ky.) 198. See Chiles *v.* Drake, 2 Metc. (Ky.) 146.

Precedent. — In Wyatt *v.* Williams, 43 N. H. 102, the declaration, omitting the commencement and conclusion, was as follows:

"In a plea of the case, for that whereas, heretofore, to-wit, on the *27th* day of *July*, 186*o*, at said *Warren*, the plaintiff was and for a long time had been the lawful wife of one *Vanness Wyatt*, and as such was then and there lawfully and rightfully entitled to receive and enjoy out of the labors and earnings of said *Vanness Wyatt*, her maintenance and support, according to his position in life, for and during his life, and till death should ensue from natural and lawful causes, unless the said plaintiff should earlier decease, then for and during her life: and whereas, the said plaintiff was also entitled to receive and enjoy, for the time aforesaid, the comfort, fellowship, and society, of said *Vanness Wyatt*, as her husband in her domestic affairs, and the said plaintiff as the wife of said *Wyatt*, was then and there receiving and enjoying, according to her lawful right as aforesaid, her maintenance and support as aforesaid, as also the comfort and fellowship and society as aforesaid, as she had the lawful right to do; when, on the day and year, and at the place last aforesaid, the said defendant, contriving, and unlawfully, wickedly and unjustly intending to injure the said plaintiff, and to deprive her of her maintenance,

Form No. 6815.

(Precedent in White *v.* Maxcy, 64 Mo. 553.)[1]

[(*Caption as in Form No. 5921.*)][2]

Plaintiff states that she was the wife of *Samuel White*, late of the county of *Pulaski*, deceased; that *James G. Maxcy*, of the county of *Pulaski* aforesaid, on the *third* day of *April*, A. D. 1873, with force of arms, did wrongfully shoot and mortally wound her husband, *Samuel White*, of which mortal wound her husband, *Samuel White*, on the *fourth* day of *April*, 1873, died; that the defendant, *James G. Maxcy*, wrongfully shot and killed her husband with a pistol loaded with gunpowder and ball, which the defendant then and there in his hand had, held and shot off and discharged at and against the right side of her said husband, *Samuel White*, inflicting a mortal wound, of which said mortal wound her said husband, *Samuel White*, on the *fourth* day of *April*, 1873, died. Plaintiff further states that the death of her said husband, *Samuel White*, was caused by the wrongful act of the defendant, *James G. Maxcy*, by the means and in the manner aforesaid.

Plaintiff states that by the wrongful act and means aforesaid, done and used by the defendant, *James G. Maxcy*, by shooting and killing her said husband, *Samuel White*, she is damaged to the amount of *five thousand* dollars, for which she asks judgment.

[(*Signature of attorney as in Form No. 5921.*)][2]

f. Where Death is Caused by Steamboat.[3]

(1) Through Burning of Vessel.

support, comfort, fellowship, and society, which she was then rightfully enjoying and was entitled to enjoy for the period aforesaid, through the said *Vanness Wyatt*, her husband as aforesaid; did fraudulently, wickedly, and unjustly, with a pistol, then and there held in his right hand, loaded with gunpowder and a leaden ball, shoot, penetrate, and wound the said *Vanness Wyatt*, husband of the said plaintiff as aforesaid, with the leaden ball aforesaid, shot, by force of the gunpowder aforesaid, ou of the pistol aforesaid, by him, the said defendant; insomuch that the said *Vanness Wyatt*, her husband, then and there, the same day, died; whereby the said plaintiff lost and was deprived of her maintenance support, comfort, fellowship, and society as aforesaid of the said *Vanness Wyatt*, her husband, which she ought to have had and otherwise would have had, from the day and year aforesaid to the day of the date of this writ, and for a long time to come, to-wit, *fifty* years; to-wit, at *Warren* aforesaid to the damage of said plaintiff, as she says, the sum of $*10,000*."

No question was raised as to the form of the declaration, but on demurrer it was held that judgment should be for the defendant, as under the existing statutes of *New Hampshire* a wife could not maintain an action for the killing of her husband.

For another form see State *v.* Walford, 11 Ind. App. 392.

1. The petition in this case sufficiently stated a cause of action under the statute, and it was not necessary to make any reference to the act itself, inasmuch as the petition stated facts bringing the case within the provisions of the act. Consult also note 2, p. 5, *supra*.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. **Running Down Boat Containing Deceased.** — A declaration alleging in the first count that the defendants were common carriers of passengers between Providence and Newport over the

Form No. 6816.

(Precedent in McDonald *v.* Mallory, 7 Abb. N. Cas. (N. Y. Ct. App.) 86.)[1]

[(*Caption and commencement as in Form No. 5926.*)][2]

First. — That at the time of the death of the above named *Charles McDonald*, as hereinafter stated, and for a long time prior thereto, the said defendants were the owners of the steamer "*City of Waco*," to wit: at the port and city of *New York*, in the State of *New York*, of which said city and State said defendants were residents and citizens, and that said steamer was registered and belonged in the said port of *New York*, and was employed by said defendants in carrying passengers and freight up to the time of the burning thereof, as hereinafter mentioned, between said city of *New York* and the city of *Galveston*, in the State of *Texas*.

Second. — That between and including the *30th* day of *October*, 1875, and the *9th* day of *November*, 1875, said steamer, by direction of said defendants, and while in said employment, proceeded on a voyage from the said city of *New York* to the said city of *Galveston*, and received on board at said city of *New York*, and carried on said voyage, a large number of passengers, and so far performed said voyage, as to arrive near, but outside of the bar and harbor at *Galveston*, where she came to anchor at a place where she was still upon the high seas, and where she was burned, as hereinafter more particularly described.

Third. — That during all said voyage, so far as it was performed,

waters of Narragansett Bay, a public highway, and having in their service as common carriers of passengers a certain steamboat, under the command of one S., as their servant and agent, and that the plaintiff's intestate was, in the exercise of due care, carried over and upon said bay and highway, and that by reason of the unfitness and carelessness of the said S., and of the officers and crew of said steamboat, in navigating the said bay, and upon said highway, the said steamboat was directed and managed so negligently, carelessly and unskilfully that she was wrongfully run upon the sail-boat, when the said boat was with due care carried over and upon said bay and highway, whereby the plaintiff's intestate received a mortal wound, of which he instantly died; and in the second count, that the defendants by their servants and agents so carelessly, recklessly and wrongfully managed and directed their steamboat that it was run upon, against and over a sail-boat, then controlled and managed with due care, upon which the decedent was, and the said decedent, by the wrongful and negligent and careless acts of the said defendants, and their servants and agents, had inflicted upon him by the said steamboat a mortal wound, whereof he instantly died, states a cause of action. Chase *v.* American Steamboat Co., 10 R. I. 79. See also Parker *v.* Providence, etc., Steamboat Co., 17 R. I. 376.

Death Caused by Collision. — For substance of complaint where a steamboat passenger was killed in a collision, which was held bad for the reason that it failed to aver that the deceased left a widow or next of kin who sustained a pecuniary loss from his death, see Safford *v.* Drew, 3 Duer (N. Y. 627.

1. The defendants in this case demurred to the complaint, on the grounds that it appeared on the face thereof that the court had no jurisdiction of the action, and that the complaint did not state facts sufficient to constitute a cause of action. The superior court sustained the demurrer, but on appeal this decision was reversed and judgment was rendered for the plaintiff on the demurrer.

Consult, generally, note 2, p. 5, *supra*.

2. The matter to be supplied within [ ] will not be found in the reported case.

as aforesaid, and at the time of the said burning of said steamer, said *Charles McDonald* was on board said steamer in the employment of said defendants in the capacity of fireman.

Fourth. — That said *Charles McDonald* was engaged at the city and port of *New York* by said defendants, so to serve on said steamer as fireman, said steamer being then at said city and port, and owned and employed as above mentioned; and said *Charles McDonald* entered into and performed the said service of fireman on board said steamer for said defendants, relying upon the understanding and agreement between him and said defendants, and on the representation made to him by said defendants, that said steamer was to be employed in the carrying of passengers, and would conform to all laws, regulations, and obligations affecting steamers carrying passengers; but notwithstanding said understanding, agreement, and representation, said defendants did knowingly receive on board said steamer, as freight, at the city of *New York*, to wit: on or about *October 30th*, 1875, to be carried from said city of *New York* to the said city of *Galveston*, or to be used as stores on said steamer, and did carry therein on said voyage, so far as the same was performed as aforesaid, among other things, *three hundred* cases of petroleum, all of which was crude petroleum, or if any of it was refined it was not such as would not ignite at a temperature of less one hundred and ten degrees Fahrenheit thermometer, nor was it to be carried upon a route where there was no other practical mode of transporting it, nor was its carriage under, or sanctioned by any regulations prescribed by the board of supervising inspectors with the approval of the secretary of the treasury; and that the receiving and carrying of said petroleum on board said steamer, as aforesaid, was an act of culpable negligence on the part of said defendants, and in violation of section 4,472 of the Revised Statutes of the United States which said *Charles McDonald*, in serving upon said steamer, had a right to assume that said defendants would obey.

Fifth. — That on said *9th* day of *November*, 1875, while said steamer was lying at anchor at the place aforesaid, upon the high seas, with said passengers and said *Charles McDonald*, and her other crew on board, and said *three hundred* cases of petroleum also on board as aforesaid, a fire started on board said steamer, and by reason of the presence of said petroleum on board said steamer, which was reached by said fire, said fire could not be extinguished or checked; and the same spread with such force and rapidity, by reason of the burning of said petroleum, that it was impossible for any person on board to escape alive, and the death of all on board, including said *Charles McDonald*, was caused by the violence of the fire arising from the presence of said petroleum, and the burning and explosion of said petroleum, and that the death of said *Charles McDonald* as aforesaid, was caused by the culpable negligence of said defendants as aforesaid.

Sixth. — Said plaintiff further says, that said defendants so negligently and unskillfuly conducted themselves in receiving and carrying dangerous and combustible freight on board said steamer on the voyage aforesaid, and in guarding against fire on board said steamer, and in the care and management of said steamer, and of the furnace

and fire and other matter on board said steamer, that through the said negligence of the defendants said steamer and said combustible and dangerous freight and other cargo on board took fire, and burned with such force and rapidity as to cause the death of all on board, including said *Charles McDonald*; said steamer being at the time of receiving such combustible matter at the city of *New York*, and at the time of the burning of said steamer, and at the time of the death of *Charles McDonald*, upon the high seas, outside the harbor and bar at said *Galveston*.

Seventh.—That said negligence of said defendants, whereby the death of *Charles McDonald* was caused, as hereinbefore set forth, and also the said death, occurred within the territory of the State of *New York*, to wit: at the city of *New York*, and on board said steamer, belonging to the State of *New York* as aforesaid, and being at first at the city of *New York*, and thereafter upon the high seas as above described.

Eighth.—That said *Charles McDonald* was, at the time of his engagement to serve on board said steamer, and during such service, and at the time of his death, a citizen of the state of *New York* and an inhabitant of the city of *Brooklyn*, and county of *Kings*, in said State.

That he left him surviving a widow, *Rose McDonald*, the above named plaintiff, and *seven* children, all of whom were under the age of twenty-one years, the oldest of whom was, at the time of the death of said *Charles McDonald*, of the age of *fourteen* years, which said widow and children were entirely dependent upon said deceased for their support, nurture and education, which they have lost by his death, and have been otherwise injured thereby to their damage in the sum of *five thousand* dollars, which the plaintiff claims to recover by virtue of the statute of the State of *New York* in such case made and provided.

Ninth.—That on or about the *9th* day of *March*, 1876, letters of administration of the goods, chattels and credit of said *Charles McDonald*, deceased, were duly issued and granted to said plaintiff by the *surrogate* of the county of *Kings*, in said state of *New York*, appointing said plaintiff administratrix of all the goods, chattels and credits which were of said deceased, and that said plaintiff duly qualified as such administratrix, and entered upon the discharge of the duties of the said office.

Wherefore said plaintiff demands judgment against said defendants, for the sum of *five thousand* dollars, with interest thereon, from *November 9th*, 1875, and the costs of this action.

[(*Signature and verification as in Form No. 5926.*)][1]

(2) Through Drowning Decedent.

Form No. 6817.

(Precedent in Johnston *v.* Cleveland, etc., R. Co., 7 Ohio St. 337.)[2]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. The only question raised in this case was as to whether under the statute of *Ohio* as it then existed, providing

[(*Caption as in Form No. 5929.*)][1]

David Johnston comes and says he is the administrator of *David Lyons*, late of said county of *Lucas*, deceased, duly appointed according to law; that said *David Lyons*, while in life, to-wit, on the *30th* day of *January*, 1855, and before that time, was in the employ of the *Cleveland and Toledo Railroad Company*, the defendant aforesaid, in the county of *Lucas* aforesaid, and on the day and year aforesaid, was employed as a laborer in the employ of said company on the steam ferry-boat, then and there used by said defendant in connection with the railroad of said defendant, in the carriage and transportation of passengers and freight across the *Maumee* river at *Toledo*; and while said *David Lyons*, now deceased, was so engaged under the directions of the agents and superintendents of said defendant, the said *David Lyons*, by the wrongful act, neglect, and default of the said agents and superintendents of the defendant aforesaid, while they were concerned in managing and conducting the business of said defendant, was bruised and mangled by the machinery of said boat, and was thereby thrown into the water, and he, the said *David Lyons*, became and was drowned, and so the plaintiff says the death of said *David Lyons* was caused by the wrongful act, neglect, and default of said defendant, and without the fault of said *Lyons*.

And the plaintiff further says, that *Thomas Lyons*, *Maurice Lyons*, *Catharine Mulverhill*, *Cornelius Lyons*, *Margaret Lyons*, *Ann Lyons*, and *James Lyons* are next of kin and brothers and sisters of said *David Lyons*, deceased; the said *David Lyons* leaving no widow, and having no children or child, left the said brothers and sisters aforesaid, the heirs at law of him, the said *David Lyons*, deceased; and that they, the next of kin of him the said *David Lyons*, deceased, have suffered damages, by reason of the aforesaid wrongful act, neglect, and default of the said defendant, its servants and agents, in the sum of *five thousand* dollars. Wherefore the plaintiff says he has a right to recover said sum of *five thousand* dollars, and asks judgment therefor.

[(*Signature and verification as in Form No. 5929.*)][1]

g. Where Death is Caused by Steam Railroad.

(1) Decedent an Employee.

(*a*) *Through a Collision.*

Form No. 6818.

(Precedent in Criswell *v.* Pittsburgh, etc., R. Co., 30 W. Va. 799.)

that actions for death by wrongful act should be brought by the personal representative of the deceased, and the amount recovered should be for the exclusive benefit "of the widow and next of kin" of the deceased (Swan's Rev. Stat., § 708), an action could be maintained for the sole benefit of the brothers and sisters of a deceased person who leaves no widow, without an allegation in the petition of such special circumstances as would render the death a pecuniary injury to them. The court held that the action could be maintained on the above petition.

For the present statute of *Ohio* see Bates' Anno. Stat. (1897), §§ 6134, 6135. Consult also note 2, p. 5, *supra*.

1. The matter to be supplied within [ ] will not be found in the reported case.

[State of *West Virginia*,
Ohio County, to wit:

In the *Circuit* Court thereof.

N. C. Criswell, as administrator of the estate of Thomas Waldron, deceased, complains of the *Pittsburgh, St. Louis & Cincinnati Railway Company*, of a plea of trespass on the case, for that (*Here followed first four counts*).][1]

Fifth Count. And the said plaintiff further complains and says that whereas, the said defendant, at the time of the committing by

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

Precedent. — In Central R., etc., Co. *v.* Roach, 70 Ga. 434, a verdict for the plaintiff was upheld by the supreme court. The material allegations of the petition were as follows:

"On the night of the *twenty-seventh* day of *January*, in the year of our Lord one thousand eight hundred and *seventy-eight*, the said *The Central Railroad and Banking Company of Georgia*, a corporation as aforesaid, by the negligence, carelessness and unskillfulness of itself, its agents, servants and employes, so demeaned itself as to cause the death of the said *Alexander J. Roach*, the husband of your petitioner, thereby depriving your petitioner of the comfort, protection and support of her said husband, the said *Alexander J. Roach*, to the great damage of your petitioner, to wit, the sum of *ten thousand* dollars, which said amount the said defendant, although often requested, refuses to pay. And your petitioner further shows that the said *The Central Railroad and Banking Company*, a corporation incorporated under the laws of *Georgia*, and having its place of business and running its railroad cars and locomotives in the county of *Chatham* and state aforesaid, hath endamaged your petitioner in this, to wit; For that, whereas heretofore, to wit, on the night of the *twenty-seventh* day of *January*, in the year of our Lord one thousand eight hundred and *seventy-eight*, the said corporation above mentioned being then and there the owner and proprietor of certain engines and cars, running on its said railroad between the city of *Savannah* and the city of *Macon*, said engines and trains being then and there managed and controlled by the agents, servants and employes of the said corporation, the husband of your petitioner, *Alexander J. Roach*, being then and there in the employ of the said corporation, and running one of the engines which was running just behind another engine and cars, which last mentioned engine and cars was managed and run by one *James Greenlaw*, who was then and there the agent and employe of the said corporation; that the said engine and cars which were just ahead of the one on which your petitioner's husband was, was slackened up without any warning given to prevent the other running into it, and without any good reason, thereby causing the engine and cars on which your petitioner's said husband was employed, to collide with the said preceding engine and cars, and thereby causing great injuries to your petitioner's said husband, from which, after languishing for *ten* days, he died.

That the engine and cars on which your petitioner's said husband was employed were running on schedule time, and were in their proper places according to the schedule of the road, and the accident which resulted in his death was caused wholly by the mismanagement of those in charge of the engine preceding the engine and cars run by your petitioner's said husband.

[That the said acts of the said *James Greenlaw*, the agent and manager as aforesaid of the defendant corporation, by which the said *Alexander J. Roach* was killed as aforesaid, were done by him without due caution and circumspection.]

That at the time of the killing of her said husband by the negligence, mismanagement, and unskillfulness of the said defendant, its agents, employes, etc., he was in his *sixty-first* year of age, was in sound health, was an experienced engineer, having been in the employ of the defendant for about *twenty-four* years in that capacity, was an industrious and hard-working man, and was, by his personal exertions, capable of making and did make a

it of the grievances as hereinafter mentioned, was in possession of a certain other railroad in the county of *Ohio*, and of a certain other railroad locomotive steam-engine, and of railroad cars to the last mentioned engine attached, and also of a certain other hand-car, which said engine, cars and hand-car were then used, managed and controlled by the said defendant, upon the said railroad last mentioned, at the time last aforesaid, and the said defendant was then and there using, managing, controlling and driving the said engine and cars last mentioned upon and along the said last mentioned railroad, and was driving and running the same upon the said railroad last mentioned toward the city of *Wheeling*, in the said county

yearly income of —— dollars; that he rendered to herself and children a comfortable support, besides laying by the sum of about —— dollars yearly for their benefit; that in all human probability, he would have lived and continued to support your petitioner and her said children, for a number of years, to wit, the number of —— years, but for the carelessness, negligence and unskillfulness of the said defendant, its agents, employes, etc., whereby his death was caused, thereby depriving your petitioner of the support, protection and comfort of her said husband, to her great damage, to wit, the sum of *ten thousand* dollars."

The words enclosed by [ ] were not in the declaration as originally filed, but were afterwards added by way of amendment in answer to a motion by defendant to dismiss the suit on the ground that the declaration did not aver any criminal act or negligence on the part of defendant or its employees.

For form of complaint for death of a yard-hand, caused by the collision of cars in defendant's yard, see Kelley *v.* Chicago, etc., R. Co., 53 Wis. 74.

Complaint Held Insufficient. — A complaint in the following words:

"*Dennis Sullivan* complains of the *Toledo, Wabash and Western Railway Company*, and says, that heretofore, to wit, on the *29th* day of *September*, 1870, at the county of *Cass*, in said State, one *John Sullivan*, then in life, and aged only *seventeen* years, the son of the plaintiff, occupying the position of a child to the plaintiff, depending upon the plaintiff for his home, and serving him in such relation, was employed as a servant of the defendant, as a hand to assist in loading and unloading one of her gravel trains, and, as such, had to be carried from point to point along said defendant's railroad; that, on the said *29th* day of *September*, the said *John Sullivan*, being in the line of his duty in the said employment, was upon the engine drawing the said gravel train over the said road from *Peru*, in said State, in the direction of *Logansport*, in said State; and while the said gravel train so drawn was proceeding on the way over the said railroad from said *Peru* in said direction, at a certain curve in said railroad, in the said county of *Cass*, it was met by, and collided with, a certain other train of the defendant, passing in an opposite direction over the said railroad, and the engine so drawing the said gravel train was struck by the engine of the train with which it so collided, with such force and violence, that the said *John Sullivan* was then and there instantly, and without any fault or negligence on his part, killed; that the defendant carelessly, and negligently, and recklessly run the said train with which the said gravel train collided, without giving notice of the approach thereof to the conductor of the said gravel train, when she might have well done so, and, by reason of the said carelessness, the said *John Sullivan*, without negligence on his part, came to his death, to the damage of the plaintiff *five thousand* dollars, for which sum he claims judgment, and prays for other proper relief," was held defective, (1) because it contained no averments taking the case out of the general rule that a principal is not liable to one of his servants for injuries sustained through the negligence of a fellow servant, and (2) because it fails to show that the plaintiff was without negligence contributing to the injury. In an action to recover for the death of a minor, it is not sufficient to aver that the deceased was without fault. Sullivan *v.* Toledo, etc., R. Co., 58 Ind. 26.

of *Ohio*; and the said *Thomas Waldron*, deceased, of whose estate the said plaintiff is administrator as aforesaid, was then and there, being in full life, a servant of the said defendant, by it employed to do certain work and labor upon the said railroad last mentioned, and was by the said defendant licensed, permitted, instructed and required to go and travel upon the last mentioned hand-car, along the railroad last mentioned, at all times, from the said city towards the place upon said railroad last mentioned where the said engine and cars thereto attached last mentioned were then being run and driven on the said railroad last mentioned towards the said city; and it was then and there the duty and obligation of the said defendant to give notice to the said *Thomas Waldron*, deceased, of all engines, cars, and trains moving and being driven upon the last mentioned railroad towards the said city of *Wheeling*, and of all obstructions upon the said last mentioned railroad. Yet the said defendant, though well knowing the premises, and that the said engine and cars last mentioned were being moved and driven, with great rapidity, along and upon the last mentioned railroad towards the said city, and without giving to the said *Thomas Waldron*, deceased, any notice thereof, carelessly, negligently, and improperly allowed, permitted, directed, and required him to go and travel upon the last mentioned hand-car, along and upon the railroad last mentioned, towards the place where the engine and cars last mentioned were being moved and driven as aforesaid, along and upon the last mentioned railroad, towards the said city of *Wheeling*; and the said *Thomas Waldron*, deceased, then in full life, did, as such servant, and in accordance with his duty as such servant, and being wholly ignorant, and without any information from any source, that the engine and cars last mentioned were being rapidly moved and driven, along and upon the said railroad, towards the said city, go, proceed, and travel upon the said hand-car last mentioned, along and upon the said railroad last mentioned, towards the engine and cars last aforesaid; and the said defendant did then and there carelessly, negligently and improperly wholly fail to notify the said *Thomas Waldron*, deceased, of the approach towards said city of the engine and cars last mentioned, as the said defendant ought to have done; and the said *Thomas Waldron*, deceased, then in full life and vigor, going, proceeding, and travelling thereon with all reasonable care and circumspection, upon and along the last mentioned railroad, the hand-car last aforesaid was run against, into, and upon, with great force and violence, by the engine and cars last mentioned, then moving with great rapidity towards and against the hand-car last mentioned, to wit, on the *4th* day of *October*, 1884, at the said county of *Ohio*; by means whereof the said *Thomas Waldron*, deceased, then in full life, was then and there, with great force and violence, struck, wounded, hurt, and injured, and thrown from the said last mentioned hand-car to the ground, by reason of which violence, striking, wounding, hurting, and injuring last mentioned the said *Thomas Waldron*, deceased, did thereafter, to wit, on the day and year aforesaid, die. And the said plaintiff says that the carelessness, negligence, default, and wrongful conduct of the

defendant last aforesaid was the cause of the death of the said *Thomas Waldron*, deceased; that the said carelessness, negligence, and wrongful conduct, and default of the said defendant in this count mentioned, and the wounds, hurts, and injuries thereby caused, as hereinbefore in this count mentioned, were such as would have entitled the said *Thomas Waldron*, deceased, if his death had not ensued, to maintain an action against the said defendant in respect of the last mentioned carelessness, negligence, default, and wrongful conduct of the said defendant as in this court mentioned; that the said *Thomas Waldron*, deceased, has left surviving him his widow, *Bridget Waldron*, and his infant children, *John Waldron* and *Thomas Waldron*, who are the distributees of his estate; that this suit is brought for the benefit of the distributees of the estate of the said *Thomas Waldron*, deceased, and that, by reason of the premises contained, the distributees of the estate of the said *Thomas Waldron*, deceased, have been greatly injured, and have sustained damages to the amount of *10,000* dollars; and the plaintiff says that, by reason of the premises, he has been greatly injured, and has sustained a large amount of damages, to wit, to the amount of *10,000* dollars, and therefore he sues, etc.

Dennis O'Keefe and *W. P. Hubbard*, P. Q.

(*b*) *Through Defective Appliances.*[1]

1. Defective Coupling-pin. — In Louisville, etc., Consol. R. Co. *v.* Utz, 133 Ind. 265, the material allegations of the complaint, which was held sufficient against the objection that "it failed to allege that the company knew, or had means or opportunity of knowing, that the coupling-pin was defective," were as follows:

"On the *15th* day of *June*, 18*88*, the said *William P. Woods* was engaged as such brakeman upon a moving freight train of defendant, running upon said line of railroad, near the station named *Mentor*, and while attempting to pass from the top of one car to another in the performance of his duty, the iron pin in the coupling of said cars suddenly broke and the coupling parted, and said cars suddenly separated, by reason of which said *William P. Woods* was precipitated with great violence from the top of said train to the track below, between the separated parts of said train, and was, by the rear part of said train, run over, wounded, crushed and killed.

The plaintiff avers that the iron coupling-pin, which broke as aforesaid, was so worn by long use, and so weak, rusted and cracked as to be insecure and unsafe to use as a coupling-pin, and that the breaking and separation of the cars aforesaid, and the injury and death of said *William P. Woods*, were caused solely by the fault and negligence of the defendant in not providing a safe and suitable coupling-pin for the coupling of said cars; that said *William P. Woods* had no knowledge or notice of the unsafe or dangerous condition of the said coupling-pin, nor was the injury or death of said *William P. Woods* caused by any fault or negligence on his part, but solely by the negligence of the defendants as aforesaid."

Defective Snow-plow. — In Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190, the complaint, which was held sufficient, contained the following allegations, to wit:

"That on the said *10th* day of *January*, 18*88*, the said *Hugh M. Munro*, now deceased, was in the employ of the said defendant corporation within the *Territory* of *Montana* in the capacity of locomotive engineer for hire and reward by the said defendant paid, and that the duty of running a locomotive engine upon said defendant's line of railway within said *Territory* was by said defendant assigned to said *Hugh M. Munro* on the said *10th* day of *January*, 18*88*, and the defendant directed and ordered the said *Hugh M. Munro*

aa. BRAKE.

Form No. 6819.

(Precedent in Ohio, etc., R. Co. *v.* Pearcy, 128 Ind. 200.)[1]

[(*Caption as in Form No. 5915.*)][2]

Florence M. Pearcy, administratrix of the estate of David L. Pearcy, deceased, complains of the *Ohio and Mississippi Railway Company*, defendant, and says that the defendant is a corporation, organized to run a certain locomotive engine, the property of said defendant, known as engine No. *161*, over and upon its said railway in said *Territory*; that prior to and at the time the said orders were so presented to said *Munro* there had been and then was a severe snow-storm in progress, and defendant's line of railway over and upon which said *Munro* was so ordered to run said engine was covered with drifting snow theretofore accumulated thereon and then fast accumulating, notwithstanding which the said defendant corporation did wilfully, improperly, negligently, and carelessly refuse and neglect to send a snow-plow ahead of said engine No. *161* to clear the snow and ice from said defendant's said track which had accumulated and was accumulating thereon by reason of said storm, so as to render the passage of said engine No. *161* safe and proper.

That there was attached to the forward part of said engine No. *161* a certain attachment known as a pilot-plow, an appliance constructed thereon for the purpose of clearing the railway of snow and ice accumulated thereon and render safe the passage of the engine to which said plow was attached over and upon said railway of defendant.

That on the said *10th* day of *January*, 18*88*, the said defendant corporation knowingly, wilfully, negligently, and carelessly allowed to be and remain upon said engine No. *161*, attached thereto as aforesaid a certain pilot-plow, the iron braces, bolts, and rods of which were broken, imperfect, and insufficient, by reason of which condition the said plow was loose and insufficiently secured to the pilot of said engine, allowing the said pilot to raise up and ride over obstructing snow and ice instead of cutting through the same, as was the intention of its construction, rendering the running of said engine upon said railway dangerous, and that the said defendant well knew of the broken, defective, and dangerous condition of said engine No. *161* at the time the said *Hugh M. Munro* was so ordered to run the same upon and over said railway, notwithstanding which the said defendant corporation did negligently and carelessly furnish to said *Hugh M. Munro* said engine with the said broken and imperfect pilot-plow attached thereto to run over and upon its said line of railway.

That while said *Hugh M. Munro* was running said engine in performance of his duty as such engineer, and pursuant to the orders of said defendant corporation, and before daylight on said *10th* day of *January*, 18*88*, near *Gray Cliff*, in said *Territory* of *Montana*, the said engine struck an accumulation of snow and ice which said defendant had carelessly and negligently allowed to accumulate upon its said railway track, and the pilot-plow of said engine, by reason of its broken, loose, and imperfect condition aforesaid, did ride upon said accumulation of snow and ice, thereby derailing said engine and throwing the same from said railway track, whereby the said *Hugh M. Munro* was instantly killed."

1. In this case a general verdict in favor of plaintiff resulted, and judgment thereon was affirmed by the supreme court, which held that it was not necessary to aver facts in the complaint to show affirmatively that the employee had no means of ascertaining the defect; and, further, that it was not necessary to aver that defendant had knowledge of the defective condition of the appliance, it being averred that the defendant was guilty of negligence in using them. See also Louisville, etc., Consol. R. Co. *v.* Utz, 133 Ind. 265; Warner *v.* Western North Carolina R. Co., 94 N. Car. 250, 25 Am. & Eng. R. Cas. 432.

Consult, generally, note 2, p. 5, *supra*.

2. The matter to be supplied within [ ] will not be found in the reported case.

under the laws of the State of *Indiana*, and owns and operates, for hire, a railroad running through the counties of *Jennings*, *Ripley* and *Dearborn*, in said State, commonly known as the *Ohio and Mississippi Railroad*; that,* on the *1st* day of *August*, 1*887*, said *David L. Pearcy* was employed by the defendant to work for it in and about its freight trains, in the capacity of a brakeman on said railroad, in the transportation of freight over defendant's said railroad for hire; that on said day, while said *David L. Pearcy* was at work pursuant to his said employment, and in the proper discharge thereof, in the capacity of a brakeman on a certain freight train, then being transported by the defendant over its said railroad, at or near a place known as *Moore's Hill* grade, in *Dearborn* county, State of *Indiana*, he was killed by reason of the defectiveness and unsafe condition of a brake and the appliances thereof, on one of the defendant's cars in said freight train, the said brake and appliances being unsafe, defective and out of repair, in this, that the threads of the screw on top of the brake-staff of said brake had become and were worn out and battered so that said threads would not hold a nut securely so as to keep the brake wheel on said brake-staff, when the said wheel was grasped to let off brakes, as said *Pearcy* was required in his said employment to do by the defendant as a brakeman on said freight train, and which he might with safety do when said screw and nut were in good condition and repair, which unsafe and defective condition of said brake, brake-staff and screw was unknown to said *David L. Pearcy*, and which brake, brake-staff and screw the defendant negligently and carelessly used in its said business on said day and for many days prior thereto; that, on said *1st* day of *August*, 1*887*, at or near the foot of said *Moore's Hill* grade, the said *David L. Pearcy* was required by said defendant, pursuant to said employment, to let off the said brake while said train was in rapid motion, and when he was grasping said brake wheel to let off said brake, the said wheel came off in his hands by reason of the fact that the threads of said screw were in the condition aforesaid, and did not, and would not, by reason of its unsafe and defective condition, retain the nut that held said brake wheel in position on said brake-staff, and said brake wheel coming off suddenly in his hands, while the said *David L. Pearcy* was applying only sufficient force thereto to let off said brake, he thereby lost his balance and was thrown forward and off said car onto the ground below and killed, without fault or negligence on his part, or on the part of the plaintiff; that said *David L. Pearcy* was a young man about *24* years of age, and in good health and splendid physical condition, and had dependent on him for support a young wife and unborn child at the time he lost his life as aforesaid; that on the ——— day of *November*, 1*887*, the plaintiff was appointed administratrix of his estate by the *circuit* court of *Jackson* county, in the State of *Indiana*. Wherefore plaintiff demands judgment for *ten thousand* dollars, and all other proper relief.

[(*Signature and verification as in Form No. 5915.*)][1]

1. The matter to be supplied within [ ] will not be found in the reported case.

bb. CAR.[1]

Form No. 6820.

(Precedent in Preston *v.* St. Johnsbury, etc., R. Co., 64 Vt. 280.)[2]

[(*Commencement.*)][3] In a plea of the case for that heretofore, to wit, on the *19th* day of *October*, 1889, and for a long time before, to wit, at *Concord* in *Essex* county, to wit, at *St. Johnsbury* aforesaid, the defendant was and had been the owner and operator of a certain railroad, engines and cars by it used and employed in transporting passengers and freight from *Lunenburg* in said *Essex* county to said *St. Johnsbury*, and that there on said *19th* day of *October* said *Charles C. Blood* was and for a long time before had been in the employ of the defendant, hired by it as a brakeman to assist in the governing and managing one of its said trains as such brakeman and thereby in the transportation of said passengers and freight, and that by virtue and in course of said employment of said *Blood* then and there

1. Car Window Unskilfully Placed.— In an action against a railroad company for the death of an employee, the complaint, after proper averments of the relationship of the plaintiff to the deceased, and the taking out of letters of administration by him, charged "That the *Louisville, New Albany and Chicago Railway Company* was, on the *10th* day of *May*, 1887, and is now, a corporation organized and doing business under the laws of the State of *Indiana*; that said railway company was operating locomotives and trains of cars upon its right of way, extending from the city of *Louisville*, in the State of *Kentucky*, to the city of *Chicago*, in the State of *Illinois*, passing through the counties of *Floyd* and *Washington*, in the State of *Indiana*, prior to and on the *10th* day of *May*, 1887; that said decedent was employed as brakeman by said defendant, and it was the duty of said decedent, as such brakeman, to set the brakes at all stations when said train was required to stop; that said company had negligently and unskilfully placed a window on the top of the caboose, at the rear end of said freight train on which said decedent was employed, so near the front end of said caboose as not to permit him, the said decedent, to climb out on the top of said caboose without falling between said cars; that said decedent, in attempting to go through said window, the usual way of passing to his post of duty, in order to get to his post of duty, and by reason of the window being the usual way to get to his post of duty, being placed so near to the front end of the caboose, he, the said decedent, in trying to get to his post of duty through said window, so unskilfully placed, fell down between the cars of said train and was killed near *Salem*, *Washington* County, *Indiana*, in the night time, without any fault or negligence on the part of said decedent; that said decedent had no knowledge of the dangerous and hazardous condition of said window on said caboose, through which he had to pass, and which was the usual way to get to his post of duty as such brakeman; that said company had not informed him of the dangerous condition of said window, of which said company had full knowledge; that said decedent had no opportunity of knowing the dangerous and hazardous condition of said window. Wherefore," etc. It was contended by the defendant that it appeared from these allegations that the deceased met his death while away from his post of duty, and that no reason or excuse was given for his absence. The court held otherwise, however, and affirmed a judgment in favor of the plaintiff. Louisville, etc., R. Co. *v.* Hobbs, 3 Ind. App. 445.

2. A demurrer to this declaration was overruled and this judgment was affirmed by the supreme court.

Consult, generally, note 2, p. 5, *supra*.

3. The declaration in *Vermont* is inserted in the original writ. The commencement and conclusion are consequently the same as the commencement and conclusion of the writ. For forms of attachment writs in *Vermont* see *ante*, Forms Nos. 2821, 2822.

said *Blood* was obliged to and did stand upon and walk over the tops of said cars while the same were in motion to perform his said duties, and by virtue of the said employment of said *Blood* by defendant it then and there became and was the duty of said defendant to furnish cars for said *Blood* to stand upon and walk over as aforesaid, that were well and safely constructed and of proper and safe material for his use as aforesaid with proper care on his part; yet the defendant, disregarding said duty, then and there carelessly and wrongfully furnished said *Blood*, to stand upon and walk over as aforesaid, a car which had not been before used by or known to said *Blood* and which was so insufficiently, carelessly and negligently constructed and of such unfit material that it greatly endangered the life of said *Blood* who was obliged then and there to use it as aforesaid; all of which was then and there unknown to said *Blood* but well known to defendant.

And the plaintiff avers that then and there, while said *Blood* was in the careful and prudent use of said car on his part in standing upon and walking over the top thereof in the performance of his said duty as aforesaid, said car, by reason of said faulty and negligent construction and unfit material, gave way while in motion under the weight of said *Blood* and threw him with a great quantity of the lumber with which said car was loaded upon the ground in the midst of and underneath said lumber, whereby he was greatly bruised, maimed, cut, shaken and his bones broken and his whole system injured internally, insomuch that he then and there became and was very sick and weak and so remained for a long space of time, to wit, *one* month, during which time he suffered great pain and anguish and was prevented from carrying on his lawful and necessary affairs and was forced and obliged to expend and did expend a great sum of money, to wit, *five hundred* dollars, in endeavoring to cure the injuries so received as aforesaid, and thereafterwards, to wit, on the *19th* day of *November*, *1889*, at *St. Johnsbury* aforesaid, died of his said wounds and injuries, to the damage of the plaintiff *five thousand* dollars.

[(*Conclusion.*)][1]

cc. ENGINE.[2]

1. See *supra*, note 3, p. 44.

2. **Sufficient Declaration.** — In an action for the death of a locomotive engineer caused by a defective locomotive, the declaration, after reciting the duty of the defendant to keep the engine in suitable repair, and as a breach of that duty that defendant permitted the engine to become and remain out of repair and dangerous to the engineer, and especially that said engine could not be oiled except when running, and that there were no platforms or other safeguards so as to protect one engaged in oiling the engine, and that the foot-board on the front was out of repair and in an unsafe condition, charged that "on the *21st* of *February Charles Castaine* was in the employ of defendant, and was engaged in running said engine on said railroad, as engineer, and that then and there he complained to said defendant, and notified it of the said defective and dangerous condition of said engine, and said defendant caused the said *Charles Castaine* to remain and continue in said employment by then and there promising him that said defects, including the repairing of said foot-board, would be speedily repaired and remedied; that defendant did not heed its duty in this respect, and failed and neglected to remedy said defects; and that on said *21st* day of *Febru-*

Form No. 6821.[1]

(*Commencing as in Form No. 6819, and continuing down to* *) on the *fifth* day of *February*, 1867, the said *James H. Scott* was in the employ of the defendant in the capacity of a fireman upon the defendant's locomotive engines upon said railroad; that on the said day the said *James Scott* was ordered by the defendant to serve as fireman on a certain locomotive engine known as No. *16*, attached to one of defendant's express passenger trains then running on said railroad between said *Indianapolis* and said *Columbus*; that said engine was old and rickety, with a weak, defective, patched up and leaky boiler, which was not strong enough to endure a high pressure of steam, and could not be used with safety in drawing a train of any kind, and that the use of said engine in drawing an express train in its weak and unsound condition as aforesaid, involved great peril and danger to the lives of both the passengers and the defendant's employees on said train; that the said *James H. Scott* did not know, and had no means of knowing, the weak and unsafe condition of said engine when he was placed upon it as fireman by the defendant, but that the defendant, with full knowledge of the defective and unsafe condition of said engine, carelessly and negligently caused the same to be used in drawing said express train as aforesaid; that on the said day, in the county of *Franklin*, in the state of *Ohio*, the boiler of said locomotive, while being used to draw said express train between the city of *Indianapolis* and the city of *Columbus* as aforesaid, by reason of its defective and unsound condition, exploded, and by reason of said explosion so caused as aforesaid, the said *James H. Scott*, while engaged in the discharge of his duties as fireman on said engine, was then and there killed, without any fault or negligence on his part; that said *James H. Scott* left as his heirs at law the following named persons, to wit, *Mary Scott*, his widow, and *Jane Scott* of the age of *six* years, and *Frank Scott* of the age of *three* years, his children, who have been damaged in the sum of *five thousand* dollars; that the plaintiff had been duly appointed administrator of the estate of the said *James H. Scott*, by the *Circuit* court of *Marion* county, in the state of *Indiana*; wherefore the plaintiff demands judgment for *five thousand* dollars, and all other proper relief.

Daniel Webster, Plaintiff's Attorney.

(*c*) *Through Derailment of Train.*[2]

ary, and while he was in the employ of defendant as engineer, and was engaged in running said engine, using due care and diligence, he was, in consequence of said defects, thrown with great force and violence from said engine, and was thereby then and there killed," etc. A verdict for the plaintiff was upheld. Missouri Furnace Co. *v.* Abend, 9 Ill. App. 319.

1. This form is substantially the same as the complaint held sufficient in Columbus, etc., R. Co. *v.* Arnold, 31 Ind. 174. For another form see Warner *v.* Western North Carolina R. Co., 94 N. Car. 250, 25 Am. & Eng. R. Cas. 432.

Consult, generally, note 2, p. 5, *supra*.

2. Precedents. — In an action against a railroad company to recover for the death of an engineer who had been ordered by the defendant to take a certain locomotive over a section of defendant's road, and who was killed by the derailment of the engine owing to

Form No. 6822.[1]

Clay County, to wit. *Alice Mary Walsh* sues the *Western Railway of Florida*, a corporation duly created and existing under the laws of *Florida*, for that the defendant on the *twenty-eighth* day of *April*, 1*888*, was and still is such a corporation, and was owning, operating and using a certain railroad in *Clay* county, *Florida*, and operating and using on said railroad on said day its engines and cars, and plaintiff was the wife and is now the widow of *John Walsh*, deceased, and

the defendant's negligence, the complaint, omitting formal parts and prefatory averments, charged "That the said defendant carelessly and negligently failed to provide a safe road-bed for said *Walker* to pass over in so doing, and carelessly and negligently failed to provide him with a safe and suitable engine with which to do said work; but on the contrary carelessly and negligently permitted the grades and curves upon said road, and especially the fills and embankments thereon, to be and to remain too narrow and otherwise of an improper construction, so as to make the same likely to give way, and permit the ties and rails to give with a heavy load, and also permitted said road to become and remain out of repair, and permitted the ties upon which the rails rested to become rotten and loose, so that said road was grossly and unnecessarily dangerous and unsafe. That said defendant further carelessly and negligently ordered said *Walker* to go over said road with an engine and train which was too heavy for the road and for the character of the fills and embankments thereon, and also permitted the engine upon which said *Walker* was sent out, and which he was directed to take, to be and remain out of line and untrue, and out of level upon its wheels, and generally unsafe and out of repair. That on said date and while said *Walker* was passing over said road from *Bolles Junction* to *Alto*, with and upon said engine, under orders of defendant, as aforesaid, at a point between said stations where there is a curve in said road and a high fill thereon, the engine which he was taking and upon which he was riding as aforesaid left the track — by reason and on account of the general bad condition of the road, and the rotten and loose condition of the ties as aforesaid, and by reason and account of the narrow and improper construction of said fill and curve, and by reason and on account of the said engine being out of repair, and too heavy for the road as aforesaid, and rolled down the embankment, with and upon said *Walker*, thereby inflicting upon him great bodily injury, causing his death immediately thereafter. That at the time of said occurrence, and previous thereto, the said *Walker* was a man of sober and industrious habits, good health and good ability as a manager of property and affairs, and was a skillful engineer, and able to earn high wages in such capacity; that, in addition thereto, he was a prudent, kind and affectionate husband and father and that the plaintiffs were each and all dependent upon him for support, education and maintenance. That by reason of the careless and negligent acts and omissions of the defendant, causing the death of said *Walker* hereinbefore set forth, the plaintiffs have lost his earnings and accumulations, and his foresight and management, and have also been deprived of his support, maintenance, comfort and society, and his advice, counsel and oversight as a husband and parent, and are and have been damaged thereby." It was held that the negligence of the defendant was sufficiently charged and a recovery by the plaintiffs was proper. Walker *v.* McNeill, 17 Wash. 582.

For other forms see Vaughn *v.* California Cent. R. Co., 83 Cal. 18, 41 Am. & Eng. R. Cas. 363; St. Louis, etc., R. Co. *v.* Willis, 38 Kan. 330, 33 Am. & Eng. R. Cas. 397; Brickman *v.* South Carolina R. Co., 8 S. Car. 173; Mickle *v.* Congaree Constr. Co., 41 S. Car. 394; Galveston, etc., R. Co. *v.* Leonard, (Tex. Civ. App. 1894) 29 S. W. Rep. 955.

1. This declaration is substantially the declaration in the case of Walsh *v.* Western R. Co., 34 Fla. 1, in which case a judgment sustaining a demurrer to the declaration was reversed, the court holding that the declaration set out a good cause of action.

Consult, generally, note 2, p. 5, *supra*.

defendant before and at the time of committing the grievances hereinafter mentioned owned, used and operated said railroad for the carriage of goods and persons in said county and state, between *Green Cove Springs* and *Bêlmore*, and did employ divers servants to manage and operate said road, and on said day and before then employed said *John Walsh*, the husband of plaintiff, as a servant for hire and reward; and he did then and there faithfully perform his duties as such servant in the capacity of a superintendent, and on said last mentioned date said *John*, following out the line of duty assigned to him by the defendant, and at the request of defendant, and in the exercise of his duties as such servant and superintendent, and for the purpose of more effectually performing the same, did go upon one of the engines belonging to the defendant and pass over said railroad until said engine came near a certain creek in said county over which defendant's road passes. That the track of the road over which said *John* was then and there passing and being at work in his proper and lawful capacity as a servant and superintendent, and for hire and reward then and there paid to him, was then and there extremely dangerous and subjected him to great hazards, risks and dangers of life and bodily injury; by reason whereof the defendant, well knowing the premises, ought then and there carefully to have constructed, inspected and operated the said track and the machinery and appliances incident and necessary to its proper construction, operation and maintenance; yet the defendant did then and there disregard its duty in this behalf in that the said track was then and there with its appliances so negligently, carelessly, insecurely and improperly and defectively constructed, inspected, operated and maintained for the purposes and uses aforesaid; and the said *John* while so employed then and there as a servant and superintendent, and while then and there exercising due care and precaution, did not know and could not see the said defects and dangers in and about said track, which defects and dangers were then and there known to defendant, and by law the defendant ought and was bound to know the said dangers and defects; and defendant did then and there so negligently, carelessly and improperly conduct itself in and about the premises, and in and about the management, construction and maintenance of said track, that by reason thereof and of the imperfect, negligent and careless manner in which said defendant then and there set and allowed to be set to work the said *John* in his capacity of a servant and superintendent as aforesaid, without any caution or warning or instruction of or about said dangers from said defendant, the said *John* then and there and without any fault or negligence on his part and in the course of the lawful and proper use thereof, was then and there exposed to great and unnecessary dangers and risks, and dangers and risks not required or contemplated by his employment; whereby and in consequence of which said track then and there broke, gave way, fell apart, spread open and "sloughed," and the engine jumped and fell from said track, and the said *John* was thrown therefrom with great violence and force and down an embankment to the ground and the engine fell upon him, and greatly hurt, bruised and

injured him, and thereby caused his death, and he then and there died from the effects of said bruises and injuries on the *twenty-eighth* day of *April*, 1*888*, in *Clay* county, *Florida.*

And further, there were attached to the said engine, upon which said *John* was then and there at work and in his proper and lawful capacity as a servant and superintendent, certain cars that were extremely dangerous and subjected him to great hazards and risks and dangers of life and bodily injury, by reason whereof the defendant, well knowing the premises, ought then and there carefully to have constructed and inspected and operated the said cars and the machinery and appliances incident and necessary thereto, yet the defendant did then and there disregard its duty in this behalf in that said cars were then and there, with their machinery and appliances, so negligently, carelessly, insecurely, improperly and defectively constructed and operated and managed for the purposes and uses aforesaid, and the said defects in and about the construction, inspection and use of said cars and their appliances and machinery were then and there so hidden that the said *John Walsh* while so employed then and there as a servant and superintendent, and while exercising due care and precaution, did not know and could not see the defects and dangers in and about said cars and their machinery and appliances, but said dangers and defects were known then and there to defendant, and defendant by law ought and was bound to know the same; and defendant did then and there so negligently, carelessly and improperly conduct itself in and about the premises, and in and about the management, construction and inspection of said cars and their appliances, that by reason of the premises and of the improper construction, application and adaptation of such appliances and machinery of said cars as aforesaid, and of the imprudent, negligent and careless manner in which said cars and machinery and appliances were then used and inspected, and of the imprudent, negligent and careless manner in which defendant then and there set and allowed to be set to work the said *John* in his capacity of a servant and superintendent as aforesaid without any caution, instruction or warning of such danger as aforesaid from defendant, the said *John* then and there and without any fault or negligence on his part, and in the course of the lawful and proper use thereof, was then and there exposed and subjected to great and unnecessary dangers and risks, and risks and dangers not required or contemplated by his employment; whereby and in consequence of which the said cars then and there broke, gave way and fell apart and from the track of defendant's road, and the said *John* was then and there with great force and violence thrown from the engine aforesaid to the ground and greatly bruised, hurt, wounded and injured, and by reason of said bruises, wounds and injuries received then and there he died on the *twenty-eighth* day of *April*, 1*888*, in *Clay* county, *Florida.*

And further, that defendant well knew the said track of defendant's road and its said appliances, and said cars and their appliances and machinery to be dangerous and perilous to the life of said *John Walsh*, and he was thereby subjected to dangers and perils not contemplated by said employment as such servant and superintendent

as aforesaid, and that said *John* did not know the said dangers or perils, nor had he reason to anticipate or provide against the same when he entered said employment as aforesaid or subsequently till the day of his death as aforesaid, and the death of said *John* and the damage hereinafter mentioned were caused by the fault and negligence of the defendant without fault on the part of said *John*.

And further, that said *John* during his lifetime and the period of her intermarriage to him was a kind, affectionate and indulgent husband to her, and supported and maintained her in a proper, decent and substantial manner, so that she had the reasonable and necessary comforts and luxuries of life, and continued to have them to the time of his death caused as aforesaid; and that before said *twenty-eighth* day of *April*, 1*888*, plaintiff was lawfully married to said *John* and was his lawful wife and is now his lawful widow.

And further, that by reason of the death of said *John*, caused as aforesaid, she was and is now deprived of and has lost the said comforts, necessities and conveniences, luxuries and support and society of her said husband, and also his aid and assistance in the management of her domestic affairs and children and the profit and advantage of his fortune which she otherwise would have had and enjoyed, and she was thereby made to suffer great mental anguish and pain, and was forced to expend and did expend divers sums of money for the decent and proper burial of her said husband and for the support of herself and her children, the said children being minor children and heirs of said *John*.

Whereby she has suffered great damage, to wit: in the sum of *twenty-five thousand* dollars, which damage she has demanded and been refused, and hence she brings her suit.

R. W. Williams, Attorney for Plaintiff.

Form No. 6823.

(Precedent in Wellman *v.* Oregon Short Line, etc., R. Co., 21 Oregon 531.)[1]

[(*Caption and commencement as in Form No. 5931*).

That defendant is, and at the times hereinafter mentioned was, a corporation, duly incorporated under the laws of this state.][2]

That on the *16th* day of *January*, 1*890*, plaintiff's intestate, *Fred Wellman*, was in the employ of the defendant in the capacity of fireman on one of defendant's locomotive engines; and at the time of the injury and death of said *Fred Wellman*, hereinafter set out, said *Wellman* was in the proper discharge of his duty as such fireman upon a locomotive of defendant running over and upon the railroad track of defendant in *Union* county, *Oregon*, which locomotive was with another of defendant's locomotives, attached to a train in charge of a conductor also in the employ of defendant; that defend-

1. Judgment in this case having resulted in favor of the plaintiff, the defendant appealed, relying upon errors in the giving and refusal of instructions by the trial court, but the judgment was affirmed.

Consult, generally, note 2, p. 5, *supra*.

2. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

ant carelessly and negligently permitted the said track and road-bed of the railroad, controlled and operated by defendant, to become obstructed, and negligently and carelessly permitted and allowed the track of said railroad to be and become out of repair and unsafe for the passage of its said engines and trains over said track at a point near what is known as *Stumptown*, in *Union* county, *Oregon*, and where the death of plaintiff's intestate was caused; and that said track was at said point negligently and carelessly allowed by the defendant to become and remain obstructed by slides to and upon the same, of snow, ice, rocks and gravel; and that the cross-ties under the rails of said track were old, rotten, and insufficient to hold the fastenings of the rails thereon; and the rails of said track were insecurely and insufficiently fastened to the cross-ties and without proper braces; that defendant negligently and carelessly failed and neglected to properly inspect its road-bed and track at said point, and to notify plaintiff's said intestate and the parties in charge of said engines and train of the obstruction upon said track and the unsafe condition of the same. The said engine, upon which plaintiff's intestate was at work as fireman, in passing over said railroad track and road-bed, ran into and upon the said obstruction, and upon said unsafe track; and said engine was, by reason of said obstruction and the bad condition of said track, derailed and thrown from the said track and road-bed, and fell upon plaintiff's intestate, whereby he was instantly killed, [by reason whereof the estate of the plaintiff's said intestate has been damaged in the sum of *five thousand* dollars.

That on the *first* day of *February*, 1*890*, letters of administration on the estate of the said *Frank Wellman*, deceased, were duly issued to *Arthur Wellman*, the said plaintiff, by the *County* Court of the said county of *Union* in the state of *Oregon*, appointing him the said *Arthur Wellman* sole administrator of said estate; and that thereupon the said *Arthur Wellman*, the said plaintiff duly qualified as such administrator and immediately entered upon the discharge of his duties as such administrator, and ever since that time has been and now is acting as such administrator.

Wherefore plaintiff, as such administrator, demands judgment for said sum of *five thousand* dollars, and for his costs of this action.

J. D. S. Pater & Chas. H. Corey,
Plaintiff's Attorneys.][1]

Form No. 6824.

(Precedent in Reed *v.* Northeastern R. Co., 37 S. Car. 48.)[2]

[(*Caption and commencement as in Form No. 5932.*)][1]

1. That the defendant is a corporation duly incorporated under

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. The defendant at the trial of this case demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The circuit judge sustained the demurrer and dismissed the complaint. On appeal, the supreme court held that this was error and that the complaint stated a cause of action. With reference to the fourth paragraph, however, it was held that in stating as the ground of

the laws of the State, and as such is the owner of a certa.n railroad known as the *Northeastern Railroad*, together with the tracks, cars, locomotives, and other appurtenances thereto belonging, between the city of *Charleston* and the city of *Florence*, in said State.

2. That on or about the ——— day of *June*, 1*890*, there was on the main line or track of the defendant's railroad, at a point within a mile of *Ashley Junction*, a station on said road, and leading off from said main line, a side track commonly known as a "Y" track, constructed for the purpose of connecting with the *Charleston and Savannah Railway* directly, to avoid the necessity of certain trains coming up to the junction; that said side track or "Y" was connected with defendant's main line by a switch; and that within said side track or "Y," and leading out from it, is what is commonly known as a spur track, said spur track being also connected with the said "Y" track by a switch; and plaintiff alleges that it was necessary for the safe running of defendant's trains and the preservation of the lives of the passengers and employees of the defendant, that both of said switches, the one connecting the main line with the "Y" track, and the other connecting the "Y" track with the spur track, should be securely fastened and locked and properly cared for.

3. That on or about the ——— day of *June*, 1*890*, the plaintiff's intestate, *George Patterson Reed*, was in the discharge of his duty as a wood-passer on the engine and tender pulling a certain train of the defendant known as the *Columbia special No. 53*, bound from the town of *Lane's* to the city of *Charleston*, in said State; passing over the main line of the said defendant, and at the point where said "Y" switch is placed near *Ashley Junction* aforesaid.

4. That on said date the defendant carelessly, negligently, wrongfully, and unlawfully caused said "Y" switch, securing said "Y" track or siding, as well as the switch within the "Y" track securing the spur track, to be insecurely and improperly fastened and left open and uncared for, in consequence of which the said train of cars pulled by said engine and tender aforesaid, coming down on said main line or track at a greatly excessive and dangerous speed, without the engineer having his train under proper control or being prepared to stop, as required by the rules of the said company, when reaching said switch connected with the "Y" track aforesaid, through the defendant's negligence aforesaid, entered upon said "Y" track, and proceeding down the same entered upon the spur track, thus causing the engine and tender to be derailed, by reason whereof the said *George Patterson Reed* was instantly killed, while in the discharge of his duties aforesaid, through the negligence, carelessness, and wrong doing of the defendant.

complaint the negligence of the defendant in leaving the switches open, and the act of the engineer in running his engine at an excessive speed, the complaint stated two causes of action, which should have been separately stated, and that the plaintiff should have been required, on motion, to make the complaint more definite, and either to state both causes of action properly or elect which he would retain for trial; also that the plaintiff should amend his complaint by omitting the name of the intestate's mother as one of the beneficiaries of the fund to be recovered.

Consult, generally, note 2, p. 5, *supra*.

5. That the death of the said *George Patterson Reed* was caused by the wrongful act, default, and negligence of the defendant, in the manner before mentioned.

6. That on the *1st* day of *August*, 1*890*, letters of administration on the estate of the said *George Patterson Reed* were granted by the *Probate* Court for *Florence* County, in said State, to his wife, the plaintiff, *Ophelia Reed*, the said *George Patterson Reed* having died intestate and married, leaving surviving him his father, his mother, his wife, the plaintiff, *Ophelia Reed*, and *four* minor children, to wit: *Alice*, *Julia*, *Thomas*, and *Daisey*, one of whom, *Thomas*, has since died intestate and under age, and the father of said intestate having also since departed this life; and the said *Ophelia Reed* has duly qualified as such administratrix and entered upon the discharge of said trust.

7. That the said *Ophelia Reed* and her minor children aforesaid, to-wit: *Alice*, *Julia*, and *Daisey*, had for her and their maintenance, comfort, and support during his lifetime, a beneficial interest in the said life and earnings of the said *George Patterson Reed*, and by his death have been deprived of the aid, comfort, and support which he living had furnished and would furnish to her and them by reason of the income resulting from his labor and services; and that by his death she and they, to-wit: the said minor children and the mother[1] of said intestate, have been injured to her and their damage *ten thousand* dollars; and, therefore, as administratrix as aforesaid, for the benefit of herself, the wife of the said intestate, and his *three* minor children, to-wit· *Alice*, *Julia*, and *Daisey*, and the mother of the said intestate, the only persons designated by the statute to derive the benefit thereof, she, the said plaintiff, brings this action.

Wherefore she demands judgment against the defendant for *ten thousand* dollars and costs.

[(*Signature and verification as in Form No. 5932.*)][2]

(*d*) *Through Running Over Decedent.*[3]

1. See *supra*, note 2, p. 51.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. **Precedents.** — In an action by a widow against a railroad company for damages for the death of her husband, a petition alleging that the deceased was a track-walker over a section of the defendant's road, and, "That while so engaged on the *eighth* day of *May*, 18*85*, he was run upon, injured and killed by the locomotive and cars of defendant, known as the morning *Lexington* train, west, and resulting from or occasioned by the negligence of the officers, servants or employees of defendant, whilst running, conducting or managing said locomotive and train of cars; that the said train was out of time and under the control and management of one *Fitzgerald*, as conductor, and one *O'Donnell*, as engineer; all, at or near *Rock Creek*, in said county and state aforesaid; on the line of defendant's railway," was held sufficient without any further statement as to the specific act of negligence complained of. Sullivan *v.* Missouri Pac. R. Co., 97 Mo. 113, 38 Am. & Eng. R. Cas. 79. For other forms see Louisville, etc., R. Co. *v.* Markee, 103 Ala. 160; Kansas City, etc., R. Co. *v.* Hammond, 58 Ark. 324; Atchison, etc., R. Co. *v.* Farrow, 6 Colo. 498, 11 Am. & Eng. R. Cas. 239; McEvoy *v.* Manhattan R. Co. (Super. Ct.) 12 N. Y. St. Rep. 73.

Form No. 6825.

(Precedent in Hildebrand *v.* Toledo, etc., R. Co., 47 Ind. 400.)[1]

[(*Caption as in Form No. 5915.*)][2]

Theodore Hildebrand, administrator of the estate of Calvin Graves, Jr., deceased, plaintiff, complains of the *Toledo, Wabash, and Western Railway Company*, defendant, and says that heretofore, to-wit, on the *27th* day of *October*, A. D. 1870, at said county and State, said *Calvin Graves, Jr.*, was in the employ of the said defendant as carpenter, and upon the day aforesaid, while engaged in repairing one of the cars belonging to said defendant, upon one of their side tracks in the city of *Lafayette*, in *Tippecanoe* county, State of *Indiana*, was, while in the exercise of proper and reasonable care on his part, run over, crushed, and wounded by an engine and cars belonging to said defendant, and in charge of their servants, so that he died of said injuries so received in said county and State on the *28th* day of *October*, A. D. 1870; that the servants in charge of said engine and cars, by which the said injuries were inflicted, were fellow-servants of the said *Graves*, and were acting conformably to all the rules of the said company at the time the said injuries were inflicted; that it was the duty of the said defendant to establish, provide, and promulgate rules and regulations in the management of their engines and cars, so as to insure the safety of the company's employees while in the discharge of the company's business while upon the tracks of said company repairing their said cars; yet the plaintiff avers that the defendant, by its negligence, carelessness, and unskillfulness in the management of its said engine and cars, and by its failure to provide such rules and regulations in running its said engines and cars upon the said side tracks, so negligently permitted its said engines and cars to be run upon the said side tracks, where its said employees were working, without rules and regulations for their management, that the said *Graves* by reason thereof received the injuries so complained of, resulting in the death of the said *Graves*, as aforesaid; that said *Graves* left as his heirs at law and children the following named persons, to-wit: *Mary E. Graves*, his late wife, *Sarah Graves*, of the age of ——— years, *Emma Graves*, of the age of ——— years, *Susan Graves*, of the age of ——— years, and *Eva Graves*, of the age of ——— years, his children, who have sustained damages in a great sum, to-wit, *five thousand* dollars; that the plaintiff has been duly appointed administrator of the estate of the decedent *Graves*, in said county of *Tippecanoe*, where said *Graves* died, and has sustained damages in a great sum, to-wit, *five thousand* dollars; wherefore he claims damages in the sum of *five thousand* dollars, and other and proper relief.

1. The complaint in this case consisted of three counts, the first and third of which were held good on demurrer and are given in the text The second failed to allege that there was no negligence on the part of the deceased, and was held bad on that account.

Consult note 2, p. 5, *supra*.

For a similar complaint held good see Louisville, etc., R. Co. *v.* Hanning, 131 Ind. 528.

2. The matter to be supplied within [ ] will not be found in the reported case.

3d. The plaintiff, as administrator aforesaid, further complains of the defendant, and says that the defendant is a railroad corporation, owning, running, and operating a line of railroad from the city of *Toledo*, in the State of *Ohio*, through the city of *Lafayette*, *Tippecanoe* county, State of *Indiana*, to the city of *St. Louis*, in the State of *Missouri*, a distance of about *six hundred* miles; that in the transportation of freight it becomes necessary for the defendant to use, and they do use and employ, a large number, to-wit, *two thousand* freight cars; that the said city of *Lafayette* is a large and important station upon the defendant's railroad, and said defendant has constructed and necessarily uses a large number, to-wit, *six* side tracks in said city of *Lafayette* of great length, to-wit, *five hundred* feet each, all connected with the main line or track of said defendant's railroad by means of switches; that in the transportation of freight on defendant's road, it frequently becomes necessary, after the cars reach the city of *Lafayette*, to put them, whether empty or laden, upon said side tracks, so that slight but needed repairs to their brakes, bumpers, and other parts can be made without their going into the shops of the company for that purpose; and when said repairs are made, it becomes necessary for the employees of said company to go under and between said cars and make said repairs in such a way as to be greatly exposed to personal injuries without any negligence on their part, if locomotives or other cars are run upon the side tracks where such repairs are going on so as to collide with or jostle against the cars being repaired, or the trains in which they are situated; and the plaintiff further avers that for many years, to-wit, *five* years last past, the defendant has been accustomed repeatedly and almost daily, and as often as the exigencies have required, to place upon said side tracks trains of cars, many of which needed repairs to their brakes, bumpers, and other parts, and she has caused carpenters and other persons to go under and between the said cars, so that it became and was necessary to have rules and regulations for the government of her employees and agents at *Lafayette*, to the end that none of the persons so employed or engaged in such repairs should be unnecessarily exposed to injury while engaged in such work; and the plaintiff further avers that in the keeping up and operating of said railroad the defendant necessarily employs, and for many years has employed, a large number of locomotives and cars upon construction and repair trains, and that the defendant has been long accustomed to have such construction and repair trains switched off upon the said side tracks in *Lafayette*, upon which there have been and are cars needing repairs as aforesaid; and the plaintiff avers that a reasonable regard and care for the safety of the employees and servants of the defendant required, and it was the duty of the defendant that it should have made, rules and regulations for the government of her agents and servants at said *Lafayette* station, that whenever cars were actually undergoing repairs, and men and employees were under and between them, and so exposed to injury from their being jostled or moved by trains or locomotives being placed upon the same side track, the switches leading thereto should be kept closed, or other rules or precautionary measures adopted, so that trains could not enter upon said side tracks to collide with or

jostle against such cars undergoing repairs in such a manner as to expose the parties so employed to injury; yet the plaintiff avers and says that the defendant did not make or provide any such rule or regulation to have such switches closed at such times aforesaid, or make any other rules, or take any other precautionary measures, so as to provide against the said cars being so jostled against or moved by trains coming upon said side tracks where the said defendant's servants were repairing the said cars; that heretofore, to-wit, on the ——— day of *October*, A. D. 1870, at said *Lafayette*, the said *Graves* was in the employ of said defendant as carpenter, and upon the day aforesaid, while engaged in repairing one of the cars of the said defendant upon one of the said side tracks in said city of *Lafayette*, and while in the exercise of proper and reasonable care on his part, owing to the said switch being left open, and no other rules or precautions being made by said defendant to warn him of its approach, or to notify the person in charge of a certain steam engine and cars then coming upon said side track, where the said *Graves* was engaged in repairing said cars, of the said situation and exposure of said *Graves*, and by reason of there being no such rules or regulations, and by reason of the said switch being left open, and by reason of the said steam engine and cars coming upon said side track, where the said *Graves* was engaged in repairing said car, the said engine and cars were driven against the said cars upon said side track, one of which the said *Graves* was repairing, and thereby the said *Graves* was violently struck, run over, crushed, and wounded, so that he died of said injuries so received on the ——— day of ———, A. D. 1870; that at the time he was so struck the said *Graves*, owing to his said position between the said cars, could not see, hear or know that the said engine and cars were so coming upon the said side track, and the said parties in charge of the said engine and cars could not, owing to the said cars being between them and the said *Graves*, see *Graves* or know that he was engaged in mending said car and so exposed; that said *Graves* left as his heirs at law and children the following named persons, to-wit: *Mary E. Graves*, his late wife, *Sarah Graves*, of the age of ——— years, *Emma Graves*, of the age of ——— years, *Susan Graves*, of the age of ——— years, and *Eva Graves*, of the age of ——— years, his children, who have sustained damage in a great sum, to-wit, *five thousand* dollars; that the plaintiff has been appointed administrator of the estate of the decedent, *Graves*, in the said county of *Tippecanoe*, where the said *Graves* died; that he has sustained damage in a great sum, to-wit, *five thousand* dollars; wherefore he claims damages in the sum of *five thousand* dollars, and other and proper relief.

[(*Signature and verification as in Form No. 5915.*)][1]

(*e*) *Through Starting Train Too Quickly.*[2]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Petition Held Sufficient.** — In an action for the death of a track laborer while being carried on defendant's cars, a petition which, after prefatory averments, charged, "That late in the afternoon of said day the said *John Luby* and the other laborers were ordered and re-

Form No. 6826.

(Precedent in Union Pac. R. Co. *v.* Geary, 52 Kan. 311.)[1]

[(*Caption and commencement as in Form No. 5917.*)

That on (*Here allege the death of Geary and appointment of plaintiff as administratrix as in Form No. 5940.*)

That the defendant was on the *eleventh* day of *August*, 1*888*, and now is, a railway corporation duly organized under the laws of the state of ———, and was and is the owner and operator of a certain railroad in the state of *Kansas* known as the *Union Pacific Railroad.*

That on said *eleventh* day of *August*, 1*888*, the said *Jeremiah Geary* was, and for many years theretofore had been, in the employ of the said defendant as a track repairer on the defendant's railway track in the said county of *Ellsworth* in said state.

That, at the date aforesaid, and in the county aforesaid,][2] he, the said *Jeremiah Geary*, being employed by said defendant as a track repairer, and, in pursuance of his duties in that behalf, got upon one of the cars of defendant for the purpose of unloading certain ties thereupon, said ties being designed for present use in repairing defendant's track a short distance east of the place where said *Jeremiah Geary* got upon said train; that the said train of cars being then and there operated by said defendant, its agents, servants, and employees; that while the said *Jeremiah Geary* was upon said car as aforesaid, by the gross negligence, carelessness, wrongful act, neglect, omission and default of the agents, engineers and superintendents of said defendant, while concerned in managing and conducting the business of said defendant, in the operating of said train of cars of defendant, and in causing said train of cars to be suddenly started, with a violent and unusual jerk or motion, and without giving any signal or warning of the intended movement of said cars, he, the said *Jeremiah Geary*, was, in consequence thereof, thrown from the car he was on and bruised and mangled by the cars of defendant, so that he, at the date aforesaid, died from the injuries then and there received as aforesaid.

[That at the time of his death as aforesaid the said *Jeremiah Geary* left his plaintiff, his widow, and *five* children, to wit (*naming them*),

quired, by the agent and servant of the defendant in charge of the train and laborers, to mount the flat cars and pass therefrom into the caboose for the purpose of returning to *Des Moines*, to which point it was the duty of the defendant to safely carry them; that before said *Luby* and other laborers had time to pass from the flat cars to the caboose, as they were ordered and required to do, the employees of the defendant in charge of the train, without proper regard to the safety of the laborers, negligently caused the train to start, whereby the said *Luby*, while attempting to pass from the flat cars into the caboose, in the line of his duty, in obedience to the orders and requirements aforesaid, and in the exercise of care and diligence and without fault on his part, was thrown from the cars and thereby instantly killed," etc., was demurred to on the ground that it showed contributory negligence of the deceased, but the supreme court sustained the petition. Luby *v.* Chicago, etc., R. Co., 52 Iowa 168.

1. A judgment in favor of the plaintiff in this case was affirmed on appeal. Consult, generally, note 2, p. 5, *supra.*

2. The words and figures enclosed by and to be supplied within [ ] will not be found in the reported case.

and that by reason of the premises the said widow and children have been damaged in the sum of *ten thousand* dollars.

Wherefore the plaintiff, as administratrix as aforesaid, asks judgment against the defendant in the sum of *ten thousand* dollars, and costs of this suit.

(*Signature and verification as in Form No 5917.*)][1]

(*f*) *Through Being Struck by Overhead Bridge.*[2]

Form No. 6827.

(Precedent in Maher *v.* Boston, etc., R. Co., 158 Mass. 37.)[3]

[(*Caption as in Form No. 6806.*)][1]

And the plaintiff says that she is the mother and next of kin of *Peter W. Maher*; that on or about *February 4*, 1*891*, the said *Peter W. Maher*, now deceased, was employed by the defendant corporation; that while he was so employed, and in the exercise of due care, the defendant so negligently and carelessly ran a car, upon which he was required in the course of his employment to be, under a bridge, and so negligently and carelessly protected him in properly guarding the approach to said bridge, thereby not notifying him of his approaching the same, that he, the said deceased, was knocked off from the said car and killed.

[(*Signature of attorney as in Form No. 6806.*)][1]

(*g*) *Through Unloading Car.*

Form No. 6828.

(Precedent in Lynn *v.* Illinois Cent. R. Co., 63 Miss. 158.)[4]

[State of *Mississippi*, } In the *Circuit* Court.
County of *Marshall*. } *April* Term, A. D. 1*885*.

Rose Lynn, the plaintiff in this case, by *J. H. Watson*, her attorney, complains of the *Illinois Central Railroad Co.* in an action of trespass on the case, for that, heretofore, to wit, at the date hereinafter mentioned, the said defendant was a railroad corporation duly organized under the laws of the state of *Illinois*, and as such railroad corporation owned and operated a certain line of railroad lying in part in the said state of *Mississippi* and county of *Marshall*.][5] And the said defendant [being such corporation, as aforesaid][5] on the *8th* of *October*, 1*884*,

1. The matter to be supplied within [ ] will not be found in the reported case.

2. For substance of a similar declaration held to state a good cause of action see Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971, 54 Am. & Eng. R. Cas. 82.

For form of declaration for death of fireman on a locomotive by being struck by the upright side of a bridge see Sheeler *v.* Chesapeake, etc., R. Co., 81 Va. 188.

3. The jury in this case returned a verdict for the plaintiff, and defendant alleged exceptions, which were overruled and the verdict sustained. Consult, generally, note 2, p. 5, *supra*.

4. The defendant in this case filed a general demurrer to the plaintiff's declaration, which was sustained by the trial court. On appeal, this judgment was reversed and it was held that the demurrer should have been overruled.

Consult, generally, note 2, p. 5, *supra*.

5. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

in said county of *Marshall*, employed *Lee Lynn*, a minor son of said plaintiff, as a laborer on its railroad and on one of its construction trains thereon, and by virtue of said employment, the said *Lee Lynn* was, on the *8th* day of *October*, 1*884*, a laborer on, and engaged in the loading and unloading of "stringers" and other timbers on a construction train, and in the discharge of his duties as such laborer for hire, the said duties so assigned him on said construction train being then and there dangerous and accompanied with risks too great for one of the age of said minor knowingly to assume and undertake, and said plaintiff avers that the said *Lee Lynn* was a minor and had not reached the age of discretion, being of tender years, and that the said defendant employed the said minor with full knowledge of his minority, and without plaintiff's knowledge and against her consent; and that the said minor was in the employment of said defendant on said day of *October*, 1*884*, in the county of *Lafayette*, and it became and was the duty of said defendant to use and exercise due and proper care on account of the tender years of said *Lee Lynn*, to protect him against the injuries incident to such dangerous labor; yet the said defendant, not regarding its said duty in that behalf, did not use due and proper care to protect said minor from injury and danger, but wholly neglected so to do, and instructed said minor to load and unload one of its construction trains with "stringers" and other timbers, in the said county of *Lafayette*, on the day and year aforesaid; and said defendant well knew said employment and labor to be dangerous, but the same was unknown to said minor, and whilst said minor was laboring on said construction train by virtue of said contract and employment, and was exercising due and reasonable care and diligence, by reason of the said dangerous work the said minor was bruised and injured by said defendant, of which said bruises and injuries on the day aforesaid the said minor died. And said plaintiff further avers that she is the mother of said minor, that said minor was unmarried, and died without children or descendants of children, and that the father of said minor departed this life long before the committing of the grievances before stated.

And the said defendant again employed the said *Lee Lynn*, on the said day of *October*, 1*884*, on another of its construction trains, to load and unload the same with stringers and other timber. And said plaintiff avers that at said date the said *Lee Lynn* was a minor, *eighteen* years of age, and that the said defendant employed him without her knowledge and against her consent; and that under said contract of employment, and on account of the tender years of said minor, it became and was the duty of the said defendant to use due and proper care and precaution not to expose the said minor to any dangerous labor; yet the said defendant, not regarding its duty in that behalf, did not use due and proper care and precaution not to expose and place him at dangerous work, but wholly neglected so to do, and exposed and placed him in dangerous employment, to wit: the loading and unloading of a construction train with stringers and other timbers; and whilst said minor, on the *8th* of *October*, 1*884*, in said county of *Lafayette*, was engaged in loading and unloading said construction train, by virtue of his contract, and in the discharge of

his duties, with reasonable care and precaution, and without any negligence on his part, the said minor was by the gross negligence and carelessness of said defendant's employees bruised and injured, of which said bruises and injuries the said minor died. And said plaintiff avers that the said decedent's father departed this life before the committing of the grievances hereinbefore stated, and that said plaintiff is entitled to have and recover from said defendant what the services of her deceased minor son are reasonably worth from the date of his injuries till he shall have attained twenty-one years of age, and said plaintiff avers that said services are reasonably worth *four hundred and thirty-two* dollars, or the sum of *twelve* dollars per month [to the plaintiff's damage *five hundred* dollars.

J. H. Watson, Plaintiff's Attorney.][1]

(2) Decedent a Passenger.[2]

(*a*) *Through a Collision.*

Form No. 6829.

(Precedent in Hamilton *v.* Hannibal, etc., R. Co., 39 Kan. 57.)

[(*Caption as in Form No. 5921.*)][3]

The said plaintiff, *M. F. Hamilton*, complains of the said defendant, *The Hannibal and St. Joseph Railroad Company*, and alleges that at the time of the happening of the wrongs and grievances hereinafter

1. The matter enclosed by [ ] will not be found in the reported case, but has been added to render the form complete.

2. **Through Starting Train Too Quickly.** — In Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48, the complaint, which was held to be sufficient, after charging that decedent took passage on said railroad at Jeffersonville for Columbus on the thirty-first day of March, 1863, charged that the agents of said company in charge of said train, not mindful of their duty and the obligation of the company to safely and securely carry and deliver said decedent at Columbus, wholly neglected and refused to do so, but on the contrary, "by their servants and agents, so carelessly, negligently and unskilfully managed said train of cars, at and near the usual and common place of delivery of passengers at said *Columbus*, that through said carelessness, negligence, and want of attention of the defendants and their agents and servants, and without want of ordinary care on the part of said *Rebecca*, said *Rebecca* was unable to safely and securely get out of and leave said cars at said *Columbus*; and neither the conductor, nor any other of said defendants, or their agents or servants, were present to assist said *Rebecca* to safely and securely get from and leave said cars at said *Columbus*, notwithstanding they well knew that said *Rebecca* was old and infirm; and the defendants then and there wholly neglected and refused to stop the motion of said cars a sufficient length of time, and allow said *Rebecca* sufficient opportunity safely and securely to leave said cars, but having stopped said train, and while said *Rebecca* was in the act of getting off, suddenly started the same again, without allowing her a reasonable time for that purpose, by means of which said *Rebecca*, in endeavoring to leave said cars, without want of ordinary care on her part, fell and was thrown with great violence from said cars on to the platform, between the platform of the cars and the platform of the depot, at said *Columbus*, and across the iron rail of said railway track, and was then and there instantly killed."

3. The matter to be supplied within [ ] will not be found in the reported case.

set forth and at the present time, the defendant was and is a railroad corporation, organized under the laws of the state of *Missouri*, was and is doing business therein as a common carrier, and at said dates and times the said road of defendant passed into the county of *Atchison*, and was at said date and is doing business as a common carrier and railroad corporation therein; that on the *17th* day of *September*, 1*885*; the plaintiff was the lawful wife of *Milton Clarkson Hamilton*, and had been for a long time prior thereto, and now is his widow; that at said date *Milton Clarkson Hamilton* was and had been for a long time prior thereto a stout, hearty, healthy man, and was then of the age of *forty-six* years; that at that date he was engaged as inspector of supplies, by the *Chicago, Rock Island & Pacific Railroad Company*, and in the reception of a large salary from said company for his services as such inspector, to wit: the sum of ——— dollars per month; that on said *17th* day of *September*, 1*885*, it became and was the duty of said *Milton Clarkson Hamilton* to inspect certain supplies for his employer; and on that day, for the purpose of attending to his said duties at the proper place, he became and was a passenger on the cars of the defendant, for hire, and the defendant then and there, in consideration of a certain reward, then and there to it paid, contracted and obligated itself to safely carry and transport said *Milton Clarkson Hamilton* to the place of his destination on its said railroad.

Plaintiff further alleges, that whilst so as a passenger for hire on said train of cars of defendant, said defendant, by its negligence and carelessness of its agents and employes on said road, on said day, did permit two trains, one being the train and cars upon which said *Milton Clarkson Hamilton* was then being carried as aforesaid, to collide, both of said trains being on the same track of the said defendant, in the county of *Buchanan*, in the state of *Missouri*, then and thereby, and without any fault or negligence upon the part of said *Hamilton*, crushing, bruising and wounding him, the said *Hamilton*, in the legs, arms and body, from which he suffered terrible agony, and from which he died, at *St. Joseph*, *Buchanan* county, *Missouri*, on the *23d* day of *September*, 1*885*.

And plaintiff further alleges that at the date of the happening of the injuries and death herein set forth, the laws of the state of *Missouri* permitted the widow of any person whose death might be caused by the wrongful act or omission of another, if such widow instituted her action within six months from the date of the death, to recover against such person causing such death, and limited the recovery in such action to *five thousand* dollars, which said law of the state of *Missouri* is contained in §§ 2121, 2122, and 2123, which read as follows, to wit: (*Here were set out the sections of the statute verbatim.*)

[Plaintiff further alleges that said *Milton Clarkson Hamilton* was killed, as aforesaid, within six months before the time when this suit was instituted.][1]

1. It was held in the above case that the petition set forth in the text failed to show a right of recovery under the *Missouri* statute, in that it was not alleged, and did not appear, that the action had been brought within six months, as would have been necessary under the statute. The words enclosed

Plaintiff further alleges that at the time of his (said *Hamilton's*) death, said *Milton Clarkson Hamilton* left him surviving this plaintiff, his widow, and *three* children, aged respectively *twenty-one*, *nineteen* and *eleven* years; that he left his said widow and the younger children totally destitute and wholly without support; to the damage of this plaintiff in the sum of *five thousand* dollars.

Wherefore plaintiff prays judgment against said defendant for the sum of *five thousand* dollars and costs of suit.

[(*Signature and verification as in Form No. 5921.*)][1]

(*b*) *Through Derailment of Train.*[2]

by [ ] have been supplied to meet this objection, which is the only one raised as to the sufficiency of the petition. It seems, however, that the action could not have been maintained in *Kansas* under the *Missouri* statute. See the opinion of the court on this point.

Consult, generally, note 2, p. 5, *supra*.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Precedents.** — In an action against a railroad company for wrongfully causing the death of a passenger, the plaintiff's intestate, an averment in the complaint that "the defendant did not use due and proper care or skill in and about the carrying of the said *R. J.* on the said journey, but so negligently and unskilfully conducted itself in that behalf, and in conducting, managing and directing the coach in which said *R. J.* was such passenger, * * * and the engine whereby the said train was drawn upon and along the said railway, that the coach which contained the said *R. J.* was thrown and cast with great violence from and off the rails of the said railway," is sufficiently certain and definite to support a recovery, without any allegation as to the immediate cause of the derailment. Louisville, etc., R. Co. *v.* Jones, 83 Ala. 376, 34 Am. & Eng. R. Cas. 417.

A declaration in an action against a railroad company for causing the death of a passenger, under *West Virginia* Code, c. 103, which avers that the defendant, not regarding its duty, conducted itself so carelessly, negligently and unskilfully, that by reason thereof, and the default of the defendant and its servants, and for the want of due care and attention, the car, in which the deceased was being carried, was overset and thrown down, by means whereof the said deceased was greatly wounded and injured, and by reason thereof he died, is not demurrable on the ground that the allegation is too general, in that it does not show in what manner the car was overset. Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 370.

In an action against a railroad company for the death of a passenger, a declaration which, after the prefatory averments, charged that "the defendants so carelessly, unskillfully, and negligently behaved, and conducted themselves in the premises, and while the train with the said *Gray* therein was passing and being propelled upon, over and along, the defendants' said road, viz.: on the *6th* day of *May*, in the town of *Norwalk*, a part of said train, with the said *Gray* therein, was, with great force and violence, precipitated and plunged into a certain stream there situated, called and known by the name of *Norwalk* river, and immersed and covered in, and by the waters thereof, and so with the said *Gray* therein, for a long time, viz.: *two* hours and more next thereafter, continued immersed and covered, by means of all which the said *Gray* was greatly wounded, bruised and injured, and suffered great pain and anguish both of body and mind, and then and there died and lost his life, to his great damage, viz.: to the amount of *thirty thousand* dollars, and no part of which the defendants ever paid to the said *Gray*, in his life time, and that by reason of the matters aforesaid and by virtue of the statutes in such case made and provided, an action for the recovery thereof hath survived to the plaintiff, as administrator as aforesaid," was held sufficient. Soule *v.* New York, etc., R. Co., 24 Conn. 575.

Form No. 6830.

(Precedent in St. Louis, etc., R. Co. *v.* Sweet, 63 Ark. 565.)[1]

[(*Caption and commencement as in Form No. 5909.*)

That on (*Here allege death of Sweet and appointment of plaintiff as administrator as in Form No. 5940*).

That defendant is, and at the times hereinafter mentioned was, a corporation duly incorporated under the laws of this state, and as such corporation was a common carrier of passengers for hire on its railroad between the places hereinafter mentioned.][2]

That on the said *18th* day of *September*, 1*890*, the defendant received the plaintiff's intestate, *Frank Sweet*, into one of its cars, for the purpose of carrying him therein, and upon said railroad, as a passenger from *Walnut Lake* to the city of *Pine Bluff*, in *Jefferson* county, in this state, for the sum and price of $*1.25* then paid to the defendant by the said plaintiff's intestate. That the track of defendant's road between *Fairfield* and *Pine Bluff* in said county and state, and especially at a point about *three* miles east of *Pine Bluff*, and between *Pine Bluff* and *Fairfield* station, was at the time defective and unsound, and unfit to be used for that purpose, which defendant did (know), or might and should then and thereafter have known, by due care, but, not regarding their duty, they carelessly and negligently suffered it to be used, although the ties which held the rails in place were rotten and unsound, and in such condition as to be actually dangerous to the traveler over said road; and while said car was proceeding with the plaintiff's intestate thereon at the point last aforesaid, it was, by reason of such defect in the said track, and the unsoundness thereof, thrown from the track, and said car wrecked, and the said *Frank Sweet* caught therein and bruised and mangled in a most horrible manner, from the effects of which the said *Frank Sweet* did languish and live for a period of *ten* hours after he was bruised and mangled, as aforesaid, before dying, and that, during the said *ten* hours he so lived, he suffered great bodily pain and mental anguish [and then and there, on said day, died].[2] That his death aforesaid was caused by the injuries received in the manner as stated aforesaid, and by reason thereof his estate has been damaged in the sum of *ten thousand* dollars. [Wherefore the plaintiff, as administrator as aforesaid, prays judgment for *ten thousand* dollars, and for other relief.

N. T. White, Attorney for Plaintiff.][2]

(*c*) *Through Running Over Decedent.*[3]

1. It was held that the allegations in the above form would support an action either *ex contractu* or *ex delicto.*

Consult, generally, note 2, p. 5, *supra.*

2. The words enclosed by and to be supplied within [ ] will not be found in the reported case.

3. Running Over Passenger Ejected from Train.— Where a declaration alleged that a passenger on a railroad train in South Carolina "was violently ejected and thrown from said cars by the defendant and its agents and servants in the course of their employment, and in being thus forcibly and unjustly ejected from said cars as aforesaid, was thrown thereunder and run over and killed thereby," and the evidence showed that the passenger was run

aa. While Boarding Train.

Form No. 6831.

(Precedent in Andrew *v.* Chicago, etc., R. Co., 45 Ill. App. 269.)[1]

[State of *Illinois*, } *Circuit* Court of *Boone* County.
Boone County. } *October* Term, A. D. 1891.][2]

John Andrew, plaintiff, administrator of the estate of *Charles Kelly*, deceased, who died intestate, complains of the *Chicago & North-Western Railway Company*, defendant, of a plea of trespass on the case; for that, whereas, the defendant, in the lifetime of said *Charles Kelly*, to wit, on the *seventeenth* day of *February*, 1891, in *Belvidere*, to wit, in the county of *Boone* and State of *Illinois*, was possessed of, and using and operating a certain railway, extending to the city of *Belvidere*, in the county of *Boone* aforesaid, and through certain depot grounds, and then and there possessed by said defendant, and was also then and there possessed of a certain locomotive engine and train of cars attached thereto, which said locomotive engine and train were then and there under the care and management of divers, then servants of the defendant, who were then and there driving the said locomotive engine, and conducting said train of cars upon and along said railroad depot ground there on the side track.

And the plaintiff avers, that on, to wit, the *seventeenth* day of *February*, 1891, his said intestate had travelled from *Caledonia*, *Illinois*, to *Belvidere*, *Illinois*, a long distance, to wit, *fifteen* miles, as a passenger on defendant's said railroad, and on defendant's said train of cars, and on the evening of the same day was about to return to his home near *Caledonia*, *Illinois*, as a passenger upon defendant's said train of cars on which the plaintiff's said intestate had travelled to *Belvidere*, as aforesaid, and to that end went to defendant's passenger depot grounds aforesaid, at *Belvidere*, *Illinois*, and entered defendant's passenger car on said train, and then standing on said side track there, and left therein certain parcels belonging to himself, and then stepped outside of said car, and onto defendant's depot platform there, in search of a certain person said intestate then and there expected to meet; and while the plaintiff's said intestate so stood and remained on said depot platform, a certain other passenger train of cars of the defendant came into said depot station from *Chicago*, *Illinois*, on the main track of said railroad, having attached thereto a certain passenger coach and car designed by the defendant to be attached to said train of cars in which said intestate had left his said

over and injured by this train, and that about an hour afterwards another train ran over the body, it not being absolutely certain whether death was caused by the first or second, it was held that the declaration furnished a sufficient basis for recovery on these facts, and that if it were necessary to include any allegation concerning the second train it could be done by amendment. South Carolina R. Co. *v.* Nix, 68 Ga. 572.

1. It was held that this declaration, while unnecessarily prolix, clearly charged negligence on the part of the defendant, and care on the part of the deceased.

Consult, generally, note 2, p. 5, *supra*.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

parcels, as aforesaid, and to be drawn by said locomotive engine in said train from *Belvidere*, *Illinois*, to *Caledonia*, *Illinois*; and that to accomplish such design and purpose, it then and there became necessary for the defendant to move said first mentioned train on said side track, eastward a distance of about *one thousand* feet, and then to stop said train, and back said train through a certain switch and onto a certain diagonal railroad track of defendant lying and being between defendant's said side track and defendant's said main track, and through another railroad switch of defendant, which said diagonal track of defendant was then and there about *ninety* feet east of the east end of the defendant's depot platform at *Belvidere*, *Illinois*, and within the corporate limits of the city of *Belvidere*, *Illinois*, and on the defendant's said depot ground, and thence to back said train, bound for *Caledonia*, as aforesaid, westward on said main track, and to attach said passenger car, drawn from *Chicago*, as aforesaid. And the plaintiff further avers that the place where said diagonal track of the defendant then was located, was then and there liable to be frequented by divers persons having occasion to go to said depot of the defendant. And the plaintiff further avers that prior to the *first* day of *November*, 1*890*, and the time when the defendant commenced the practice of attaching said passenger car, drawn from *Chicago*, as aforesaid, to its *Caledonia* train of cars, the plaintiff's said intestate had, for many years, frequently been a passenger on defendant's said *Caledonia* train from *Belvidere* to *Caledonia*, aforesaid, and during all that time the invariable practice and habit of the defendant had been to cause said *Caledonia* bound train to be moved directly out from said side track, where the same stood when the plaintiff's said intestate deposited his said parcels therein, as aforesaid, and to proceed directly to *Caledonia*, as aforesaid, without stopping, backing or switching said train of cars. And the plaintiff further avers that when his said intestate proceeded to take passage in defendant's said train of cars for *Caledonia*, on the occasion aforesaid, as aforesaid, he had no notice whatever of any change in the manner and practice of defendant in the departure of said train of cars from *Belvidere* for *Caledonia*, aforesaid, nor of any practice of defendant of attaching any car brought from *Chicago*, as aforesaid, onto said *Caledonia* train of cars of defendant. And the plaintiff further avers that when defendant's said train of cars from *Chicago* reached *Belvidere* station, the evening of *February 17*, 1*891*, the usual time for departure of defendant's said train of cars for *Caledonia* aforesaid, had then arrived, and said train of cars bound for *Caledonia*, as aforesaid, was, by the defendant's servants in charge thereof, immediately moved eastward about *1,000* feet upon defendant's said side track, and stopped and backed to a certain railroad switch, and onto defendant's said diagonal railroad track, and that then and there it was night-time and foggy weather. And the plaintiff further avers that then and there, and while said train of defendant was being so moved eastward, backed and switched, as aforesaid, it was so dark that moving objects were not discernible to persons then upon defendant's depot grounds, any considerable distance from such persons. And the plaintiff further avers that by reason of the

premises and in consequence thereof, it became and was the duty of the defendant, then and there to give and cause to be given reasonable warning to persons about to take passage on its said train of cars for *Caledonia*, aforesaid, that said train of cars would be moved eastward, stopped, backed and switched, as aforesaid, and then and there to place and cause to be placed on the rear end of said train of cars while the same was so being moved, stopped, switched and backed, as aforesaid, some person, to warn persons then and there seeking to take passage on said train of cars, of the danger of attempting to board and get upon said train of cars while the same was being so moved, stopped, backed and switched; and then and there to place, and cause to be placed at the rear end of said train of cars, while the same was being so moved, stopped, backed and switched, some person to inform persons then and there seeking to take passage on the defendant's said train of cars, bound for *Caledonia*, of the manner in which said train of cars would then and there depart from *Belvidere*, *Illinois*, for *Caledonia*, *Illinois*; and then and there to place, and cause to be placed, at the rear end of said train of cars while the same was being so moved, stopped, backed and switched, a light and signal, to warn persons then and there lawfully upon said depot grounds of defendant, of such movement and intended movement of said train of cars; and then and there generally to adopt and put in use, and to cause to be adopted and put in use, reasonable precautions while said train of cars was so being moved, stopped, backed and switched, as aforesaid, to prevent persons then and there lawfully upon defendant's depot grounds, for the purpose of taking passage upon said defendant's said train of cars, and who then and there, with all due care and diligence on their part, were attempting to take passage on said train of cars of defendant from *Belvidere*, *Illinois*, to *Caledonia*, *Illinois*, from being injured by defendant's said train of cars, while the same was being so moved, stopped, backed and switched.

Nevertheless, the said defendant, not mindful of its said duty in those regards, or either of them, carelessly and negligently failed and neglected to give, or cause to be given, any warning to persons then and there about to take passage on its said train of cars for *Caledonia* aforesaid, that said train of cars would be moved eastward, stopped, backed and switched, as aforesaid, and then and there carelessly and negligently moved, stopped, backed and switched said train of cars, as aforesaid, in the night-time and in foggy weather, without placing or causing to be placed at the rear end of said train of cars, while the same train of cars was being so moved, stopped, backed and switched, as aforesaid, any person, to warn persons who then and there, with all due care and diligence on their part, were seeking to take passage on defendant's train of cars for *Caledonia*, aforesaid, of the danger of attempting to board said train of cars while the same was being so moved, stopped, backed and switched, and then and there carelessly and negligently failed to place, and cause to be placed at the rear end of said train of cars, while the same was being so moved, stopped, backed and switched, some person, to inform persons who then and there were lawfully

upon said defendant's said depot grounds, and who then and there, with all due care and diligence on their part, were seeking passage on defendant's said train of cars to *Caledonia* aforesaid, of the manner in which said train of cars would then and there depart for *Caledonia* aforesaid; and then and there carelessly and negligently failed to place at the rear end of said train of cars, while the same was being so moved, stopped, switched and backed as aforesaid, in the night-time and in foggy weather, any light and signal, reasonably suitable and sufficient then and there to warn persons who then and there were lawfully on defendant's said depot grounds, and who then and there, with all due care and diligence on their part, were seeking to take passage on said train of cars for *Caledonia* aforesaid, of such movements and intended movements of said train of cars; and then and there carelessly and negligently failed to adopt and use, and to cause to be adopted and used, by its then servants, any precautions whatever to prevent persons then and there lawfully upon said depot grounds of defendant, and who then and there, with all due care and diligence on their part, were seeking passage on the defendant's said train of cars to *Caledonia*, aforesaid, from being run over and injured by said train of cars, while the same was being so moved, stopped, backed and switched, in the night-time, by means whereof the plaintiff's said intestate, who then and there was lawfully upon said defendant's depot grounds, and who then and there, with all due care and diligence on his part, was seeking to take passage on defendant's said train of cars, so being moved eastward, stopped, backed and switched as aforesaid, to *Caledonia* aforesaid, and who then and there, with all due care and diligence on his part, was pursuing defendant's said train of cars, while the same was so being moved eastward, stopped, backed and switched as aforesaid' for the purpose of taking passage thereon to *Caledonia*, aforesaid, and without any notice and warning, then and there, that said train of cars would be so moved, stopped, backed and switched, before departing for *Caledonia*, aforesaid, and who was then and there upon defendant's depot grounds, lying and being between defendant's said side track and defendant's said main track, and who, then and there, was about to step onto defendant's diagonal railroad track, and while said train of cars was being backed as aforesaid, when said train of cars, or some portion thereof then and there was, by the defendant's servants in charge thereof, carelessly and improperly run against the plaintiff's said intestate, with great force and violence, and thereby the plaintiff's said intestate then and there was knocked down and caused to fall under said train of cars, or some portion thereof, and then and there said train of cars, or some portion thereof, was run over and upon the plaintiff's said intestate, and thereby the plaintiff's said intestate then and there was killed.

[And the plaintiff avers that the said *Charles Kelly* left him surviving one *Jane Kelly*, his widow, and one *John Kelly*, his son and next of kin, who are still living, and that by reason of the death of the said *Charles Kelly* as aforesaid the said *Jane Kelly* has been and is deprived of her means of support, and the said *John Kelly* has been and is deprived of his means of support and education, to the

damage of the plaintiff as administrator as aforesaid of *five thousand* dollars. And therefore he brings his suit, etc.

And the plaintiff brings into the court here the letters of administration to him granted by the *County* Court of the county aforesaid, which gives sufficient evidence to the court here of the grant of letters of administration on the said estate to the plaintiff, etc.

N. C. Warner, Attorney for Plaintiff.][1]

bb. While Changing Cars.

Form No. 6832.

(Precedent in Atchison, etc., R. Co. *v.* Cochran, 43 Kan. 225, 41 Am. & Eng. R. Cas. 48.)[2]

[(*Caption as in Form No. 5917.*)][3]

The plaintiff herein complains of the defendant herein, for that on the *30th* day of *May*, 1*887*, he was duly appointed and qualified, and letters of administration of the estate of *John M. Gibson*, deceased, were issued to him by the *probate* court of *Johnson* county, state of *Kansas*, as the administrator of said estate. And plaintiff further states that the defendant herein is now, and was at the date hereinafter first mentioned, a railroad corporation duly organized under and by virtue of the laws of the state of *Kansas*, and then owned and operated, and now owns and operates, a railroad known as the *Atchison, Topeka & Sante Fe Railroad Company*, and as such corporation and railroad company was then and is now operating and exclusively managing and controlling the *Southern Kansas Railway Company*, a corporation duly organized under the laws of the state of *Kansas*; that the *Atchison, Topeka & Santa Fe Railroad Company* was then and still is a common carrier of passengers for hire upon its trains into and through *Douglass* and *Johnson* counties, *Kansas*, and that the *Southern Kansas Railway Company*, so operated, managed and controlled by the *Atchison, Topeka & Santa Fe Railroad Company*, was then and still is a common carrier of passengers for hire upon its trains of cars into and through *Johnson* county, *Kansas*, and then ran its trains of cars over and used defendant's tracks from *Kansas City*, *Missouri*, to *Holliday*, *Kansas*; and that the town or village of *Holliday* was then a regular station and depot in *Johnson* county, *Kansas*, of the said *Atchison, Topeka & Santa Fe Railroad Company*, on the main line of its said railroad; and that said town or village of *Holliday*, and the city of *Olathe*, in *Johnson* county, *Kansas*, were then regular stations or depots on the line of the *Southern Kansas Railway*. Plaintiff

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. The plaintiff in this case having recovered a judgment the defendant excepted, and on appeal the judgment was reversed on the ground that the testimony showed that the defendant company did not operate and control the other railroad as alleged, and hence was not responsible for the injury. No objection seems to have been made to the sufficiency of the petition and the cause was remanded.

Consult, generally, note 2, p. 5, *supra*.

3. The matter to be supplied within [ ] will not be found in the reported case.

further states, on the *21st* day of *March*, 1*887*, the plaintiff's intestate, *John M. Gibson*, had ridden as a passenger on a regular passenger train of cars of the defendant company from *Lawrence* and *Eudora*, *Kansas*, to *Holliday* station, and that upon that day, at *Holliday* aforesaid, *John M. Gibson*, now deceased, purchased from the defendant company's ticket agent at *Holliday* depot aforesaid a ticket entitling him to be transported on that day as a passenger thence to *Olathe*, *Kansas*, by and upon a regular passenger train of cars of (and then used by the defendant in the name) the *Southern Kansas Railway Company*; and that in order for *John M. Gibson*, now deceased, to get upon the regular passenger train of cars so then being operated, managed and controlled by the defendant company to be carried from *Holliday* to *Olathe* aforesaid, it became and was necessary for *John M. Gibson*, now deceased, to walk across the interjacent railway tracks belonging to the defendant company, and then being used by said company and said *Southern Kansas Railway Company* with their locomotive engines and passenger and freight trains of cars (there being no other way for the decedent to get to and upon said train); and that while the decedent was in the act of walking across the interjacent railroad tracks aforesaid, at the station and upon the invitation of the defendant company, and for the sole purpose of boarding the regular passenger train of cars of the *Southern Kansas Railway Company* as aforesaid to be carried thence to *Olathe* aforesaid upon said train of cars, which was then at rest about two or three tracks remote from the platform of the defendant's depot or ticket office, which said *Southern Kansas* train of cars did not then come to nor did it intend to then come to the platform of the depot, and which train was then about ready to start for *Olathe* aforesaid, and there then being no regular crossing across the interjacent tracks and no person there to warn him of danger, the defendant company then and there, to wit, on the *21st* day of *March*, 1*887*, at *Holliday* aforesaid, carelessly, grossly, negligently, wantonly, and recklessly, by and through its servants and employees then in charge of and operating and running one of its freight trains of cars with a locomotive engine attached thereto and in motion, on one of said interjacent tracks of the defendant company, permitted the locomotive so attached to said freight train of cars last aforesaid (without any warning of any character to the decedent of danger) to run against, strike, come in contact with, and knock down and drag in a violent and forcible manner the said *John M. Gibson*, now deceased, without any fault, negligence or want of care on the part of the decedent, and that by reason of said locomotive engine so striking him and so knocking him down and dragging him, the decedent was greatly bruised, cut and mangled in and about his head, back, legs, arms and body, internally, and his right leg was broken; and in consequence thereof the decedent became sick, sore and lame, and in consequence of the injuries so received as aforesaid he was confined to his bed, and suffered much mental and bodily pain and agony, from the said *21st* day of *March*, 1*887*, until on or about the *30th* day of *March*, 1*887*, when he died, intestate, at *Olathe*, *Kansas*; and that the injuries all and singular so received by him as aforesaid were the cause of the death of *John M. Gibson*, without any fault, negli-

gence, or want of care on the part of said decedent contributing thereto. Plaintiff further states that *John M. Gibson*, now deceased, left *Mary A. Cochran* (nee *Gibson*) and *Elizabeth J. Adams* (nee *Gibson*), his only children him surviving, and are his only next of kin him surviving; and that by reason of the premises, all and singular, the said *Mary E. Cochran* and *Elizabeth J. Adams*, sole surviving children and sole next of kin aforesaid, have been greatly damaged by the death of *John M. Gibson*, now deceased, in and to the amount of $*10,000*, no part of which hath been paid. Plaintiff therefore, as such administrator, demands judgment against the defendant company herein for the sum of $*10,000* so as aforesaid sustained, with costs of suit and equitable relief.

[(*Signature and verification as in Form No. 5917.*)][1]

(3) Decedent Neither Employee nor Passenger.

(*a*) *Through Running Over Decedent.*[2]

aa. Generally.

Form No. 6833.

(Precedent in Barker *v.* Hannibal, etc., R. Co., 91 Mo. 88.)

[(*Caption as in Form No. 5921.*)][1]

Plaintiff states that upon the ——— day of ———, she was lawfully married to *Edward B. Barker*, deceased, late of *Buchanan*

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Precedents.** — In an action against a railroad company for negligently causing the death of the plaintiff's husband, a petition alleging that the deceased was on the defendant's track by license and permission, and that while on said track, "by the carelessness, negligence and unskilfulness of the defendant, its officers, agents, servants and employees, while running, conducting and managing certain cars, was run over by two cars of said defendant, and which cars were, at the time they ran over the said *Frank Le May*, carelessly, negligently and unskilfully conducted and managed by said defendant, its officers, agents, servants and employees, and received injuries thereby, from which he instantly died," is sufficient. Le May *v* Missouri Pac. R. Co., 105 Mo. 360. For another form see Shaw *v.* Missouri Pac. R Co., 104 Mo. 648.

In an action by a widow against a railroad company for the death of her husband, a petition alleging that the defendant, "through its servants, agents and employes," was operating a train over its road, and that "by the willful negligence of its agents, servants and employes," the train was run against the deceased while he was upon or on the side of the track, and that the defendant saw, or, by the exercise of ordinary diligence, could have seen him in time to have stopped the train, and thereby have prevented his death, is sufficient, and is not objectionable as not alleging with sufficient definiteness and certainty the particular servants, or the facts to support the charge that their conduct was wilful. Coleman *v.* Kentucky Cent. R. Co., (Ky. 1896) 33 S. W. Rep. 945.

In an action against a railroad company, a count of the declaration alleging that the defendant did so carelessly and negligently manage and conduct a train of cars, that by reason thereof the rear car of said train became detached and separated from the other cars of same, and being so detached and separated, ran with great force and violence against the plaintiff's intestate then and there being, and thereby did so greatly wound him that by reason thereof he then and

county, and at the times hereinafter mentioned she was the wife and is now the widow of said deceased, *Edward B. Barker.*

Plaintiff states that defendant now is, and at the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the state of *Missouri*, and that it then was and still is engaged in running its steam locomotives, its cars and trains of cars, for the transportation of persons and goods between the city of *Atchison*, in the state of *Kansas*, and the city of *Hannibal*, in the state of *Missouri*, and particularly through and between the city of *St. Joseph*, in *Buchanan* county, and the town of *Easton*, in said county, and state of *Missouri.*

Plaintiff states that the defendant, on the *fifteenth* day of *April*, 1879, by its servants, agents, and employes, carelessly, negligently, unskillfully, and recklessly, ran one of its engines and trains of cars upon and over the said *Edward B. Barker*, and thereby struck and inflicted grievous bodily injury upon the said *Edward B. Barker*, by reason of which the said *Edward B. Barker* was then and there instantly killed.

Plaintiff states that said *Edward B. Barker*, was run over and killed, as aforesaid, within one year before the commencement of this suit, and at a point on defendant's railroad track between the said city of *St. Joseph*, and the said town of *Easton*, about one mile southeast of the said city of *St. Joseph.*

[Plaintiff states that the deceased, *Edward B. Barker*, left no minor child.][1]

there died, etc.; and another count alleging the negligent management of the train as above, and that the rear cars of the same became detached and separated from said train while it was in rapid motion, and, being so detached and separated, ran with great force and violence against the deceased, who was walking within the corporate limits of the town through which the defendant's track ran, on the said track, in the same direction that said train was running, and who had stepped on said track after said train had passed him, and in the interval between said train and said detached rear cars, and was run over and killed by said cars, were both held good on demurrer. Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt. (Va.) 602, *followed* in Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553.

In Murphy *v.* New York, etc., R. Co., 30 Conn. 184, the declaration, which was sufficient, omitting the formal parts, was as follows:

"In a plea of the case, whereupon the plaintiff, as administrator aforesaid, declares and says, that heretofore, to wit, on the *11th* day of *May*, 1860, the said *John Murphy*, then and there in full life, being a child of the age of *six* years, was playing along the railroad track, used and possessed by said *New York and New Haven Railroad Company*, near the *Temple* street bridge in said town of *New Haven*; and that the said defendants, on said last named day, were in possession of a certain locomotive engine, with a train of cars attached, which then were under the care and direction of a certain servant of the defendants, and that the said defendants, then and there, by their said servant, so carelessly, negligently, and unskillfully managed and directed said locomotive with said cars as to run said locomotive upon and against the said *John Murphy*, whereby the said *John Murphy* was killed; so that through the wrongful negligence, carelessness and unskillfulness of the defendants, as hereinbefore set forth, by their said servant, the plaintiff, administrator as aforesaid, has been greatly injured; all which is to the damage of the plaintiff," etc.

1. The plaintiff in this case having recovered a judgment, the judgment was reversed on appeal and the cause remanded on the ground that the petition showed no cause of action. The statute provides (Mo. Rev. Stat. (1889),

Plaintiff states that the deceased, *Edward B. Barker*, was run over and killed, as aforesaid, by the defendant, without any fault or negligence whatever on the part of the said deceased.

Wherefore, plaintiff prays judgment against defendant for the sum of *five thousand* dollars, according to the statute in such case made and provided, together with the costs of this action.

[(*Signature and verification as in Form No. 5921.*)][1]

Form No. 6834.

(Precedent in East Tennessee, etc., R. Co. *v.* Pratt, 85 Tenn. 10.)[2]

Francis Caroline Pratt
v.
East Tennessee, Virginia & Georgia Railroad Company.

Plaintiff, *Francis Caroline Pratt*, widow of *W. C. Pratt*, deceased, sues the defendant, the *East Tennessee, Virginia & Georgia Railroad Company*, a body politic and corporate, duly in court by summons, for the sum of $*25,000*. For that whereas, heretofore, to wit, on the *14th* day of *April*, 1*883*, defendant was, and hitherto hath been, and still is, operating, managing, and controlling a certain line of railway between *Knoxville, Tenn.*, and the *Kentucky* State line, having under its care, direction, control, and management divers engines and cars, and in its employ divers and many servants; and on the day and year aforesaid, at, to wit, on the line of said railway, in the county of *Knox*, and State aforesaid, defendant wrongfully and negligently run its engine and cars in, upon, and against *W. C. Pratt*, husband to plaintiff aforesaid, whereby, and on account of which, the said *W. C. Pratt* was wounded, bruised, and mangled in body, head, arms, and legs, thereby causing great mental and physicial pain and suffering, for the space of *one* hour, when the said *W. C. Pratt*, on the day and year aforesaid, at, to wit, in the county of *Knox* aforesaid, by reason of the wounds and bruises aforesaid, wrongfully and negligently inflicted as aforesaid, then and there died, to plaintiff's damage, $*25,000*, wherefore she sues and demands a jury to try the issue to be joined.

Williams, Attorney.

§ 4425) that the action may be brought by the husband or wife of the deceased, or if he or she fails to sue within six months after the death of the deceased, then by the deceased's minor child or children. The action in the present case having been brought by the widow after the expiration of six months, the petition should have averred that there were no minor children. The words enclosed by [ ] have been supplied to cover this defect.

Consult, generally, note 2, p. 5, *supra*.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. This declaration is sufficient, and sufficiently gives notice that the injury was done contrary to the statute, and that the company will be required to prove in its defense that it observed all the precautions prescribed by the statute, although there be no reference thereto in the declaration. See also East Tennessee, etc., R. Co. *v.* Humphreys, 12 Lea (Tenn.) 200, 15 Am. & Eng. R. Cas. 472.

Consult, generally, note 2, p. 5, *supra*.

bb. AT A CROSSING.[1]

1. Precedents — Generally. — A count in a declaration in an action against a railroad company for causing the death of plaintiff's intestate, in the following words: "And also for that the defendant corporation at *Lincoln* aforesaid on the *first* day of *March*, A. D. 1892, was possessed of a certain railway locomotive, tender, and train of cars attached thereto, and was by its servants at that time propelling, driving, managing and conducting the same upon and along a certain railway which crossed a grade a certain public highway, to wit, —— street in the town of *Lincoln* county aforesaid, that at said *Lincoln* on said last mentioned date, the plaintiff's intestate with *fourteen* others was in a public conveyance, to wit, a sleigh drawn by *four* horses; that said sleigh and horses were driven, managed and controlled exclusively and solely by one —— the servant and agent of ——, the proprietor of said sleigh, horses and harness; that said driver was in no sense the agent and servant of the plaintiff's intestate; the aforesaid crossing was a dangerous one, as the defendant corporation well knew, but the plaintiff's intestate was ignorant of its existence, and of the existence of any railroad crossing at that place; that the defendant corporation had gates at each side of said highway at said crossing to warn the public when said gates were down and closed that it was dangerous to cross said railway; and to notify the public when the gates were up and open that it was safe to cross said railway on said highway aforesaid; that at said *Lincoln* on said last mentioned date said gates were up and open, indicating that said railway was safe to cross, and inviting said driver with his horses, passengers and sleigh to cross said railway; that said driver of said sleigh, in response to said invitation, with his sleigh, horses, and passengers, proceeded to cross then and there, and while in the act of crossing and while the plaintiff's intestate was in the exercise of due care, through the defendant corporation through its agents and servants in having the gates at said crossing open and up, and in inviting the driver to cross as aforesaid when it was dangerous to do so, and through the defendant's negligence in running and controlling the aforesaid locomotive, tender and train of cars at and on said crossing, and through the negligence of the defendant in leaving said dangerous crossing unguarded and unprotected while said sleigh as aforesaid at *Lonsdale* aforesaid on the day month and year last mentioned, the plaintiff's intestate was struck by said locomotive, tender and train of cars and was killed," was held to state a good cause of action Wilson *v.* New York, etc., R. Co. 18 R. I. 491.

In an action by a wife for damages for the wrongful killing of her husband, a petition alleging that the defendant at the time of the action was operating the cars which killed the deceased, and that he, in the exercise of proper care and caution, was crossing the defendant's track, when the defendant, by its agents and servants, negligently, carelessly and wrongfully ran its car against the wagon of the deceased, overturned the same and killed him, states a cause of action and is not open to objection in that it does not specify the particular act of negligence which caused the injury. Pope *v.* Kansas City Cable R. Co., 99 Mo. 400, 43 Am. & Eng. R. Cas 290.

For other forms see Pennsylvania Co. *v.* Marshall, 119 Ill. 399, Chicago, etc., R. Co *v.* Morris, 26 Ill. 400, Pennsylvania Co. *v.* Sinclair, 62 Ind. 301; Atchison, etc., R Co. *v.* Priest, 50 Kan. 16; Telfer *v.* Northern R Co., 30 N. J. L. 188; Schneider *v.* Wisconsin Central R. Co, 81 Wis. 356.

Running Over Child. — Where a complaint, omitting the formal averments, charged that "The plaintiff, as administrator of *Alexander Vining*, deceased, complains of said defendant and says, that on the *3d* day of *July*, 1863, the said *Alexander Vining*, then being an infant of *seven* years of age, and without the fault or neglect of his parents, with whom he then resided, was casually upon the railway track of the defendant, at a public crossing or highway over said track, in *Allen* county, *Indiana*; that said defendant was then running a locomotive and train of cars over and along said track, and the plaintiff avers, that while said *Alexander* was upon said track at said public crossing as aforesaid he could be distinguished by the agents and servants of said defendant, then running said locomotive and train, for a distance of more than *half a mile* from said crossing within which distance said loco-

motive and train could have been stopped. yet the defendant wrongfully, negligently and carelessly, without giving any warning, or in any way attempting to stop said train, and while said child might have been, and was, seen by the defendant s servants then running said locomotive and train, ran the said locomotive and train against and over the said child, and thereby so injured and maimed said child that it died thereof," etc., the defendant demurred on the ground that it did not state facts sufficient to constitute a cause of action, there being no averment that the child was not guilty of contributory negligence, but the demurrer was overruled on this point and the complaint held sufficient; but a demurrer on the ground that the administrator could not sue was sustained, the action being for the parent or guardian. Pittsburgh, etc., R. Co. *v.* Vining, 27 Ind. 513.

In an action against a railroad company for causing the death of the child of the plaintiff's testator, the complaint, omitting the caption and the formal averments as to the capacity in which the action was prosecuted, the date of the injury, the averments of the defendant's corporate existence, etc., and the line of its road, etc., proceeded as follows.

'That about *five* o'clock in the afternoon of said day the infant daughter of said plaintiff's testator, named *Elizabeth*, who lived with and was of the age of *twenty* months, escaped from the residence of plaintiff's testator, and was on the track of said railroad about *six* miles southeast of the city of *Columbus*, in said county, at a private crossing of said railroad known as '*Hunter's Crossing*,' on what is known as the *Madison* branch of said railroad, in *Bartholomew* county; that the plaintiff's testator at said time resided with his family in a house about *two hundred* yards southwest of said '*Hunter's Crossing*' of said railroad; that said house of plaintiff's testator was surrounded by a fence, part rail and part plank, said fenre being of the height of, to-wit, *six* feet, the east line of said fence, in front of said house, being constructed of sawed planks nailed to posts set in the ground, in which said plank fence was a gate, for ingress and egress, of the same height of said fence, said gate being provided with a good and sufficient lock or catch, which fastened and held said gate to its place when closed; that said *Elizabeth* could not climb over said plank or rail fence or said gate, and could not get through or under the same at any place except when said gate was opened, and she could not open said gate when shut; that said gate was kept shut at all times, except when plaintiff's testator and the family passed through it, at which times said gate was closed as soon as the person opening the same had passed through; that said *Elizabeth* was not permitted by plaintiff's testator, or any member of his family, or any one having control or authority over her, to go outside of said inclosure unattended by a competent person to take care of her, and the said *Elizabeth* had never escaped from the premises before the time above mentioned; that a few minutes before the killing of said *Elizabeth* by the defendant, as hereinafter stated, said *Elizabeth* was in the house with plaintiff's testator and his family, and at the same time some neighbor opened the gate and passed into the house of plaintiff's testator, and left the gate open without the knowledge of plaintiff's testator or that of his family at the time, and the said *Elizabeth*, without being observed by the plaintiff's testator or any member of his family, passed out of said gate before plaintiff's testator or his family knew that it was open, onto the track of said railroad; that plaintiff's testator discovered the absence of said *Elizabeth* within a few minutes after her escape, and started in quest and pursuit of her, and discovered her on said railroad, and before he could reach her, a certain passenger train, controlled and operated by defendant and in charge of defendant's servants who were then acting in the line of their employment, was driven over said track where said *Elizabeth* was, at a high and dangerous rate of speed, from said city of *Columbus*, the said track being straight and without any obstructions and the said *Elizabeth* being in full view of defendant's said servants in charge of said train, for the distance of, to wit, *six hundred* feet from where the said *Elizabeth* was, as said train approached the said *Elizabeth*, that after the discovery of the said *Elizabeth* by the defendant's said servants, by the use of ordinary care, they could have slowed said train and stopped long before it reached said *Elizabeth*, yet the said servants of the

Form No. 6835.

(Precedent in Weber *v.* Atchison, etc., R. Co., 54 Kan. 390.)[1]

[(*Caption and commencement as in Form No. 5917.*)

The defendant is now and was at the times hereinafter mentioned a railroad corporation duly incorporated under the laws of this state, and as such railroad corporation operated a line of railroad extending from *Atchison* in this state to *Sante Fe* in the territory of *New Mexico.*][2]

That on the *17th* day of *March,* 1*889*, these plaintiffs were the parents and next of kin of one *Myrtle G. Weber*, an infant of the age of *16* years; then residing with said plaintiffs at the city of *Winfield*, *Cowley* county, *Kansas*; that on said day said *Myrtle G. Weber* was traveling along and upon a certain street known as *Fuller* street, in the city of *Winfield*, in the county of *Cowley*, state of *Kansas*, which said street is a public highway, and said street and public highway crosses the track of the defendant's railway in said city of *Winfield*, *Kas.*; and when said *Myrtle G. Weber* reached said crossing, the defendant had three cars attached to a caboose standing on its track and across said street and public highway. Said three cars attached to said caboose had so been standing across said street and public highway for more than one hour preceding the injury hereinafter alleged, and in violation of § *1* of ordinance No. *284*, of the city of *Winfield*, *Kas.*, and other ordinances of said city; and while said *Myrtle G. Weber* was attempting to cross said track of said defendant at said crossing, the defendant, by its servants, caused one of its locomotives and train of cars to approach said crossing, by backing and passing rapidly over and along the track of the said railroad, and ran said locomotive and cars with carelessness and gross negli-

defendant neglected to stop said train, or do anything to avoid a collision with or injury to the said *Elizabeth*, but carelessly and negligently drove said train at a high and dangerous speed of, to-wit, *fifty* miles per hour, over and upon said *Elizabeth*, thereby killing and destroying her; that since the commencement of this action the said *William Hunter* departed this life testate, and by his last will and testament the plaintiff, *Joel S. Davis*, was appointed the executor thereof, that by the careless and negligent killing of the daughter of plaintiff's testator, as aforesaid plaintiff's testator has been wrongfully deprived of her services for *nineteen* years and *four* months, which, less her maintenance and support for said time, would be of the value of $*10,000*, and he has been damaged in that sum." It was held that while the complaint did not aver in general terms that the parents were free from contributory negligence, the special facts averred were sufficient on this point, and also that the averments charging the negligence of the defendant were sufficient. Pennsylvania Co. *v.* Davis 4 Ind. App. 51.

1. After the pleadings in the above case had been filed and the trial begun, and each party had made a statement of the case to the jury, an objection was made to the admission of any testimony on the ground that the petition, in connection with the statements made in behalf of the plaintiffs, failed to show a right of recovery A colloquy then ensued between the court and counsel for plaintiffs, in which some admissions were made by the latter, whereupon the court sustained the objection and dismissed the action. On appeal, it was held that under these circumstances the averments and admissions of the plaintiffs should receive a liberal interpretation in their favor, and the judgment was reversed and the cause remanded for another trial,

Consult, generally, note 2, p. 5, *supra.*

gence, and striking the said three cars attached to said caboose which were upon the same track, and negligently and carelessly omitted, while so approaching said crossing, to give any signal, by bell, or whistle or lights or otherwise, by reason whereof, the said *Myrtle G. Weber* was unaware of the approach of said locomotive and train which was backing, and by reason of said gross negligence of the defendant, and in violation of § *1*, ordinance No. *355*, of the city of *Winfield, Kas.*, (and without any fault or negligence of the said *Myrtle G. Weber*,) the locomotive and train of cars struck the said *Myrtle G. Weber*, with great violence, to the ground, and under the wheels of the cars of the defendant, and dragged her, the said *Myrtle G Weber*, while so under the wheels of the defendant's cars as aforesaid, for more than *50* feet along and over the track of the defendant, thereby breaking and fracturing the left lower limb, and lacerating, mangling and tearing the flesh from the left lower limb, and otherwise injuring the said *Myrtle G. Weber*; that by reason of said injuries the said *Myrtle G Weber*, on the *20th* day of *March*, 1*889*, did die; and that no personal representative is or has been appointed of or for said deceased; and that by reason of said injury and death of said *Myrtle G. Weber* these plaintiffs have been damaged in the sum of $*10,000*.

[*Torrence & Torrence*, Plaintiff's Attorneys.][1]

Form No. 6836.[2]

(*Caption as in Form No. 6807.*)

The Pennsylvania Railroad Company, a body corporate, the defendants, were summoned to answer unto *Michael Clark*, administrator of all and singular the goods and chattels, rights and credits which were of *Ann Clark*, deceased, at the time of her death, who died intestate, in an action of tort, and thereupon the said plaintiff, by *Charles H. Voorhis*, his attorney, complains, for that whereas the said defendants heretofore, to wit, on the *thirty-first* day of *August*, eighteen hundred and *seventy-six*, at the time of committing the grievances hereinafter mentioned, were possessed of and were the owners and proprietors or lessees of a certain railroad of great length, that is to say, extending from *Trenton* on the *Delaware* river, to the city of *Jersey City* in the county of *Hudson*, and which said railroad passed in and across the township of *Hudson* in said county of *Hudson*, together with the track, cars and locomotive engines and other appurtenances thereunto belonging, to wit, at *Jersey City* in the county of *Hudson* aforesaid; that the said rail-track of the said defendants then and there crossed divers public highways of the people of the state of *New Jersey* situate in the township of *Harrison* in said county of *Hudson*, and then and there crossed a public high way on a level with said highway in the township last aforesaid, said highway being known as *Fourth* street; that the said place in the said township of *Harrison* in the said county of *Hudson* where the said

1. The words enclosed by [ ] will not be found in the reported case.

2. Consult, generally, note 3, p. 5, *supra*.

rail-track of the said defendants crossed the said public highway known as *Fourth* street and called and known as a railroad crossing, was then and there a dangerous crossing by reason of the fact that persons passing on foot or on horseback, or in wagons, carts and carriages, and going in a southwardly direction along said highway called *Fourth* street, in approaching the said rail-track situated at the said railroad crossing were then and there prevented from seeing the said rail-track and the cars and locomotive engines of the defendants that passed over the same at said crossing by divers obstacles, to wit, one dwelling-house, three outhouses and two high fences, and the approach to the said track along and on said *Fourth* street by passengers on foot or on horseback, or in wagons and carriages, could then and there have been rendered safe and prudent only by the said defendants providing flagmen or other servants and agents to be stationed by the said defendants at the said railroad crossing to warn passengers on foot and on horseback and in carts, wagons and carriages of the approach of locomotive engines and rail-cars and carriages of the said defendants towards the said crossing and while actually passing over the said rail-track at said crossing, and also by the defendants, their servants and agents approaching to said railroad crossing, with engines and cars slowly and with great care and caution, and also by the ringing of bells or sounding of whistles on the part of the said defendants, their servants and agents while approaching and crossing the said railroad crossing with said locomotive engines and cars.

And the said *Ann Clark*, deceased, in her lifetime, to wit, on the *thirty-first* day of *August*, in the year one thousand eight hundred and *seventy-six*, at the township of *Harrison* in the county of *Hudson*, to wit, at *Jersey City* in the county of *Hudson*, was then and there walking in a southerly direction along the said highway called and known as *Fourth* street, and did then and there approach the said railroad crossing and did then and there go to and get upon the said rail-track of the said defendants situated upon the public highway aforesaid, as she, the said *Ann Clark*, lawfully might without any negligence on the part of the said *Ann Clark*. And the said nefendants, by their servants and agents, then and there drove aed propelled by steam divers, to wit, one locomotive engine and ten cars upon and along their said railroad track near to, at and upon the said crossing at the said highway where the said *Ann Clark* was then passing on foot with reckless and dangerous speed, to wit, at the rate of *sixty* miles an hour, and without stationing any flagman or agent to warn passengers of the approach of the said train and without any servant or agent of the said defendants to warn the said *Ann Clark* of the approach of said locomotive engine and cars, and careless by neglecting to sound any bell of a weight of not less than *thirty* pounds or blowing a steam whistle which could be heard distinctly at least *three hundred* yards at the distance of at least *three hundred* yards from the place where the said railroad track crossed the said highway, and did not continue to ring such bell and sound such whistle until said locomotive engine had crossed such road as aforesaid, the said railroad track and said public highway being on

the same level, and that by and through the carelessness, negligence and improper conduct of the said defendants as aforesaid, and by the great speed aforesaid and by reason of the want and absence of the proper agents and servants as aforesaid to warn of the approach of the said locomotive engine and cars, and by reason of not sounding the said bell or whistle as aforesaid, the said locomotive engine then and there struck the said *Ann Clark* with great force and violence and she then and there received divers, to wit, *five* mortal wounds, bruises, cuts and contusions in and about her head and body and her body was then greatly rent and torn, whereby and by means whereof the said *Ann Clark* on a certain day, to wit, the *thirty-first* day of *August*, in the year eighteen hundred and *seventy-six*, at the township of *Harrison* in said county of *Hudson*, died. By means of the premises the said plaintiff was forced and obliged to lay out and expend large sums of money for the burial of said *Ann Clark*, deceased, to wit, the sum of *three hundred* dollars, and *Mary Clark*, *Ann Clark*, *Susan Clark*, *James Clark*, *Elizabeth Clark*, *Catharine Clark*, *Margaret Clark* and *Michael Clark*, the next of kin of said *Ann Clark*, now deceased, sustained great loss and damage to *ten thousand* dollars, whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff, as administrator as aforesaid of the said *Ann Clark*, deceased, for the inclusive benefit of the said *Mary Clark*, *Ann Clark*, *Susan Clark*, *James Clark*, *Elizabeth Clark*, *Catharine Clark*, *Margaret Clark* and *Michael Clark* the next of kin of said *Ann Clark*, deceased; and whereas also the said defendants heretofore, to wit, on the *thirty-first* day of *August*, in the year one thousand eight hundred and *seventy-six*, were possessed of a certain other railroad at the township of *Harrison* in the county of *Hudson* aforesaid, together with the tracks, cars, locomotive engines and other appurtenances thereunto belonging; that the track of the said railroad at the said township of *Harrison* aforesaid there crossed a public highway, whereon the people of the state of *New Jersey* were accustomed to go and return, pass and repass, and then and there crosses the said public highway on a level with the same; that the said *Ann Clark*, now deceased, was then and there traveling on foot and approached to and got upon the said railroad track where the said public highway crossed the said track of the said defendants, and the said defendants then and there, by their servants and agents, caused divers, to wit, one locomotive engine propelled by steam, which drew along, to wit, *ten* cars to approach said crossing and to cross the same at an excessive and dangerous rate of speed, to wit, at the rate of *sixty* miles an hour, and then and there carelessly and negligently omitted while approaching the said crossing and at the distance therefrom of *three hundred* yards, as they lawfully should have done, to ring a bell of a weight of not less than *thirty* pounds or blow a steam whistle which could have been heard at a distance of *three hundred* yards, and carelessly and negligently omitted to continue to ring the said bell or blow the said whistle until the said engine had crossed the said highway, and further the said defendants then and there carelessly and negligently omitted to provide proper servants and agents to warn

the said *Ann Clark*, and other the citizens of the state of *New Jersey* traveling on the said highway, and crossing the said railroad track at the said railroad crossing of the approach of said locomotive engine and cars to said crossing and passage over the said track at the said road crossing. By means whereof said *Ann Clark* was then and there unaware of the near approach of said locomotive engine and cars; that by means of said negligence and omission of said defendants, and without any fault or negligence on the part of said *Ann Clark*, the said locomotive engine struck the said *Ann Clark* with great force and violence, and thereby she then and there received divers mortal wounds, cuts and contusions of which she then and there died. By means whereof the said plaintiff was forced and obliged to lay out and expend a large sum of money, to wit, the sum of *three hundred* dollars, for the burial of said *Ann Clark*, now deceased, and further to the damage of the said plaintiff administrator as aforesaid, and *Mary Clark*, *Ann Clark*, *Susan Clark*, *James Clark*, *Elizabeth Clark*, *Catharine Clark*, *Margaret Clark* and *Michael Clark*, the next of kin of said *Ann Clark*, of *ten thousand* dollars in all, whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff as administrator as aforesaid of the said *Ann Clark*, now deceased, for the exclusive benefit of *Mary Clark*, *Ann Clark*, *Susan Clark*, *James Clark*, *Elizabeth Clark*, *Catharine Clark*, *Margaret Clark* and *Michael Clark*, who are the next of kin of said *Ann Clark*, now deceased.

And the said plaintiff brings into court here the letters of administration of *Robert McCague*, *Jr.*, *Surrogate* of the county of *Hudson*, which give sufficient evidence to the said court here of the grant of administration to the said plaintiff as aforesaid, the date whereof is the *sixth* day of *June* in the year of our Lord one thousand eight hundred and *seventy-seven*.

Chas. H. Voorhis, Attorney for Plaintiff.

(*b*) *Through Wanton Acts of Defendant's Servants.*

Form No. 6837.

(Precedent in Haley *v.* Kansas City, etc., R. Co., 113 Ala. 640.)[1]

[(*Caption as in Form No. 5907.*)][2]

Sixth. Plaintiff demands of defendant the other and further sum of *twenty-five thousand* dollars, and for cause of complaint says: That

1. The original complaint in the above case consisted of eight counts, of which the seventh was withdrawn, and demurrers were sustained as to the rest. The second and sixth counts were then amended, and two additional counts, the ninth and tenth, were added. All the original counts (except the seventh) and the second amended count were held defective in that they showed that the plaintiff's intestate was a trespasser on the defendant's right of way at the time he was killed, and also because they did not aver wilfulness and wantonness in causing the injury on the part of the defendant's employees. The counts given in the text were held to sufficiently charge wilfulness and wantonness on the part of the defendant's employees to state a cause of action against the defendant

Consult, generally, note 2, p. 5, *supra*.

2. The matter to be supplied within [ ] will not be found in the reported case.

heretofore, to wit, on the *15th* day of *November*, 1895, the defendant was engaged in running and operating a railroad in and through the county aforesaid, over and along which they ran cars and trains of cars propelled by steam. That at a point about *three* miles northwest of *Sulligent*, in said county, a footway or path ran parallel to and about *five* feet from the track of defendant's road, which footway or path was, as the defendant well knew, commonly used and travelled over and along by persons on foot, so that many persons passed and repassed thereon daily, as was well known to defendant, its agents and employes. That on the day aforesaid the defendant, its servants and employes, in utter disregard to the safety of such persons so passing along said path as aforesaid, knowingly and willfully propelled a train of cars on defendant's road, having a plank needlessly placed on one of its cars so being propelled as aforesaid, so as to extend over and beyond the side of the car a great distance, to wit, a sufficient distance to extend over and upon the pathway aforesaid. And plaintiff says that one *S. F. Pennington*, who was then and there passing on foot along and upon said path or footway, was by the plank so extending over and beyond the car so being propelled as aforesaid, struck and killed. And plaintiff says, that the death of *S. F. Pennington* was due to the willful and knowingly propelling said train of cars on the track of defendant's road at and by the place aforesaid, while having the plank or timber aforesaid projecting over and beyond the side of said train as aforesaid.

Seventh. * * *[1]

Ninth. Plaintiff demands of the defendant the other and further sum of *twenty-five thousand* dollars, and for cause of complaint says: That heretofore, to wit, on the *15th* day of *November*, A. D. 1895, the said defendant was a corporation engaged in running and operating a railroad which passed through the county aforesaid, on and upon which defendant ran cars and trains of cars propelled by steam. And plaintiff says, that on the day aforesaid, said defendant, its servants and employes, were engaged in operating a train of cars for the purpose of repairing said road, and hauling material therefor on and upon said road between a point near *Sulligent*, in said county, and points a few miles therefrom. That at the point where the injury hereinafter complained of was inflicted, a path or footway ran along and by the side of the track of said railroad at a sufficient distance therefrom to be safe and beyond danger to persons walking along and over said path or footway. That at and along the place aforesaid, said path or footway was commonly used by pedestrians, so that many persons were daily and constantly passing and repassing thereon. Plaintiff further says, that the defendant, its servants and employes in charge of the train aforesaid, well knowing that on and along said path or footway many persons were accustomed to pass and repass as aforesaid, in utter disregard of, and indifference to, the safety of the persons whom they well knew were frequently passing along said path as aforesaid, on the day aforesaid, at, to wit, a point about *three* miles northwest of *Sulligent*, in said county, did knowingly, willfully, and in utter disregard to the safety of the persons

1. See *supra*, note 1, p. 79.

aforesaid, propel on and along the track of defendant's railroad the train of cars aforesaid, on one of which cars the said defendant, its servants and employes, had knowingly and willfully placed a wooden plank about one inch thick in such manner that said plank projected over and beyond the side of the car aforesaid, a great distance, to wit, about *five* feet, and over and upon and across the path aforesaid. And plaintiff says, that on the day aforesaid, *S. F. Pennington*, while travelling along the path aforesaid, and about *five* feet from the track of said railroad, and a sufficient distance therefrom to be entirely safe from trains and cars loaded in a usual and proper manner, was, at the point aforesaid, struck by the plank projecting from and beyond the car as aforesaid and killed. And plaintiff says, that the killing of *S. F. Pennington* was due to the fact that defendant, its servants and employes, knowing the danger to persons so using said path as aforesaid, and in disregard of their safety as aforesaid, did knowingly and willfully propel said car along the place aforesaid, while there extended from and beyond it, the plank so knowingly and willfully placed as aforesaid.

Tenth. And plaintiff demands of defendant the further sum of *twenty-five thousand* dollars, and for cause of complaint, says: That heretofore, to wit, on the *15th* day of *November*, 1895, at, to wit, in the county aforesaid, the defendant was a corporation engaged in operating a railroad in and through said county and propelling thereon cars and trains of cars propelled by steam, and was, on the day aforesaid, engaged in running a train of cars between points within a few miles of the town of *Sulligent*, for the purpose of hauling material for the repair of said road. That at a point about *three* miles west of said town of *Sulligent*, said railroad passed through a thickly settled neighborhood, and had running along the side of said railroad a path or footway which ran about *five* feet from the side of said track, and at a distance rendering its use by pedestrians safe from cars or trains of cars loaded in a proper or usual manner, along and over which path, persons living in said neighborhood, as well as many other persons, were accustomed to pass and repass, so that many persons so passed and repassed daily. And plaintiff says that on the day aforesaid, defendant, its agents and servants, well knowing that the footway aforesaid was commonly and frequently used by pedestrians as aforesaid, and utterly disregarding the safety of the persons aforesaid, being about to propel along and by the path or footway aforesaid, the train of cars aforesaid, did knowingly and intentionally place on one of the cars of said train so about to be propelled as aforesaid, a wooden plank about one inch thick so that it projected over and beyond the side of the car aforesaid, a great distance, to wit, about *five* feet, and on and over the path aforesaid, so that one *S. F. Pennington*, while passing along the path aforesaid, at the point aforesaid, and while he was walking at a distance from the track of said road safe from any danger from passing cars loaded in a proper and usual manner, to wit, about *five* feet from the side of the track of said road was, on the day aforesaid, and while said train on which was the plank aforesaid, was being willfully and intentionally propelled along said railroad at the point aforesaid, struck by

the plank so projecting, as aforesaid, and killed. And plaintiff says that the killing of said *S. F. Pennington* was owing to the fact that the defendant, its servants and employes, well knowing the danger to persons passing along the path aforesaid, and in disregard thereof, knowingly and intentionally propelled along the point aforesaid, the train on which was the plank placed as aforesaid.

[(*Signature as in Form No. 5907.*)][1]

h. Where Death is Caused by Street Railway.

(1) Through Derailment, Decedent a Passenger.

Form No. 6838.

(Precedent in Holland *v.* Lynn, etc., R. Co., 144 Mass. 425, 30 Am. & Eng. R. Cas. 648.)[2]

[(*Caption as in Form No. 6806.*)][1]

The plaintiff says that the defendant is a common carrier of passengers in the cities of *Boston* and *Chelsea*, by means of street-railway cars drawn on the defendant's railway by horses; that the plaintiff's intestate, on or about the *thirty-first* day of *August*, 1885, at the request of the defendant, took a seat in one of the cars of the defendant, to be conveyed, for a reasonable sum to the defendant, on said railroad, in said *Boston* and *Chelsea*, whereby it became the duty of said defendant to convey the plaintiff's intestate safely on said car. Yet the defendant, not regarding its duty in that behalf, wholly neglected so to do, and by its agents and servants so negligently, carelessly, and unskilfully managed said car, and the horses which drew the car, in which the plaintiff was seated, and the said railway of the defendant was so unskilfully and imperfectly built by the defendant, and was suffered by the defendant to be in so defective and dangerous a condition, that said car several times ran off the track of said defendant, and was dragged over the pavement of the street, and was so jolted as to cause injury to the plaintiff's intestate, who, during all this time, was in the exercise of due care and diligence on her part; that by reason of said negligence and improper management by said defendant, its agents and servants, the said plaintiff's intestate was severely injured in her body, from which injuries so received by her she died, to her great damage and injury, as the plaintiff says.

[(*Signature of attorney as in Form No. 6806.*)][1]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. In this case no question was raised as to the sufficiency of the declaration, but it was held that no action could be maintained against a street railway corporation for death by wrongful act prior to the enactment of Stat. (1886), c. 140, authorizing such action, and a demurrer to the declaration was on that account sustained.

Consult, generally, note 2, p. 5, *supra*.

(2) Through Running Over Decedent.

(*a*) *Decedent an Employee.*

Form No. 6839.[1]

State of *Colorado*, County of *Arapahoe*. } ss. In the *District* Court.

Jennie Crumbaugh, plaintiff, vs. *The Denver Tramway Company*, defendant. } Amended Complaint.

Comes now the plaintiff, by *Thomas, Bryant & Lee*, her attorneys, and for a cause of action against the defendant alleges:

That she is a resident of *Arapahoe* county, *Colorado*, and that the defendant is, and at all times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the said state, and is and was engaged in operating and maintaining various lines of cable and electric railways along, through and in the different streets and highways of the said city of *Denver*.

That on or about the *12th* day of *November*, 1*888*, the plaintiff intermarried with one *Thomas Crumbaugh*, hereinafter mentioned, and from said date during and until the said *25th* day of *November*, 1*892*, at all times was and continued to be the wife of the said *Thomas Crumbaugh*.

That on the said *25th* day of *November* and for some time prior thereto said *Thomas Crumbaugh* was and had been in the employ of the defendant company and was engaged as a conductor upon one of the electric cars of the defendant; that on the said last mentioned date the said *Thomas Crumbaugh*, while engaged in the due and careful performance of his duty as conductor for the defendant as aforesaid, without any negligence or want of care on his part, was caught and struck by a rapidly moving car in the county and state aforesaid belonging to the said defendant, which was being run and operated by the defendant upon its tracks and for its use and benefit, with such force and violence that he was crushed between the said moving car and the rear end of the car upon which he was then engaged and employed in the performance of his duties, and that he was crushed, bruised and mangled and his bones were broken and he sustained injuries by reason whereof he almost immediately or within a few hours thereafter died.

The plaintiff further says that at the time of the death of her said husband, *Thomas Crumbaugh*, aforesaid, she was wholly and entirely dependent upon his earnings and resources for support.

The plaintiff further alleges, upon information and belief, that the accident and injuries which resulted in the death of her said husband as aforesaid were caused entirely without negligence or want of care upon the part of the said *Thomas Crumbaugh*, but wholly and entirely by the negligence of the defendant company.

1. This form is copied from the files in Denver Tramway Co. *v.* Crumbaugh, 23 Colo. 363, in which case a recovery by the plaintiff was upheld. Consult, generally, note 2, p. 5, *supra*.

Plaintiff further alleges that the said car of the defendant which ran down and upon the said *Thomas Crumbaugh* was of great and unusual size and entirely unfitted for use as a car run and controlled by electricity, and that the said car was by the defendant equipped and supplied with brakes and braking appliances insufficient to stop or control the movements of said car, and that the said car was by the defendant supplied and equipped with electrical machinery and appliances of insufficient strength and power to control and direct the movements of the said car, and that the said electrical machinery and appliances had become burnt and worn and otherwise out of repair so that they were defective and utterly insufficient for the purpose to which they were applied, all of which facts were at all times known to the defendant.

That by reason of the great size and weight of the said car and the insufficiency of the brakes and braking apparatus and electrical machinery and appliances thereon the said car became and was, on the *25th* day of *November* aforesaid, incapable of being managed by the persons placed in charge thereof by the said defendant to direct and control its movements, and that the said car was put in motion by the said defendant upon its tracks at or near the place where the said *Thomas Crumbaugh* was engaged in the due and careful discharge of his duties, and by reason of the defects and insufficiency aforesaid in the machinery and brakes aforesaid, and by reason of the great size and weight of the said car and by reason of its being unmanageable as aforesaid, the said car ran down and upon the said *Thomas Crumbaugh* and injured and caused his death as aforesaid.

That at the time and place aforesaid the said defendant caused the car aforesaid to run on and upon the same track or switch on which the said *Thomas Crumbaugh* was engaged in performing his duties for the said defendant when there were at that time and at that place other and sufficient tracks and switches upon which the said defendant could and should have run its said car, and by reason of the running of the said car upon the said track on which the said *Thomas Crumbaugh* was engaged when it became unmanageable as aforesaid, it did run down upon the said *Thomas Crumbaugh* aforesaid, causing his injury and death, to the damage to the plaintiff in the sum of *five thousand* dollars.

Wherefore, the plaintiff prays judgment against the defendant for damages in the sum of *five thousand* dollars, together with costs of this action.

Thomas, Bryant & Lee,
Attorneys for Plaintiff.

(*b*) *Decedent Neither Employee nor Passenger.*

Form No. 6840.

(Precedent in Oldfield *v.* New York, etc., R. Co., 3 E. D. Smith (N. Y.) 104.)[1]

City and county of *New York: Thomas J. Oldfield*, as administrator of all and singular the goods, chattels and credits, which were of

1. This complaint was drawn under N. Y. Laws (1849), p. 388, and was N. Y. Laws (1847), p. 575, as *amended* good in form. For the present statute

Hetty Downie, late of the city of *New York*, deceased, who died intestate, plaintiff in this action, by *David Graham*, [her] attorney, complains that the *New York and Harlem Railroad Company*, on and before the *ninth* day of *May*, one thousand eight hundred and *forty-nine*, in the lifetime of the said *Hetty Downie*, since deceased, were and still are a body politic and corporate, created by an act of the legislature of the state of *New York*, passed April 25th, 1831, and that on the day first above mentioned the said defendants kept and still keep an office for the transaction of business, within the *city and* county of *New York*.

That on the said *ninth* day of *May*, 1849, the said *Hetty Downie*, since deceased, was passing along and across a certain public street or highway in the city of *New York*, called *Centre* street, on her lawful affairs and business, and that a certain car, called a railroad car, drawn by *four* horses, the same being the property of the said defendants, driven by a servant and agent of the defendants, was wrongfully, negligently, and carelessly driven against and over the said *Hetty Downie* in her lifetime, whereby the said *Hetty Downie* was knocked down and crushed and mangled by the said horses and car, then being the property of the said defendants, and in their service, so that she died on the same day. And so the plaintiff says, that the said defendants, on the day last aforesaid, at the city of *New York* aforesaid, by the wrongful act, negligence, and default of themselves and their agents and servants, ran over and crushed and mangled the said *Hetty Downie*, and caused her death.

And the said plaintiff further says that such proceedings were had before the *surrogate* of the county of *New York*, that afterwards, on the *sixteenth* day of *June*, 1849, he the said plaintiff, was duly appointed, by the said *surrogate*, administrator of all and singular the goods, chattels, and credits, which were of the said *Hetty Downie*, deceased, as by reference to the letters of administration, issued by the said *surrogate*, and now in the possession of the said plaintiff, and which he is ready to bring into court, will more fully appear.

That an action has accrued to the said plaintiff, as administrator as aforesaid, to demand and have of and from the said defendants compensation in damages for the injury done to the next of kin of the said *Hetty Downie*, deceased, by the wrongful act, negligence, and default of the said defendants, their agents, and servants, in causing the death of the said *Hetty Downie*, deceased.

Wherefore, the said plaintiff, as administrator as aforesaid, demands judgment against the said defendants for the injury, and that they may be adjudged to make the said plaintiff, as such administrator, compensation in damages therefor, to the amount of *five thousand* dollars, besides the costs of this action.

David Graham, Plaintiff's Attorney.

in *New York* see *supra*, note 2, p. 5. Consult, generally, note 2, p. 5, *supra*. For the present form of a complaint in *New York* see vol. 4, Form No. 5926.

Form No. 6841.[1]

(*Caption and commencement as in Form No. 5934*) that heretofore, to wit, on the *third* day of *May*, 1892, these plaintiffs were the parents and next of kin of one *Van Buren Cullen*, an infant of the age of *twenty-five* months, and that on the said day the defendant was, and now is, a corporation duly organized under the laws of the state of *Texas*, and that on the said day the defendant was engaged in running and propelling street cars by electricity, for the conveyance of passengers over its railway owned by it and running in the streets of the city of *Austin*, in the county of *Travis*, and particularly in and along *Cypress* or *Third* street, in said city, and while so engaged, by the unfitness, negligence and carelessness of its servants and agents, so carelessly and negligently conducted, managed and propelled one of its said cars in and along said *Cypress* or *Third* street, in said city, that by such carelessness and negligence said car ran against, knocked down and ran over the said *Van Buren Cullen*, without any fault or neglect on his part, or on the part of plaintiffs, or either of them, wounding and lacerating his head and body, and otherwise injuring him, so that he, the said *Van Buren Cullen*, then and there, in consequence and by reason of said injuries immediately died. That plaintiffs on the day aforesaid were in the exercise of due care and precaution to keep the said *Van Buren Cullen* off the said street and out of danger from the said cars, but that the said *Van Buren Cullen* had wandered out on said street without the knowledge and without any fault on the part of the plaintiffs, and was near to and on the railway track of defendant in and along said *Cypress* or *Third* street, in the daytime, with no obstructions to prevent him from being seen by the servants and agents of the said defendant in charge of said car; that notwithstanding the said child, *Van Buren Cullen*, was near to and on said railway track in the daytime, in plain view, so that the said servants and agents of the said defendant in charge of said car, by the use of ordinary care and diligence, could have seen and prevented any injury to said child, yet the said defendant, by the unfitness, negligence and carelessness of its servants and agents, so carelessly and negligently conducted, managed and propelled said car as aforesaid that by such carelessness and negligence said car ran

1. This is substantially the petition held sufficient in Austin Rapid Transit R. Co. *v.* Cullen, (Tex. Civ. App. 1895) 29 S. W. Rep. 256.

For other forms see Senn *v.* Southern R. Co., 135 Mo. 512; San Antonio St. R. Co. *v.* Cailloutte, 79 Tex, 341.

Sufficient Charge of Negligence. — In an action against a street railway company for the death of the plaintiff's child, the charge of negligence was as follows:

"Plaintiffs state that the killing of said child was the result of gross negligence and carelessness of the officers, agents, and employees and servants of said defendant company. Plaintiffs further state that the car was running at about twelve miles an hour, and even at such rate of speed the motorman driving said car could have seen said child upon said track; but plaintiffs state, and so charge the fact to be, that said motorman was totally unfit and incompetent, and not qualified to discharge his duty, and his incompetency and unfitness was well known to all the officers of said defendant company." It was held that the petition sufficiently charged the negligence of the motorman. San Antonio St. R. Co. *v.* Mechler, (Tex. Civ. App. 1894) 29 S. W. Rep. 202.

against, knocked down and ran over the said *Van Buren Cullen*, without any fault or neglect on his part, or on the part of the plaintiffs or either of them, wounding and lacerating his head and body, and otherwise injuring him, so that he, the said *Van Buren Cullen*, then and there, in consequence and by reason of said injuries, immediately died, as aforesaid.

That plaintiffs are in poor circumstances, and are greatly in need of the pecuniary support and assistance the said *Van Buren Cullen* would have been able to provide for them; that the said *Van Buren Cullen*, was of the age of *twenty-five* months, and for his age was a child of much strength, mental and physical vigor, and prospects of longevity and great usefulness to plaintiffs; that plaintiffs, as his parents as aforesaid, were entitled to his services until he should be *twenty-one* years of age, and that thereafter he would have provided for them and given them pecuniary support and assistance. That by reason of the injury and death of said *Van Buren Cullen* as aforesaid plaintiffs have been damaged in the sum of *twenty thousand* dollars. Wherefore petitioner (*concluding as in Form No. 5934*).

(3) Through Wanton Acts of Defendant's Servants.

Form No. 6842.

(Bullitt's Civ. Code Ky. (1895), p. 562.)

(*Caption as in Form No. 5918.*)

The plaintiff, *John Doe*, says that the defendant, which is a corporation created by the legislature of *Kentucky*, having its offices and place of business in the city of *Louisville*, *Kentucky*, was, on the *third* day of *May*, 1*898*, a common carrier of passengers on street railroad cars in said city, and that on said day a servant of the defendant, who had been placed by it in charge of a street car and two mules harnessed thereto, which belonged to the defendant, and which said servant was using, managing and controlling in the regular course of business in which the defendant had employed him in the carrying of passengers, assaulted the plaintiff's intestate, *James Doe*, who had got on said car as a passenger, knocked him off said car to the ground, so that said car struck him and ran over him, inflicting such injuries that he died by reason thereof on the *fourth* day of *May*, 1*898*, having suffered great bodily pain and mental anguish during the meantime.

And the plaintiff further says that the *county* court of *Jefferson* county, by an order duly made on the *twenty-fifth* day of *May*, 1*898*, an attested copy of which is filed herewith, appointed the plaintiff administrator of the estate of the said *James Doe*.

Wherefore the plaintiff, as such administrator, asks for a judgment against the defendant for (*concluding as in Form No. 5918*).

i. Where Death of Child Occurs in a Dangerous, Attractive Place.[1]

1. Child Playing on Street Car. — For form of declaration in action for death of a child who was injured while playing with other children upon street cars left unguarded on a public street of a city see Gay *v.* Essex Electric St. R. Co., 159 Mass. 238, 242. In these cases, however, it was held the action could not be maintained.

Unloading Cars Loaded with Ice. — In

Form No. 6843.

(Precedent in Schmidt *v.* Kansas City Distilling Co., 90 Mo. 284.)

[(*Caption as in Form No. 5921.*)][1]

Plaintiffs state that they are now, and were, at and prior to the date hereinafter mentioned, husband and wife, and father and mother of *Louisa Schmidt*, their child, born on the *twenty-ninth* day of *October*, 1879. Said *Louisa Schmidt* was killed in the manner hereinafter stated, and at the time of her death was a minor and unmarried. That the defendant now is, and was, at and prior to the dates hereinafter mentioned, a business corporation, duly organized as such under and by virtue of the laws of the state of *Missouri*, and engaged in the business of buying and selling and refining grain, and for that purpose kept and still keeps and maintains distillery buildings, and in connection with said buildings, and in its business, defendant erected and maintained, and was, at the time hereinafter stated, using a large number of steam engines and boilers, to-wit, *six*, in the county of *Jackson*, and state of *Missouri*, east of and near the *City of Kansas*; that the defendant, on and prior to the *second* day of *November*, 1882, kept and maintained an escape pipe in connection with said boilers for the purpose of blowing off hot water, debris and steam from the same; said pipe extended from the distillery, where the boilers were, under and across a traveled public road and highway, and terminated above ground in an open space about *sixty* feet north of said traveled public road. Through this pipe defendant, from time to time, as occasion required in its business, blew off and discharged hot and boiling water, debris and steam from said boilers; and said water, steam and debris were discharged and thrown upon open ground and about *sixty* feet north of said traveled public road, and in the neighborhood and vicinity of several inhabitated dwelling houses along said road. At the end and outlet of the pipe where the boiling water, debris and steam were blown off and discharged, there was no fence, guard, signal or protection of any kind, but the same was left exposed, open and unguarded.

[Plaintiffs say that the place where the said pipe terminated and where the boiling water, debris and steam were blown off and discharged from said pipe as aforesaid, was a place attractive to children by reason of the said escape pipe so blowing off and discharging boiling water, debris and steam as aforesaid, and that children in the neighborhood were in the habit of resorting to such place to play and to witness the escape of said boiling water, debris and steam from said pipe.][2]

an action against a railroad company for the death of a child who was killed by being run over by a car from which ice was being unloaded in such a manner as to attract children, a petition failing to charge that the defendant was unloading the cars, that they were being unloaded in a negligent manner, or how long the child had been under the car when it was moved, was held fatally defective. Rushenberg *v.* St. Louis, etc., R. Co., 109 Mo. 112, 54 Am. & Eng. R. Cas. 118.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. The plaintiffs having obtained a judgment in this case, the defendant appealed and the judgment was reversed on the ground that the petition did not state, and the evidence did not show, that the place was attractive to

Plaintiffs say defendant wrongfully and negligently kept and maintained said pipe, as aforesaid, and wrongfully and negligently left the end and outlet thereof contiguous to said public road unprotected, and in an exposed, open and dangerous condition, and wrongfully and negligently, while said pipe was so unprotected, discharged from time to time hot and boiling water, debris and steam through the same onto the open ground near said road and highway and dwelling houses; that, on the *second* day of *November*, 1*883*, while defendant so kept and maintained said pipe, for the purposes and in the manner aforesaid, *Louisa Schmidt*, a child of plaintiffs', without fault of plaintiffs, went to the end and outlet of said pipe, near said road, and while there on the day aforesaid, the defendant suddenly, without having given any signal or warning of any kind, blew out hot and boiling water, debris and steam through said pipe, left exposed as aforesaid, onto the ground and into a depression or hole thereon at the end of said pipe, and said child, then and there being, fell into said boiling water and the said debris, and the said *Louisa Schmidt* was thereby scalded and burned to death, and did from the effects thereof on the same day die.

Plaintiffs say that the death of their said child was caused by the wrongful acts, neglects and defaults of defendant.

By reason whereof plaintiffs are damaged in the sum of *five thousand* dollars, and an action hath accrued to them under and by virtue of the statute in such cases made and provided. Wherefore plaintiffs ask judgment for the sum of *five thousand* dollars, and for costs.

[(*Signature and verification as in Form No. 5921.*)][1]

3. Answer.[2]

a. That Plaintiff is not Entitled to Sue.

Form No. 6844.

(Precedent in Limekiller *v.* Hannibal, etc., R. Co., 33 Kan. 83, 19 Am. & Eng. R. Cas. 184.)[3]

[State of *Kansas*, *Atchison* County. } ss. In the *District* Court in and for the County and State aforesaid.

children, or that children in the neighborhood were in the habit of resorting there. On rehearing, the court stated that the reversal was not for the fault in the petition, and upon the plaintiffs' filing an amended petition so as to include the omitted allegations the case was remanded for another trial. The words enclosed by [ ] have been supplied in the text in accordance with the suggestion of the court.

Consult, generally, note 2, p. 5, *supra*.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. For the formal parts of an answer in a particular jurisdiction consult the title ANSWERS IN CODE PLEADING, vol. 1, p. 799.

3. In this case which was an action against a railroad company to recover damages for killing the plaintiff's intestate, a judgment in favor of the plaintiff was reversed by the supreme court for the reason set out in the defendant's fourth defense, it being held that the administratrix not having capacity to maintain the action in the state of her appointment could not do it in *Kansas*.

Johanna Limekiller, as administratrix of the estate of Frederick Limekiller, deceased, plaintiff,
against
The Hannibal & St. Joseph Railroad Company, defendant.
} Answer.][1]

The said defendant, by *B. F. Stringfellow*, its attorney, comes and says that said [plaintiff][2] ought not to have or maintain her said action against defendant, because defendant, for answer to [her][3] amended petition, says:

1st. Defendant denies each and every allegation in said amended petition.

2d. And for a second defense, defendant says, if *Frederick Limekiller*, named in said amended petition as plaintiff's intestate, was injured. as stated therein, such injury was not caused by any fault, negligence, or carelessness of said defendant or any of its employees or agents, but was caused by the negligence and carelessness of said *Frederick Limekiller* directly and materially contributing thereto.

3d. And for a third defense, defendant says, that said plaintiff has not legal capacity to maintain said action.

4th. And for its fourth defense, defendant says, that plaintiff, as administratrix of the estate of the said *Frederick Limekiller*, by appointment of the *probate* court of *Platte* county, in the state of *Missouri*, is prohibited by the law of said state from instituting or prosecuting said action, and by the express provisions of a statute law of said state as revised in 1879 and published by authority of said state, and in force at the time of the alleged death of said *Frederick Limekiller*, and at the time of the appointment of plaintiff as administratrix of the estate of said *Frederick Limekiller*, and at the time of the institution of this suit, and still in force, under the title, 'Of the Administration of the Estate of Deceased Persons;' and under §§ 94, 96 and 97 of article 5 of statute, the actions which may be brought by administrators are specified; and then by § 97 of said article, it is provided that the preceding section shall not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions on the case, for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator; and so defendant avers that plaintiff is by such law, of said state of *Missouri*, prohibited from maintaining said action. Defendant therefore asks to be discharged with costs.

[*B. F. Stringfellow*, Defendant's Attorney.][1]

b. Setting Up Contributory Negligence.

(1) Of Decedent.

Form No. 6845.[4]

State of *Colorado*, County of *Arapahoe*. } ss. In the *District* Court.

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. For "defendant" in the reported case.

3. For "said" in the reported case.

4. This form is copied from the

Jennie Crumbaugh, plaintiff,
vs.
The Denver Tramway Company, defendant. } Answer.

Now comes the said defendant, *The Denver Tramway Company*, by *Brown and Smith*, its attorneys, and for answer to the complaint of the plaintiff filed in the above entitled action denies each and every allegation therein contained, save and except those hereinafter specifically admitted.

Admits that the defendant is a corporation organized and existing under and by virtue of the laws of the State of *Colorado*, and carrying on a street-car business in the City of *Denver*.

And for a further and second answer and defense, the said defendant alleges that it was not guilty of the negligence, carelessness and improper conduct in the complaint alleged; that the injury therein described to deceased *Thomas Crumbaugh*, if any there was, was caused by the negligence and carelessness of the said deceased *Crumbaugh* himself and his fellow servants and employees.

Wherefore defendant prays that it may go hence and have judgment for its costs expended in this cause, to be taxed.

Brown and Smith.

(*Verification.*)[1]

Form No. 6846.

(Precedent in Barker *v.* Hannibal, etc., R. Co., 91 Mo. 89.)

[*Ada H. Barker*, plaintiff,
against
The Hannibal & St. Joseph Railroad Company, defendant. } In the *Circuit* Court, *Buchanan* county, *March* Term, 1*886*.][2]

Defendant for answer to plaintiff's petition, denies each and every allegation therein, excepting, only, the allegation that defendant is a corporation. Defendant, for further answer, says, that the injury sued for was not occasioned by any negligence or default of the defendant, or its servants, or agents, but by the carelessness and negligence of the deceased, *Edward B. Barker*.

[*G. W. Easley*, Defendant's Attorney.][2]

(2) Of Decedent's Parents

Form No. 6847.

(Precedent in Wolf *v.* Lake Erie, etc., R. Co., 55 Ohio St. 518.)

[State of *Ohio*,
Mercer county, ss. } In the Court *of Common Pleas.*

records in the case of Denver Tramway Co. *v.* Crumbaugh, 23 Colo. 363.

For the complaint in this case see *supra*, Form No. 6839.

1. For form of verification in a particular jurisdiction consult the title Verifications.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete

Amos Wolf, as administrator of the estate of Tony Meyer, deceased, plaintiff,
against
The Lake Erie & Western Railroad Company, defendant.
} Answer.

The defendant answering the petition of the plaintiff in the above entitled action,

For a first defense says * * *][1]

For second ground of defense the defendant says: That *George Meyer* and *Viola V. Meyer* are the only next of kin of *Tony Meyer* deceased; that they are the sole beneficiaries of this action. That said *George Meyer* and *Viola V. Meyer*, at the time of their alleged injury to their infant child, *Tony Meyer*, lived in and occupied a dwelling house situate upon, in lot No. ———, in the village of *Celina*, which said lot adjoined the right of way of said defendant. That on said lot and along the line of the right of way of defendant at the time of the injury complained of, and for a long time prior hereto, was a good and substantial fence. That on the said *ninth* day of *September*, 1*893*, the said *George Meyer* and *Viola V. Meyer*, well knowing the location of said defendant's railroad, and defendant's operation of its trains thereon, willfully and carelessly left the gate, situate in said fence, open, and carelessly and negligently permitted their said infant child, *Tony Meyer*, to wander through said gateway, out to and upon the defendant's railroad track, and while said child was so upon said defendant's railroad track, and without fault or negligence of the defendant or its employes, said defendant's locomotive ran upon said child, and caused the injury complained of. The defendant therefore asks to be dismissed with its costs.

[*Jeremiah Mason*, Defendant's Attorney.][1]

II. PROCEEDINGS BY INDICTMENT AGAINST CARRIER.[2]

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. **Proceeding by Indictment.** — In *Massachusetts* a corporation operating a railroad or street railway may be proceeded against by indictment for the recovery of a fine, in the case of the death of a passenger or other person not a passenger or employee, where such death occurs by reason of the negligence or carelessness of the corporation, or the unfitness, gross negligence or carelessness of its employees. Mass. Pub. Stat. (1882), c. 112, § 212. See also § 213. The statute has been amended to include the case of the death of an employee Mass. Pub. Stat. (Supp. 1888), p. 133 c. 243.

Similar statutes were formerly in force in *Maine* and *New Hampshire*, but have now been superseded by the civil action. Me. Rev. Stat. (1883), c. 51, § 68, as *amended* Me. Acts (1891), p. 135, c. 124, § 1; N. H. Gen. Laws (1878), c. 282, § 14, as *amended* N. H. Pub. Stat. (1891), c. 191, § 8 *et seq.*

Requisites of Indictment — Generally. — The proceeding by indictment, though necessarily criminal in form, is to be considered and treated as a civil action for the recovery of damages in its main features, and the same rules of evidence and principles of law are to be applied as in the case of other civil actions; but so far as the form of the indictment is concerned the principles of the criminal law must govern. State *v.* Manchester, etc., R. Co., 52 N H. 528.

Alleging Negligence — *Generally.* — The statute makes a plain distinction between the liability of the corporation where the accident occurred by reason of the negligence of the corporation

1. For Causing Death of Employee.

Form No. 6848.[1]

Commonwealth of *Massachusetts*, } ss. At the *Superior* Court begun
County of *Middlesex*. } and holden at *Cambridge*,
within and for the county of *Middlesex*, on the *first Monday* of *June*,
in the year of our Lord one thousand eight hundred and *ninety-eight*.

and where it was the result of the negligence of its servants. In the latter case the negligence must be gross, and must be so alleged; in the former it need not be. And an indictment alleging that through the failure of the corporation, in running its locomotive, to reduce its rate of speed and give proper signals and warning when approaching a grade crossing, as was its duty to do, the deceased was struck and killed by the locomotive while his attention was distracted by another locomotive coming from the opposite direction, alleges negligence of the servants, and not of the corporation, and is bad in that it does not charge that such negligence was gross. Com. *v.* Boston, etc., R. Co., 133 Mass. 383, 8 Am. & Eng. R. Cas. 297.

And where an allegation of gross negligence is necessary, an allegation of gross negligence by implication merely is not sufficient. Com. *v.* Fitchburg R. Co., 120 Mass 372.

Specific Acts of Negligence Need Not be Alleged. — It is not necessary to allege in the indictment the evidence tending to support the charge of negligence, nor the specific acts the neglect to do which constituted the negligence charged, where the negligence does not consist in the omission to do any particular act or acts. Com. *v.* Coburn, 132 Mass. 555; Com. *v.* Boston, etc., R. Corp., 11 Cush. (Mass.) 512; State *v.* Manchester, etc., R. Co., 52 N. H. 528.

The names of the servants and agents need not be set out. Com. *v.* Boston, etc., R. Corp , 11 Cush. (Mass.) 512.

Alleging Existence of Beneficiaries. — The indictment should allege that the deceased left a widow and child, or one of these only, as the case may be, and if no widow or child, it should be alleged that the deceased left heirs at law for whose benefit the executor or administrator is to recover the penalty. Com. *v.* Eastern R. Co., 5 Gray (Mass.) 473. But the indictment need not set out the names of the beneficiaries; the statute provides that the forfeiture shall be payable to the executor or administrator, and it is sufficient to name the executor or administrator and allege the existence of beneficiaries. Com. *v.* Boston, etc., R Corp., 11 Cush. (Mass.) 512.

Allegation of Administration — *Generally.* — The indictment must show that administration has been taken out in the state. Com. *v.* Sanford, 12 Gray (Mass.) 174.

Sufficient Allegation. — An allegation that a certain person is a resident of the state, and "has been duly appointed and now is administrator of said" deceased, shows by reasonable implication that the appointment was made in the state. Com. *v.* East Boston Ferry Co., 13 Allen (Mass.) 589

Negation of Violation of Company's Rules Unnecessary. — The indictment need not allege that the deceased was not, at the time he lost his life, walking or being upon the defendant's road contrary to law or the reasonable rules and regulations of the corporation, the clause in the statute exonerating the corporation from liability under such circumstances being contained in a proviso, and not in the enacting part of the statute. Com. *v.* Fitchburg R. Co., 10 Allen (Mass.) 189.

Death Instantaneous. — An indictment under Mass. Stat. (1864), c. 222, § 37 against a street railway company for causing the death of a person, need not allege that the death was instantaneous, nor does the fact that a civil action lies under another statute where the death is not instantaneous render such allegation necessary. Com. *v.* Metropolitan R Co., 107 Mass. 236.

1. *Massachusetts.* — Pub. Stat. (1882), c. 112, § 212, as *amended* Pub. Stat. (Supp. 1888), p 133, c. 243. The facts in this form are from the case of State *v.* Maine Cent. R. Co., 60 Me. 490.

Consult, generally, note 2, p. 92, *supra*.

The jurors for the commonwealth of *Massachusetts*, on their oath, present: * that the *Fitchburg Railroad Company*, a corporation duly and legally established in this commonwealth, and duly authorized and empowered to propel engines and cars by the power of steam along, over and upon the railroad hereinafter described, was, on the *seventh* day of *May*, in the year of our Lord one thousand eight hundred and *ninety-eight*, as it still is, the owner of a certain railroad leading and extending from *Boston*, in the county of *Suffolk*, in this commonwealth, to and through the city of *Somerville*, in this said county of *Middlesex* and further, and was then in full occupation, possession and use of said railroad, and was a common carrier over, along and upon said railroad of passengers and merchandise, and did, on said *seventh* day of *May*, at *Somerville* aforesaid, † over, upon and along its said railroad, by its agents and servants, run, conduct and drive a certain locomotive steam-engine and train of cars attached, and by its agents and servants then and there had the care, custody, management and control of said engine and cars, upon which said engine was one *Samuel Short*, a servant of said company, then and there acting in the capacity of fireman, and being then in the exercise of due care and diligence. That by the gross negligence and carelessness of the agents and servants of said *Fitchburg Railroad Company*, other than the said *Samuel Short*, the said locomotive steam-engine, with train of cars attached, was then and there permitted and suffered to strike and run into and against, and to be with great force and violence driven and dashed into, upon and against a certain other locomotive steam-engine, then and there lawfully traveling and being propelled on and along said railroad, by means of which the aforesaid engine, upon which was the said *Samuel Short*, was thrown with great violence from the track of said railroad and broken in pieces, whereby divers mortal injuries, bruises, scalds and wounds were inflicted upon the head, body and limbs of the said *Samuel Short*, of which said mortal injuries, bruises, scalds and wounds the said *Samuel Short* afterwards, on the *ninth* day of *May*, in the year of our Lord one thousand eight hundred and *ninety-eight*, at said *Somerville*, died. Whereby said *Fitchburg Railroad Company* has become liable to a fine not exceeding *five thousand* dollars, nor less than *five hundred* dollars, to be recovered by indictment, and to be paid to the executor or administrator of the said *Samuel Short* for the use of the widow and children of the said *Samuel Short*, and that *Sarah Short*, of *Chelsea*, in the county of *Suffolk*, has been duly appointed, and now is, administratrix of the estate of the said *Samuel Short*; that said *Samuel Short* died, as aforesaid, leaving a widow, to wit, the said *Sarah Short*, but leaving no children. Against the peace of the commonwealth, and contrary to the form of the statute in such case made and provided.

Michael Sughrue, District Attorney.

2. For Causing Death of Passenger.

Form No. 6849.

(Precedent in Com. *v.* Brockton St. R. Co., 143 Mass. 501, 30 Am. & Eng. R. Cas. 632.)[1]

[(*Commencing as in Form No. 6848, and continuing down to* *)][2] that the *Brockton Street Railway Company*, a corporation duly and legally established in said Commonwealth, was on the *tenth* day of *March*, in the year of our Lord one thousand eight hundred and *eighty-five*, the owner, proprietor, and operator of a certain street railway situate in *Brockton*, in said county of *Plymouth*, extending and leading over, along, and upon a street, there known as and called *Main* Street, and was then and there a common carrier of passengers over, along, and upon said street railway, and as such owner, proprietor, and common carrier of passengers, by its servants and agents, on said *tenth* day of *March*, at said *Brockton*, did run, conduct, and drive a certain car over, upon, and along said street railway, in and upon which said car one *Edward B. Allen* was then and there a passenger, and not being then and there in the employ of said railway company, said servants and agents being then and there engaged in the business of said company, and having then and there, as such servants and agents, the care and management of said car, and being then and there unfit persons to be employed by said company in such service, and, by the unfitness and gross negligence and carelessness of its said servants and agents, the said car, in and upon which the said *Edward B. Allen* was a passenger as aforesaid, was then and there run, conducted, and driven with great, unreasonable, and improper speed, and in a grossly negligent, careless, and improper manner, and that while the said car was being so conducted, run, and driven, over, along, and upon said street railway, in the negligent, careless, and unskilful manner as aforesaid, the said *Edward B. Allen*, being then and there a passenger on said car as aforesaid, was then and there, by reason of the unfitness of, and by the gross negligence and carelessness of, the said servants and agents, pushed and thrown off of the said car down on to and upon the track of the said street railway, and being then and there so, as aforesaid, pushed and thrown off of said car and down on to and upon said track, was then and there struck and run over by the wheels of said car, whereby divers injuries, bruises, and wounds were then and there inflicted on the head, body, and limbs of him, the said *Edward B. Allen*, of which said injuries, bruises, and wounds the said *Edward B. Allen*, thereafter, to wit, on the *twelfth* day of *March*, in the year of our Lord one thousand eight hundred and *eighty-five*, died.

1. This indictment was drawn under Mass. Pub. Stat. (1882), c. 112 § 212. The indictment consisted of three counts, the case being tried on the second and third. Both counts were held sufficient. The one given in the text is the third The second is similar, but states the facts with greater particularity.

For a similar indictment against the proprietors of a steamboat, held sufficient under Mass. Gen. Stat. (1860), c. 160. § 34, see Com. *v.* Coburn, 132 Mass. 555. See also Com. *v.* East Boston Ferry Co., 13 Allen (Mass.) 589.

For indictment against a railway company see Com. *v.* Boston, etc., R. Corp , 11 Cush. (Mass.) 512.

Consult, generally, note 2, p. 92, *supra*.

2. The matter to be supplied within [ ] will not be found in the reported case.

And so the jurors aforesaid, upon their oath aforesaid, do say that, by reason of the unfitness and gross negligence and carelessness of the servants and agents of the said *Brockton Street Railway Company*, while engaged in its business, as aforesaid, on the *tenth* day of *March* aforesaid, at *Brockton* aforesaid, the life of the said *Edward B. Allen*, being then and there a passenger of said corporation, as aforesaid, and not being in its employment, was lost in the manner and form aforesaid: whereby said *Brockton Street Railway Company* has become liable to a fine not exceeding *five thousand* dollars nor less than *five hundred* dollars, to be recovered by indictment, and to be paid to the executor or administrator of the said *Edward B. Allen*, for the use of the widow and children of the said *Edward B. Allen*, and that *Carrie I. Allen*, of *Springfield*, in the county of *Hampden*, has been duly appointed and now is administratrix of the estate of the said *Edward B. Allen*; that said *Edward B. Allen* died as aforesaid, leaving a widow, to wit, the said *Carrie I. Allen*, but leaving no children. Against the peace of the Commonwealth and contrary to the form of the statute in such case made and provided.

[(*Signature as in Form No. 6848.*)]

3. For Causing Death of One Neither Employee nor Passenger.

Form No. 6850.

(Precedent in Com. *v.* Fitchburg R. Co., 120 Mass. 373.)[1]

(*Commencing as in Form No. 6848, and continuing down to* †) by its servants and agents, they being there to direct it and being then and there engaged in the business of said corporation, and while said servants and agents then and there were legally engaged in the business of said corporation, run, propel and drive by the power of steam, a certain locomotive engine over, along and upon said railroad, and that by reason of the unfitness and gross negligence and carelessness of said servants and agents, while engaged in said business as aforesaid, said engine was then and there run, propelled and driven as aforesaid, rashly and without watch, care or foresight, and with great, unusual, unreasonable and improper speed, and that the said engine then and there was, by reason of such unfitness and

1. The indictment in this case contained five counts and the jury returned a verdict of guilty upon each of the first three and not guilty upon the last two. There was held to have been a mistrial, as but one offense was charged, and the jury should have been instructed to return a general verdict of guilty or not guilty upon the whole indictment, as for a single offense. The form given in the text is the first count, with reference to which the court said: "Whether it is sufficient in form, and, if not, whether the objection was open at the time of the trial, appear to the court, upon consideration, to be questions of much difficulty; and, as a new trial must be had upon other grounds, in the course of which these questions may not be material, no opinion is expressed upon it." See also this same case reported in 126 Mass. 472.

For similar forms see State *v.* Gilmore, 24 N. H. 461; State *v.* Manchester, etc., R. Co., 52 N. H. 528.

Consult, generally. note 2, p. 92, *supra*.

gross negligence and carelessness of said servants while engaged in the business of said corporation, as aforesaid, driven at, against and upon the body of one *Charles Keniston*, of said *Somerville*, he, said *Keniston*, being then and there in the exercise of due diligence, and not then being in or upon any car or vehicle of said corporation, and not then being a passenger of said corporation, and not then being in the employment of said corporation; and that said engine did then and there, while being driven as aforesaid by said agents and servants of said corporation, violently strike *Charles Keniston*, and did then and thereby inflict divers wounds, bruises and injuries in and upon the head, body and limbs of him said *Keniston*, of which said bruises, wounds and injuries said *Keniston* then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that on said *seventh* day of *May*, in the year of our Lord one thousand eight hundred and *seventy-four*, by reason of the unfitness and gross negligence and carelessness of said servants and agents of said corporation while engaged in its business as aforesaid, the life of said *Charles Keniston*, he said *Keniston* not then and there being a passenger of said corporation nor in its employment, and then and there being in the exercise of due diligence, was lost, in the manner and form aforesaid, whereby said *Fitchburg Railroad Company* has become liable to a fine not exceeding *five thousand* dollars nor less than *five hundred* dollars, to be recovered by indictment and to be paid to the executor or administrator of said *Charles Keniston*, for the use of the widow and children of said *Charles Keniston*; and that *Eliza Keniston*, of said *Somerville*, widow of said *Charles Keniston*, has been duly appointed, and now is, the administratrix of the goods and estate of said *Charles Keniston*, and that said *Charles Keniston*, had at the said time of his decease *two* lawfully begotten children, both of whom are now living. Against the peace (*conluding as in Form No. 6848*).

DE BENE ESSE.

See the titles BILLS DE BENE ESSE, vol. 3, p. 406; *PERPETUATION OF TESTIMONY.*

DEBT.

I. THE DECLARATION, 98.
1. *In General*, 98.
a. *In England*, 98.
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CROSS-REFERENCES.

For other Forms of Declarations, Pleas, etc., in Debt, see the titles ANNUITIES, vol. 1, p. 789; *ARBITRATION AND AWARD*, vol. 2, p. 33; *BAIL AND RECOGNIZANCE*, vol. 3, p. 1; *BASTARDY*, vol. 3, p. 153; *BONDS AND UNDERTAKINGS (ACTIONS ON)*, vol. 3, p. 528; *CARRIERS*, vol. 4, p. 192; *FINES, AMERCEMENT, PENALTIES AND FORFEITURES; and the GENERAL INDEX to this work.*

For Forms of Special Pleas available in the Action of Debt, see the titles ABATEMENT, PLEAS IN, vol. 1, p. 21; *ACCORD AND SATISFACTION*, vol. 1, p. 181; *NON EST FACTUM; NUL TIEL RECORD; and the GENERAL INDEX to this work.*

For matters of Procedure, generally, see the title DEBT, 5 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 894.

I. THE DECLARATION.

1. In General.

a. In England.

(1) AT COMMON LAW.[1]

Form No. 6851.

(2 Chit. Pl. 184; 1 Saund. Pl. 408.)

Markham and Le Blanc.

Wednesday next after fifteen days of the Holy Trinity in Trin. Term, *51 Geo. III.*

Middlesex, to wit: *John Doe* complains of *Richard Roe*, being in the

1. The form of common-law declaration given in the text was that used in a declaration by bill in the king's bench. For formal parts of declarations in

custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea that he render[1] to the said *John Doe* the sum of *£50*[2] of lawful money of Great Britain, which he owes to and unjustly detains[3] from him. For that whereas (*Here set forth the cause of action in the words and figures to be found in the appropriate form under the particular title*).[4] To the damage of the

other courts, and by and against particular persons, consult the title DECLARATIONS.

1. Description of Action. — The words "of a plea that he render," etc., are superfluous, and may therefore be rejected. Lord *v.* Houstoun, 11 East 62.

2. Amount Claimed. — This sum should in strictness be exactly equal to the aggregate of the sums demanded in the different counts. 1 Saund. 288, note 1. But the declaration is good though it specify by the several counts a less sum than appears to be first demanded, and yet assigns as a breach the non-payment of the sum demanded; and in such case the plaintiff may prove and recover a less sum than is stated to be due. M'Quillin *v.* Cox, 1 H. Bl. 249. And the declaration is good though the sums demanded in the several counts amount altogether to more than the sum at first demanded. Lord *v.* Houstoun, 11 East 62.

3. Owes and Detains. — Debt is in general to be in the *debet* and *detinet*. 2 Chit. Pl. 184, note *f*. But the plaintiff may declare in the *detinet* only. Wilson *v.* Hobday, 4 M. & S. 125; 1 Saund. Pl. 405. And this in general is proper in an action by or against an executor or administrator. 2 Chit. Pl. 184, note *f*; 1 Saund. Pl. 405. But in an action against an executor on a judgment suggesting a *devastavit* plaintiff should declare in *debet* and *detinet*. 1 Saund. Pl. 405. But a declaration in such case brought in *detinet* only is cured by verdict. Hope *v.* Bague, 3 East 2. But an entire omission of the words "which he owes to him and unjustly detains" renders the declaration bad on demurrer. Woodcock *v.* Morgan, 6 Mod. 306.

4. Consideration. — If the action be founded on a simple contract, the consideration for the contract must be stated, as also any inducement necessary to explain the contract or consideration. 1 Saund. Pl. 405. And it should be stated also that the party "agreed" to pay; stating that he "promised" to do so would be bad. Brill *v.* Neele, 3 B. & Ald. 208, 5 E. C. L. 208. If the action be founded on a legal liability, the same should be stated as in assumpsit, omitting promises. 1 Saund. Pl. 405. In declaring on a specialty, however, no consideration need be shown, unless where the performance of the consideration constitutes a condition precedent, when performance of such consideration should be stated and no inducement is in general necessary. 1 Saund. Pl. 405. It should be stated that the specialty was under seal, but if the words describing it are such as will import a seal, it will suffice. Such words are indenture, deed, writing-obligatory. 1 Saund. Pl. 405.

In declaring on a record, the circumstances or consideration on which the record was founded need not be stated. 1 Chit. Pl. 320; 1 Saund. Pl. 406. But unless the record be stated as a matter of inducement only, it is necessary to refer to it by the *prout patet per recordum*. 1 Saund. Pl. 406. But an omission to do so can be taken advantage of only by special demurrer. Stat. 4 and 5 Ann., c. 16; Powdick *v.* Lyon, 11 East 565.

Profert. — In declaring on a deed which is the foundation of the action, it is necessary to make profert of it. Master *v.* Miller, 4 T. R. 338 But this is unnecessary when the deed is stated only as inducement. Banfill *v.* Leigh, 8 T. R. 573. Or where the plaintiff has no right to the possession of it or a counterpart thereof. 1 Saund. 9*a*, note 1. And if the instrument be not a specialty, no profert is necessary. 2 Saund. 62*b*, note 5. Nor need profert be made of a deed operating under the statute of uses. Banfill *v.* Leigh, 8 T. R. 573; 1 Saund. 9*a*, note 1. Nor in case of a feoffment. Read *v.* Brookman, 3 T. R. 156. Where profert cannot be made on account of the instrument being lost or in defendant's possession, such fact should be stated as an excuse for not making profert. Read *v.* Brookman, 3 T. R. 151; Bolton *v.* Carlisle, 2 H. Bl. 259.

Conclusion. — The usual conclusion in each count, that "by reason whereof,"

said *John Doe* of £5,[1] and therefore he brings his suit, etc.

Pledges to prosecute { *John Den* and *Richard Fenn.*

(2) Under Hilary Rules.[2]

Form No. 6852.

(Petersd. Prec. in Pl., p. 5.)

In the *King's Bench* (or *Common Pleas* or *Exchequer of Pleas*).

Tenth day of *March*, 1834.

Middlesex. *John Doe*, by *Jeremiah Mason*, his attorney (or *in his own proper person*), complains of *Richard Roe*, who has been summoned to answer the plaintiff in an action of debt.[3] For that whereas the defendant on the *third* day of *May*, in the year 1833, was indebted to the plaintiff in £50,[4] for (*Here set forth the cause of action in the words and figures to be found in the appropriate form under the particular title*).[5] Which said sum (or *said several monies*)[2] was (or *were*)[2] to be paid (or *paid respectively*)[2] by the defendant to the plaintiff on request; whereby, and by reason of the nonpayment thereof an action has accrued to the plaintiff, to demand and have of and from the defendant the said sum (or *said several monies respectively*):[6] Yet the defendant has not paid the said sum (or *said several sums*)[6] of money, or any part thereof: To the plaintiff's damage of £10:[7] And thereupon he brings his suit, etc.

b. In the United States.

Form No. 6853.

State of *Michigan*, County of *Lenawee.* } ss. In the *Circuit* Court for the County of *Lenawee.*

John Doe, plaintiff, against *Richard Roe*, defendant. }

John Doe, plaintiff in this suit, by *Jeremiah Mason*, his attorney, comes and files this his declaration as commencement of suit, and complains of *Richard Roe*, defendant in this suit[8] of a plea that the said defendant render unto the said plaintiff *one thousand* dollars[9] lawful

etc., "an action has accrued," etc., is unnecessary, and the usual breach at the end will suffice. 1 Saund. Pl. 405.

1. **Damage.**—This sum is in general merely nominal. 2 Selw. N. P. 468; 2 Chit. Pl. 184. note *h*.

2. Consult the annotations to Form No. 2518, vol. 2, p. 296.

3. See *supra*, note 1, p. 99.

4. This should be a sum sufficient to cover plaintiff's demand. Petersd. Prec. in Pl., p. 6, note 1.

5. See *supra*, note 4, p. 99.

6. The words enclosed by ( ) should be used where there is more than one count.

7. **Damages.**—The damages in debt are nominal, and not, as in assumpsit, the principal object of the suit, and therefore a small sum, as £10, is usually inserted, whatever may be the magnitude of the debt sought to be recovered. Petersd. Prec. in Pl., p. 6, note 3.

8. For the formal parts of a declaration in any particular state consult the title Declarations.

9. **The Debt.**—The declaration should

money of the United States of America, which to the said plaintiff the said defendant owes and from him unjustly detains;[1] for that whereas (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title*).[2] Nevertheless,

set out with certainty the amount of the debt due. McKenzie *v.* Connor, 1 Stew. (Ala.) 162; Butler *v.* Limerick, Minor (Ala.) 115; Weiss *v.* Mauch Chunk Iron Co., 58 Pa. St. 295; Hale *v.* Hall, 2 Brev. (S. Car.) 316; Wilson *v.* Lenox, 1 Cranch (U. S.) 194; U. S. *v.* Colt, Pet. (C. C.) 145. But the fact that the declaration demands in the commencement a greater sum than the aggregate of the several counts is no cause for even special demurrer. McKenzie *v.* Connor, 1 Stew. (Ala.) 162; White *v.* Walker, 1 T. B. Mon. (Ky.) 34; Hampton *v.* Barr, 3 Dana (Ky.) 578; Boyd *v.* Sargeant, 1 Mo. 437; and see Pinkston *v.* Stone, 3 Mo. 119; U. S. *v.* Colt, Pet. (C. C.) 145; *supra*, note 2, p. 99. And while a formal demand of the amount claimed in the beginning of the declaration is usual, the omission of it is not cause of demurrer nor fatal on error. Mitchell *v.* Conley, 13 Ark. 414.

In debt on a judgment for the penalty of a bond "to be discharged by a smaller sum with interest," the declaration ought not to demand the smaller sum with interest till paid, but "the penalty to be discharged thereby." An error in this respect is fatal, even after verdict. Anderson *v.* Price, 4 Munf. (Va.) 307.

1. Description of Action. — In some states the action is spoken of as a "plea of debt." Allen *v.* Leighton, 87 Me. 206; Thompson *v.* Lewis, 83 Me. 223; Marshall *v.* Reed, 48 N. H. 36. And see Anderson *v.* Yell, 15 Ark. 9; Madison *v.* Hatcher, 8 Blackf. (Ind.) 341. But the commonest form is that used in the text. Rector *v.* Taylor, 12 Ark. 128; Nunn *v.* Goodlett, 10 Ark. 89; Brannan *v.* Adams, 76 Ill. 331; Foltz *v.* Stevens, 54 Ill. 180; Whitecraft *v.* Vanderver, 12 Ill. 235; Glidewell *v.* M'Gaughey, 2 Blackf. (Ind.) 359; Randall *v.* Glenn, 2 Gill (Md.) 430; Grain *v.* Yates, 2 Har. & G. (Md.) 332; Cunningham *v.* Phillips, Tappan (Ohio) 184; Respublica *v.* Lacaze, 2 Dall. (Pa.) 119; Robinson *v.* Franklin, 1 Humph. (Tenn.) 156; Ross *v.* Milne, 12 Leigh (Va.) 209; Brown *v.* Barry, 3 Dall. (U. S.) 365.

Debet and Detinet. — In general the declaration should be in the *debet* and *detinet*. Hunt *v.* Lyle, 6 Yerg. (Tenn. 412; Lawrence *v.* Dougherty, 5 Yerg. (Tenn.) 435, Young *v.* Hawkins, 4 Yerg. (Tenn.) 171; Bloomfield *v.* Hancock, 1 Yerg. (Tenn.) 101; Bailey *v.* Beckwith, 7 Leigh (Va.) 604; and *supra*, note 3, p. 99. But that a declaration may be in the *detinet* only see Bailey *v.* Beckwith, 7 Leigh (Va.) 604, and *supra*, note 3, p. 99. And while an heir should be charged in the *debet* and *detinet*, it is not fatal after verdict or upon general demurrer if he be charged in the *detinet* only. Waller *v.* Ellis, 2 Munf. (Va.) 88.

Where the action is brought by or against an administrator, the declaration should be in the *detinet* only. Semon *v.* Hill, 7 Ark. 70; Marvin *v.* Brewer, 30 Md. 247; Childress *v.* Emory, 8 Wheat. (U. S.) 642; and *supra*, note 3, p. 99. But it is no longer a fatal defect to lay the declaration in both the *debet* and *detinet*. Fowler *v.* Keatts, 17 Ark. 469; Brown *v.* Brown, 10 B. Mon. (Ky.) 247; Leather *v.* M'Glasson, 3 T. B. Mon. (Ky.) 223. And where no part of the cause of action accrued during the life of the testator or intestate, the declaration is properly in the *debet* and *detinet*. Thomas *v.* Cameron, 17 Wend. (N. Y.) 59; Adams *v.* Campbell, 4 Vt. 447; Spottswood *v.* Price. 3 Hen. & M. (Va.) 123 And the same is true where an executor has made himself personally responsible, and by a *devastavit*. Childress *v.* Emory, 8 Wheat. (U. S.) 642.

Where an action is for foreign money, the declaration should be in the *detinet* only, the reason for the rule that *debet* for foreign money is ill being the uncertainty of its value. Brown *v.* Barry, 3 Dall. (U. S.) 365.

2. Cause of Action — *Generally.* — The declaration should disclose the right of action by apt, definite, certain and connected averments. 5 Encycl. of Pl. and Pr. 917.

Joinder of Counts. —As to what causes of action can be joined in separate counts, see 5 Encycl. of Pl. and Pr. 921.

Consideration. — In general, an allegation of consideration is necessary. Letcher *v.* Taylor, 2 Bibb (Ky.) 585; Tappan *v.* Campbell, 9 Yerg. (Tenn.)

the defendant, although often required, has not as yet paid the aforesaid sum of money above demanded, or any part thereof, to the said plaintiff, but to pay the same the said defendant has hitherto wholly

436; and *supra*, note 4, p. 99. And where the consideration in a contract amounts to a condition precedent its performance must be specifically averred. Kuykendall *v.* Gilbreath, 3 Ark. 222; Hoy *v.* Hoy, 44 Ill. 469. But where by law a consideration is implied none need be alleged. 5 Encycl. of Pl. and Pr. 915.

"*Agreed.*" — The action of debt is founded upon contract; the action of assumpsit, upon a promise: and in the one case the declaration should aver that the defendant "agreed;" in the other, that he "promised." Metcalf *v.* Robinson 2 McLean (U. S.) 363, and *supra*, note 4, p. 99.

But it has been held that where the count possesses all the attributes of a count in debt, commencing and concluding as such, but uses the word "promised" instead of the word "agreed," it will not be regarded as in assumpsit. Smith *v.* Webb, 16 Ill. 105, *following* Cruikshank *v.* Brown, 10 Ill. 75; and see National Exch. Bank *v.* Abell, 63 Me. 346; Norris *v.* School Dist. No. 1, 12 Me. 293; Payne *v.* Smith, 12 N. H. 34. But in Guinnip *v.* Carter, 58 Ill. 296, *following* McGinnity *v.* Laguerenne, 10 Ill. 101, it was held that a common count for interest containing the words "in consideration of the indebtedness, the defendant undertook, and then and there faithfully promised, to pay the same when thereunto afterwards requested," was in assumpsit; although, had the word "agreed" been used instead of "promised," it would have been a count in debt; and in Cruikshank *v.* Brown, 10 Ill. 75, a count for work done, goods sold, etc., concluding "undertook, and then and there promised," etc., was held to be simply an indebitatus assumpsit count.

Where in an action in debt it was alleged in one count that the defendant "by his promissory note of that date by him made for value received, four months after the date of said note promised said plaintiffs to pay them or their order," etc., and the count concluded with the usual refusal and request to pay, it was held that the count was sufficient, and not bad as a count in debt, the word "promised" not being used by way of averment, but as a description of the instrument sued on. McGinnity *v.* Laguerenne, 10 Ill. 101.

Breach. — The declaration must negative the payment of the entire debt, and it is best where possible that the breach be assigned in the words of the contract, or in words coextensive with the import thereof. Clary *v.* Morehouse, 3 Ark. 261; Louisiana Bank *v.* Watson, 4 Ark. 518; Green *v.* Thornton, 7 Ark. 384; Fenwick *v.* Peart, Hard. (Ky.) 7. But the mere fact that the breach is too widely stated, as where the declaration alleges that the defendant has not paid the plaintiff "or any person whomsoever," forms no material objection. Pike *v.* Fraser, 17 Ark. 597.

Where a note is made payable in money or merchandise in the alternative on demand, the declaration need not aver a breach of the latter. Henry *v.* Gamble, Minor (Ala.) 15; Gregory *v.* Bewly, 5 Ark. 318; Barry *v.* Alsbury, Litt. Sel. Cas. (Ky.) 149. But *contra* as to notes payable in money or bank notes. Campbell *v.* Weister, 1 Litt. (Ky.) 30; Mitchell *v.* Waring, 4 J. J. Marsh. (Ky.) 233.

Demand. — When the obligation upon which the count is founded is such as to evidence an indebtedness known to defendant, it is not necessary to allege that any demand for payment was made upon him. Kellogg *v.* Union Co., 12 Conn. 7 And where the contract sued on is itself payable on demand no averment of demand is necessary. Leathers *v.* M'Glasson, 3 T. B. Mon (Ky.) 223. But where, as in case of forfeiture of a lease for nonpayment of rent, there must be a demand at the time fixed or the forfeiture will not accrue, the declaration must contain an averment of demand. Chapman *v.* Wright, 20 Ill. 120.

Profert. — Formerly, a declaration in debt upon a sealed instrument was defective which failed to make profert of the instrument See *supra*, note 4, p. 99. And where an action was brought by the assignee of a bond it was held that profert of the assignment was necessary. Alston *v.* Whiting, 6 Ark. 402. But this technical requirement has been made largely unnecessary by statute. 5 Encycl. of Pl. and Pr. 922. And it is the general rule

refused, and still does refuse, to the damage of the said plaintiff of *five hundred* dollars,[1] and therefore the said plaintiff brings suit, etc.

Jeremiah Mason, Plaintiff's Attorney,
63 Main st., *Adrian, Mich.*[2]

2. Indebitatus Count.[3]

Form No. 6854.

(1 Saund. Pl. 408; 2 Chit. Pl. 185.)

For that whereas (or *and whereas also*)[4] the said defendant, heretofore, to wit, on the *third* day of *May*, A. D. 1*801* (or *afterwards, to wit, on the day and year aforesaid*),[4] at *Middlesex* aforesaid, was indebted to the said plaintiff in the sum of *£50*, of lawful money of Great Britain (or *like lawful money*)[4] for (*Here state the subject matter of the debt*), and at his special instance and request, and to be paid by the said defendant to the said plaintiff, when he the said defendant should be thereunto afterwards requested.[5] Whereby, and by reason of the said (or *said last mentioned*)[4] sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said last mentioned sum of *£50*, parcel (or *other parcel*)[4] of the said sum above demanded.[6]

3. Quantum Meruit Count.

Form No. 6855.

(1 Saund. Pl. 409; 2 Chit. Pl. 185.)

And whereas, also, afterwards, to wit, on the day and year last aforesaid. at *Middlesex* aforesaid, the said defendant was indebted

that profert is not necessary of public records or deeds to which the plaintiff has not the right of possession. Adams *v.* State, 6 Ark. 498.

1. Damages. — Only nominal damages need be claimed. Henry *v.* Gamble, Minor (Ala.) 15, Sterling *v.* Sinnickson, 5 N. J. L. 871; and *supra*, note 1, p. 100. And if omitted in the declaration may be supplied by the writ. Henry *v.* Gamble, Minor (Ala.) 15.

2. See *supra*, note 8, p. 100.

3. Formerly the count did not state that the defendant was indebted, etc., but was as follows: "And whereas also the said *Richard Roe* on," etc., "at," etc., "bought of the said *John Doe* certain," etc., "for *£50*, to be therefore paid by him the said *Richard Roe* to the said *John Doe* when he the said *Richard Roe* should be thereunto requested;" — and then the other counts followed, omitting the "whereby," etc. in the above precedent, and averring, at the end of the last count, "that all the sums mentioned in the different counts together amount to the sum first demanded;" see Aston's Ent. 209, 210; 2 Mallory's Ent. 177; Fortes. 198. But in the declaration in Emery *v.* Fell, 2 T. R. 28 and MSS. Prec. 23, V. 127 (which contained counts for goods sold, work and labor, and all the money counts), each count began with the statement, "that the defendant was indebted," etc., as above, omitting, however, the "whereby," etc. And the clause "whereby," etc., is not in the old entries, see Coke's Ent. 125, except in cases whereby the above arises from some misfeasance, as on a penal statute, or against a sheriff for an escape, or on leases, awards, etc. See Gilbert's Action, Debt, 2 Chit Pl. 185, note *i*.

4. The words enclosed by ( ) should be used where this is not the first count.

5. This appears to be unnecessary. 2 Chit. Pl. 185, note *l*.

6. This conclusion is unnecessary, and the usual breach at the end of the declaration will suffice. 1 Saund. Pl. 405.

to the said plaintiff in the sum of *£50*, of like lawful money, for (*Here state the subject matter of the debt*), he, the said defendant, undertook, and then and there agreed[1] to pay to the said plaintiff so much money as he therefore reasonably deserved to have of the said defendant, when he, the said defendant, should be thereunto afterwards requested.[2] And the said plaintiff avers, that he therefore reasonably deserved to have of the said defendant the further sum of *£50*, of like lawful money, to wit, at *Middlesex* aforesaid, whereof the said defendant afterwards, to wit, on the day and year last aforesaid, there had notice, whereby and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the said last-mentioned sum of *£50*, other parcel of the said sum above demanded.[3]

II. THE PLEA OF NIL DEBET.[4]

1. In England.[5]

Form No. 6856.

(1 Saund. Pl. 409; 2 Chit. Pl. 507.)

In the *King's Bench* (or *Common Pleas* or *Exchequer*).
Trin. Term, *51 Geo. III.*

Richard Roe
ats.
John Doe.

And the said *Richard Roe*, by *Jeremiah Mason* his attorney, comes and defends the wrong and injury, when, etc.,[6] and says that he does not owe the said sum of money (or *the said sum of £50*)[7] above demanded, or any part thereof, in manner and form as the said *John Doe* hath above thereof complained against him, and of this he the said *Richard Roe* puts himself upon the country, etc.

1. **Agreed.** — The word "agreed" should be used; stating that defendant "promised" is bad. Brill *v* Neele, 3 B. & Ald. 208, 5 E. C. L. 264.

2. See *supra*, note 5, p. 103.

3. See *supra*, note 6, p. 103.

4. **When Proper.** — As to when a plea of *nil debet* was proper, see 1 Saund. Pl. 406.

5. **Under Hilary Rules,** 4 Wm. IV the plea of *nil debet* is not to be allowed in any action. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged;" and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*; and all matters in confession and avoidance shall be pleaded specially, as directed in actions of assumpsit. In other actions of debt in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance. Petersd. Prec. in Pl., p. 292, note 1.

6. See vol 2, p. 109, note 2.

7. If the sum be specified, care must be taken that the plea applies to all the sums demanded Thus, where a declaration in debt demanded £2,000, and contained several counts, one of which stated a debt of £224, and the defendant pleaded that he did not owe the said sum of £224, it was decided that the plaintiff might sign judgment as for want of a plea. Macdonnell *v.* Macdonnell, 3 B & P. 174.

2. In the United States.

Form No. 6857.

In the *Greene* County *Circuit* Court.

October Term, 1897.

Richard Roe ats. *John Doe.* } Debt.[1]

And the defendant, by *Jeremiah Mason* his attorney, comes and defends the wrong, when, etc.,[2] and says that he does not owe[3] the said sum of money above demanded, or any part thereof, in manner and form as the plaintiff has above complained against him, and of this defendant puts himself upon the country, etc.

Jeremiah Mason, Defendant's Attorney.

1. For the formal parts of a plea in any particular state consult the title PLEAS.

2. See vol. 2, p. 109, note 2.

3. "**Does Not Owe.**" — The rule requiring the pleading to be in form does not require the use of the precise words employed in approved precedents. If equivalent words conveying the same meaning are used, it will suffice and still be good in form. Thus the words in *nil debet* "was not indebted in manner and form," etc., instead of "does not owe the said sum of money above demanded, or any part thereof, in manner and form," etc., convey the same meaning, and will be good in form. Miller *v.* Blow, 68 Ill. 304.

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CROSS-REFERENCES.

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For Forms relating to Arrest in Civil Actions on the Ground of Fraud, see the title ARREST IN CIVIL ACTIONS, vol. 2, p. 117.

For Forms relating to Criminal Prosecutions for Obtaining Goods by Deceit, see the title FALSE PRETENSES.

For other Forms in Proceedings for Relief against Deceit, Fraud, or False Representations, see the titles FRAUDULENT CONVEYANCES; JUDGMENTS AND DECREES; RESCIS-

SION AND CANCELLATION; SALES; TRUSTS; VENDOR AND PURCHASER. See also the GENERAL INDEX to this work.

For Forms relating to Deceit as a Defense, see the title FRAUD.

I. COMPLAINT, DECLARATION OR PETITION.

1. Misrepresentation Made to Plaintiff.

a. In General.[1]

(1) CAUSING LOSS OF MECHANIC'S LIEN.

Form No. 6858.

(Precedent in Alexander *v.* Church, 53 Conn. 562.)[2]

[(*Commencement of writ as in Form No. 5912.*)]

1st. That the plaintiff had an inchoate mechanic's lien on the

1. For precedents of declarations, complaints and petitions in actions of deceit or in the nature of deceit based on false representations made to plaintiff, inducing plaintiff to assign to his disadvantage certain valuable claims, see Powell *v.* Dayton, etc., R. Co., 13 Oregon 447.

Inducing plaintiff to enter into a contract. See Nounnan *v.* Sutter County Land Co., 81 Cal. 2.

Inducing plaintiff to receive and accept an assignment of a bond and mortgage in part payment for certain premises. See Vanneman *v.* Powers, 56 N. Y. 39.

Inducing plaintiff to sell his interest in a partnership. See Allerton *v.* Allerton, 50 N. Y. 670.

Inducing plaintiff to surrender a promissory note for less than its value. Barnes *v.* Quigley, 59 N. Y. 265. In this case the complaint in substance alleged that "on the *3d* day of *April*, 187*1*, plaintiff was the owner of a promissory note made by defendant, payable to the order of *Brittan & Co.*, for $*2,165.86*; which was indorsed by the payees and transferred to plaintiff before maturity; that prior to its maturity the payees failed and made an assignment; that on or about the day mentioned, defendant, for the purpose of deceiving plaintiff and inducing him to surrender up the note for a less sum than was due thereon, falsely and fraudulently represented that the note was made by him solely for the accommodation of the payees, he receiving no consideration whatever therefor, and that all moneys paid by him upon the note would be an entire loss, whereas the note was in fact for merchandise sold by the payees to defendant, and that he received full value for the note. That plaintiff relying upon said representations, and being ignorant of the facts, was induced thereby and did accept $*582.70* less than the amount due, and surrendered up the note. That by reason of the premises said plaintiff has been deceived and defrauded by said defendant out of said sum of $*582.70*, and has sustained damage to that amount."

A complaint in an action by the state alleging that defendant printed a false copy of their contract with the state, and by exhibiting it to state officials, procured from them an approval of their bill, whereby he obtained more money from the state than they were entitled to, is good on demurrer, though it does not allege that the defendants were guilty of fraud. State *v.* Stewart, (N. Car. 1878) 29 N. E. Rep. 413.

For substance of declaration in an action for deceit, where defendant falsely represented that he had confessed judgment, whereas he had not, and afterward sought to bar the action by a certificate of discharge as a bankrupt, see Hughes *v.* Oliver, 8 Pa. St. 426.

For substance of declaration in an action of deceit based on false representations made by defendant in procuring the issuance of a certain certificate see Fenemore *v.* U. S., 3 Dall. (U. S.) 357

2. The allegations set out in the text were the principal ones of the complaint, and were held to be amply

premises of the defendant for materials furnished and labor performed as a sub-contractor in the construction of a building on the premises.

2d. That the premises were amply sufficient in value to secure the plaintiff's claim.

3d. That the plaintiff had taken some of the steps provided by the statute towards the perfecting of his lien.

4th. That he was induced not to perfect the lien by the false and fraudulent declarations of the defendant that she had paid the contractor in full for the building and did not owe him anything on account of it, such payment having been in part by accepting orders drawn by him in favor of other parties, and in part by the payment of money, both of them before the plaintiff had given notice of his lien.

5th. That these declarations were made with the intent to deceive the plaintiff and induce him to forego the perfecting of his lien.

6th. That the representations had the desired effect in deceiving the plaintiff and in causing him to desist from the perfecting of his lien.

7th. That in consequence of these false and fraudulent representations the plaintiff lost his security upon the property, which he had in an inchoate condition when the representations were made, and lost the debt which was justly due him for labor performed and materials furnished in the construction of the building. [(*Conclusion of writ as in Form No. 5912.*)] [1]

(2) Inducing Plaintiff to Enter into Contract.

(*a*) *Generally.*

INDUCING PLAINTIFF TO TAKE UP AND FINISH DEFENDANT'S UNCOMPLETED CONTRACT.

Form No. 6859.

(Precedent in Norton *v.* Huxley, 13 Gray (Mass.) 285.)[2]

[(*Title of court and cause, and commencement as in Form No. 6942.*)] [3]

That in the year 1852 *Henry Thompson* was employed in the coaling of wood of the defendant in the town of *New Marlborough* upon the land of the defendant, and the defendant had agreed to make

sufficient to constitute the cause of action against the defendant for the loss which plaintiff had sustained by failure to perfect his lien. Alexander *v.* Church, 53 Conn. 561.

See also notes to Form No. 6863, *infra.*

1. For the formal parts of complaints or petitions in any particular jurisdiction consult the title Complaints, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title Declarations, *post*, p. 244.

The matter to be supplied within [ ] is not found in the reported case, but should be inserted to complete the form.

Inducing Plaintiff Not to Secure a Debt. — For declaration in an action on the case for fraudulent acts inducing plaintiff not to secure a debt by legal process, by which means he lost his debt, see Austin *v.* Barrows, 41 Conn. 287.

2. A judgment for the plaintiff in this case was sustained against the exceptions of the defendant. Norton *v.* Huxley, 13 Gray (Mass.) 285.

3. For formal parts of complaints or petitions, generally, see the title Com-

advances to the said *Thompson* as the work progressed, said advances not to exceed one-half of the amount to which said *Thompson* would be entitled upon the completion of said contract, reserving in the defendant's hands the residue of the wages of said *Thompson*; and the said *Thompson* became unable to go on with the prosecution of said contract with the defendant; and this plaintiff made application to the defendant, asking information of him in relation to the said contract, and how far and to what extent the plaintiff could safely be interested in the prosecution of the same; and the said defendant, to induce the plaintiff to enter upon the further prosecution of said contract, falsely, fraudulently, knowingly and deceitfully represented to the plaintiff substantially that there would be no risk in going upon said job and prosecuting it; that he had in his hands reserved funds to pay for all assistance; that he did not care whom he paid, if the wood was burned into coal, and that he would retain in his own hands the funds which he had reserved; and the said plaintiff, confiding in these representations of the defendant, and believing the same to be true, took upon himself the further prosecution of the said contract, and made large outlay in labor, money, material and other supplies in and upon said contract, and caused to be delivered to the defendant large quantities of coal of great value; and in fact the said representations of the defendant were false, and the defendant had no reserved funds in his hands, and had greatly overpaid the said *Thompson* for the work which had been theretofore performed upon said contract; and by means of the premises the plaintiff has been greatly injured and defrauded [(*concluding as in Form No. 6942*).] [1]

(*b*) *Contract of Employment.*[2]

FRAUDULENTLY MISREPRESENTING VALUE OF STOCK AGREED TO BE TAKEN IN PAYMENT FOR SERVICES.

PLAINTS, vol. 4, p. 1019. For formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] does not appear in the reported case, but should be inserted to complete the precedent.

1. See note 3, p. 109, *supra*.

2. **Another Precedent.** — In Smith *v.* Bowler, 2 Disney (Ohio) 154, the petition of the plaintiff, which was held defective on demurrer for not stating facts sufficient to constitute a cause of action, was in substance as follows: "That in *May*, 1855, he was employed in the banking house of *Smead, Collard & Hughes*, in *Cincinnati*, at a salary of $2,000 per annum; that the defendant being, at the time, interested in the firm of *Carney, Swift & Co.*, held out inducements to the plaintiff to leave the employment of *Smead, Collard & Hughes*, and engage in business with *Carney, Swift & Co.*; that the defendant proposed to the plaintiff to pay for his services, as bookkeeper with the firm of *Carney, Swift & Co.*, at $2,000 per annum, until the expiration of the partnership of said firm, which would be *three* years from the *1st* of *July*, 1855; and after the expiration of said term of the partnership, to give the plaintiff an interest equal to the sum of $5,000 per annum, as a partner in the firm to be formed between the said parties, or to give the plaintiff a salary equal to the sum of $5,000 in the new firm; and that the defendant, then and there, further proposed to give the plaintiff his written individual guaranty, that the terms and conditions so proposed should be performed and carried out if the plaintiff would accept the proposition. Thereupon the plaintiff did accept the proposition, and, afterward, on the *1st* of *July*, 1855, did enter the service and employment of said firm of *Carney, Swift & Co.*, as a bookkeeper, and so

Form No. 6860.

[(*Title of court and cause, and commencement as in Form No. 5926.*)][1]

I. That on the *first* day of *June*, 1*898*, at *Northport*, in the county of *Suffolk*, in the state of *New York*, the defendant having offered to the plaintiff that he would assign and transfer to him *ten* shares of the par value of *two hundred* dollars each, of the capital stock of the *Law Book Binding Company*, a corporation, incorporated under the laws of the state of *New York*, and doing business in said *Northport*, upon consideration that the plaintiff should render services in the capacity of bookkeeper and private secretary for him, the said *Richard Roe*, for a period of *eight* months, from the *first* day of *January*, 1*898*, to the first day of *October*, 1*898*, did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that said stock was of the market value of *two hundred* dollars, and that defendant had paid all charges, calls, and assessments laid or to be laid upon said shares by said company or the trustees or directors thereof.

II. That the plaintiff, relying upon said representations, then and there agreed with the defendant to render all necessary services that should be required by the defendant in said capacity of bookkeeper and private secretary for the said period of *eight* months, and thereafter proceeded to, and did, render said services (*Here may be stated facts showing how far the contract was performed by plaintiff*).

III. That, in truth, and as defendant then well knew, the said stock was not then of the market value of *two hundred* dollars; but, on the contrary, the said company was then insolvent, and the stock worthless and unsalable in the market; and the defendant had not paid all charges, calls, and assessments laid upon said shares; but, on the contrary, a special assessment of *ten* per cent. on the par value of said shares had been theretofore duly imposed upon them

continued until the *first* of *July*, 1857, when he left, because the said defendant refused to perform his part of the contract. The petition avers that the inducements and promises held out by the defendant were the cause of his leaving his former employment, and that a demand, for performance, on the defendant, has been frequently made, and as often refused—the defendant denying that any such contract had ever been made. That the defendant, by means of the said false, fraudulent and deceitful stratagems and devices, has, and did induce the plaintiff to give up his employment, and abandon his prospects of advancement, with the intent to obtain and secure the services of the plaintiff, for himself and his copartners, and did thereby cheat and defraud the plaintiff; and that the said defendant did willfully and purposely make the aforesaid false and deceptive promises and inducements to the plaintiff, with the intent and for the purpose of deceiving and defrauding him, well knowing that he did not intend, at any time, to fulfill them. Wherefore, the plaintiff says he has been injured and has suffered damage by reason of the defendant's false and fraudulent conduct, to the amount of $*6,000*, and he asks judgment therefor, and for such other and further relief as he may be entitled to," etc. In Smith *v.* Bowler, 1 Disney (Ohio) 520, will be found the substance of the original petition in the same case, which was also held to be defective on demurrer.

1. **For the formal parts** of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

Consult notes to Form No. 6863, *infra*.

by the directors of said company, which assessment had not been paid by defendant, but then remained and still remains a charge upon said shares (*or otherwise state specifically the particulars in which the representations were false*).

IV. That by reason of the premises the plaintiff has been misled, to his damage *twenty-five hundred* dollars.

[Wherefore (*concluding as in Form No. 5926*).]

(3) Obtaining Money from Plaintiff.

Form No. 6861.

(Precedent in Lynch *v.* Hall, 41 Conn. 239.)[1]

[(*Commencement of writ as in Form No. 5912.*)][2]

[1.][3] That the defendant, on the *12th* day of *August*, 1873, was indebted to the plaintiff in the sum of *eight hundred* dollars, for money before that time had and received by the defendant to and for the use of the plaintiff, and for money lent by the plaintiff to the defendant at his request, which debt the defendant fraudulently contracted, by falsely, fraudulently and deceitfully representing to the plaintiff that he would pay over the said sum of money to *Charles G. Arnold* of said *Middletown* for the benefit of the plaintiff, by means of which false representations he induced the plaintiff to pay over to the defendant the said sum of money, whereas the defendant when the said debt was contracted did thus obtain said sum of money with the intent of cheating and defrauding the plaintiff out of the same.

[2.] And the plaintiff says that the defendant has neglected and

1. The Declaration was Attacked for Insufficiency.—The court said: "The declaration is in some respects inaptly and inartistically drawn, and contains some expressions which indicate that the draftsman intended to base his action on section 370 of title 1, of the Revised Statutes, and the claims of the defendant are evidently predicated on the assumption that the declaration is for statutory fraud in contracting a debt, and not adapted to a case for fraud at common law. * * * The real gist of the declaration consists in the allegation that the defendant fraudulently induced the plaintiff to intrust him with his money to pay to another person for the use of the plaintiff, which he designed to, and did, appropriate to his own use. * * * The essential elements of confidence by the plaintiff, and falsehood and deceit by the defendant, attended with serious and premeditated injury to the plaintiff, are distinctly averred, which combined constitute an aggravated case of common-law fraud; and notwithstanding the want of complete accuracy and precision in the language used we discover no serious obstacle in the way of sustaining the declaration as for a fraud of that character." Lynch *v.* Hall, 41 Conn. 239. *Compare* Form No. 6862, *infra*.

See also notes to Form No. 6863, *infra*.

Another Precedent. — Inducing plaintiff to pay over certain sums of money not owing by him, see Searles *v.* Thompson, 18 Minn. 316.

2. The matter to be supplied between [ ] is not in the reported case, but should be added to complete the form.

For the formal parts of complaints or petitions in any particular jurisdiction consult the title Complaints, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title Declarations, *post*, p. 244.

3. This declaration was drawn prior to the adoption of the Practice act, and was not numbered and paragraphed as is now required. Conn. Prac. Act, § 9.

refused to pay over to said *Charles G. Arnold* said sum of money, although he received the same for that purpose, but has disregarded his promise, and, with the wicked purpose of cheating and defrauding the plaintiff out of the benefit thereof, still wrongfully holds said sum of money in his possession.

[3.] The plaintiff further says that the defendant has at all times neglected and refused to pay said debt and the same is still due.

[4.] And the plaintiff says that by the fraudulent and deceitful conduct of the defendant he has been damaged in the sum of *nine hundred* dollars, to recover which with just costs this suit is brought.

[(*Conclusion of writ as in Form No. 5912.*)][1]

(4) Under the Statute, in Contracting or Escaping Payment of Debt.

Form No. 6862.

(Conn. Prac. Act, p. 90, No. 135.)[2]

(*Commencement of writ as in Form No. 5912.*)[3]

First Count.

1. On *May 2d*, 1879, the defendant owed, and now owes the plaintiff $*700*, as evidenced by his note for that amount, dated *October 1st*, 1878, and payable *six* months after date, then and still overdue and unpaid.

2. On *October 1st*, 1878, the defendant applied to the plaintiff for a loan, and then represented to the plaintiff that he owned a piece of land in *Berlin* free from incumbrances, of the value of $*5,000*.

3. The plaintiff believed said statement, and was induced thereby to lend the defendant $*700* upon his note payable in *six* months, being the debt mentioned in paragraph first.

4. In fact the defendant did not own any land in *Berlin*, and did not own any property subject to execution.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Connecticut.** — Gen. Stat. (1888), § 1347, to the effect that when any person shall be guilty of fraud in contracting a debt, or conceal, remove, or convey away, any part of his estate, with intent to prevent it from being taken by legal process, or refuse to pay any debt admitted by him, or established by a valid judgment, while having estate not exempt from execution sufficient to discharge the same, concealed or withheld by him so that the same cannot be taken by legal process, or refuse to disclose his rights of action with intent to prevent the same from being taken by foreign attachment, any creditor aggrieved thereby may institute an action on this section against him, setting forth his debt and such fraudulent act or acts particularly in the complaint, and have process of attachment and execution against the body of the defendant, to be proceeded with in all respects as in actions founded upon tort.

Compare also precedents of this character under the *Connecticut* statute, which are set out in 2 Rev. Swift's Dig., pp. 531, 532; also Form No. 6861, *supra*.

3. **For the formal parts** of complaints or petitions in any particular jurisdiction consult the title Complaints, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title Declarations, *post*, p. 244.

Consult also notes to Form No. 6863, *infra*.

5. The defendant made said statement knowing it to be false, and with intent to induce the plaintiff to make said loan, and to defraud him.

Second Count.

1. Paragraph first of the first count is made a part of this count.

2. At the time of making said note the defendant owned a stock of dry goods, in a store in *New Britain.*

3. Afterwards the defendant removed and concealed said goods, with intent to prevent their being taken on legal process.

4. When said note came due, the plaintiff made diligent search for estate of the defendant, wherewith to satisfy his claim on said note, but could find none.

Third Count.

1. (*Same as 1 in second count.*)

2. After said note became due the defendant admitted that he owed the plaintiff the amount thereof, but refused to pay the same.

3. At the time of said refusal the defendant had estate not exempt from execution, more than sufficient to pay said debt, concealed and withheld by him, so that it could not be taken by legal process.

4. (*Same as 4 in second count.*)

Fourth Count.

1. (*Same as 1 in second count.*)

2. When said debt became due, the defendant had certain valuable rights of action, subject to be taken by foreign attachment.

3. The defendant, though duly requested, refused to disclose to the plaintiff against whom he had said rights of action, with intent thereby to prevent the same from being taken by foreign attachment.

4. (*Same as 4 in second count.*)

The plaintiff claims, by force of the statute in such case provided, $*800* damages.

(*Conclusion as in Form No. 5912.*)[1]

b. In Sales of Personalty.

(1) In General.[2]

1. See note 3, p. 113, *supra.*

2. **Necessary Averments.** — In an early *English* case, a declaration that merely averred that defendant sold goods to plaintiff affirming them to be his while knowing they belonged to another was good. Furnis *v.* Leicester, Cro. Jac. 474. But *compare* Pasley *v.* Freeman, 3 T. R. 51; Langridge *v.* Levy, 2 M. & W. 519; Gerhard *v.* Bates, 2 El. & Bl. 476, 75 E. C. L. 476.

In *Alabama*, the code form contains simply allegations of damages and scienter, using the word deceit. Civ. Code (1886), p. 794, and is given *infra*, Form No. 6867.

Arkansas form is set out in Sand. & H. Dig., p. 1641, and given *infra*, Form No. 6868.

Connecticut form is set out in the Practice act, p. 88, Form No. 132, and given *infra*, Form No. 6869.

Florida. — In Williams *v.* McFadden, 23 Fla. 143, it is said that "a declaration in an action of deceit for false representations concerning real estate shall state distinctly that such representations were false, that they were known to be false by the vendor, that the purchaser relied on and was misled by them, and that they were representations of material facts."

Idaho.—In Brown *v.* Bledsoe, 1 Idaho 747, six allegations were said to be necessary in a complaint in an action of deceit by false and fraudulent representations: — 1. That the representations made by the defendant were false;

Form No. 6863.

(*Title of court and cause, and commencement as in Form No. 5926.*)[1]

I. That defendant, on the *first* day of *June*, 1*898*, at *Northport*, in the county of *Suffolk*, in the state of *New York*, intending to deceive the said plaintiff and to induce him to purchase (*naming or describing personalty, as, for instance*, "a certain horse"), the property of this defendant, from him, the said defendant made to him, the plaintiff, certain false representations.[2]

2. That defendants knew them to be false; 3. That they made them with intent to defraud plaintiff; 4. That such representations were material and not matters of opinion; 5. That the plaintiff relied upon such representations in making the contract or doing the act from which the damage arose; 6. That plaintiff was fraudulently induced to forbear inquiry as to the truth of the representations made by the defendant.

Illinois. — Six different allegations must be in the declaration: 1. False representations; 2. Scienter; 3. Falsity in fact; 4. Materiality of representations; 5. Reliance by plaintiff; 6. Consequent damage. Brown *v.* Lobdell, 50 Ill. App. 559.

Kentucky form is set out in Carroll's Civil Code (1888), p. 390, Form No. 17, and set out *infra*, Form No. 6870.

Massachusetts form is set out in Pub. Stat. (1882), c. 167, p 978, and given *infra*, Form No. 6865

Nebraska.— The necessary averments are classed under three heads: 1. Misrepresentation intentionally made; 2. Falsity of the representation; 3. Plaintiff's reliance upon it to his damage. Stetson *v.* Riggs, 37 Neb. 797.

New Hampshire. — The declaration must contain these averments: 1. Intent to defraud; 2. False statements known to be false; 3. Consequent deception. Mahurin *v.* Harding, 28 N. H. 128, *citing* Barney *v.* Dewey, 13 Johns. (N. Y.) 224; Weeks *v.* Burton, 7 Vt. 67; Crooker *v.* Willard, 28 N. H. 134, note, and *distinguishing* Williamson *v.* Allison, 2 East 446; Gresham *v.* Postan, 2 C. & P. 540, 12 E. C. L. 250.

In Mahurin *v.* Harding, 28 N. H. 128, it was said: "The declaration for deceit alleges that the defendant induced the plaintiff to purchase an article by a warranty or by statements which he knew to be false and thereby deceived and defrauded him, and this is all that is essential to be alleged. It is not necessary to make any allegation in relation to the consideration or the terms of the contract of sale, unless they happen to be connected with the fraud alleged; in that case, though, if a party incautiously recites the particulars of such a contract, he may be compelled to prove them as he states them, and may fail if any material variance occurs in his proof, but the intention to defraud, the knowledge that his warranty or his statements were false, and the fact that the plaintiff was thereby defrauded, constitute, in cases of this kind, the very gist and foundation of the action of deceit."

New Jersey. — In Byard *v.* Holmes, 34 N. J. L. 296, it was said. "The action being grounded on fraud in the defendant, concurring with damage to the plaintiff resulting from that fraud, to maintain it the plaintiff must allege, with masonable certainty, and be prepared to prove, at least these three things: 1. That the defendant made some representation to the plaintiff, meaning that he should act upon it; 2. That such representation was false, and that the defendant, when he made it, knew it to be false; 3. That the plaintiff, believing such representation to be true, acted upon it, and was thereby injured." See also Lummis *v.* Stratton, 2 N. J. L. 229.

New York. — See Barber *v.* Morgan, 51 Barb. (N. Y.) 116; Upton *v.* Vail, 6 Johns. (N. Y.) 181.

Tennessee form is set out in Code (1896), § 4660, and is given *infra*, Form No 6871.

1. For the formal parts of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

2. Intent to deceive must be alleged. See cases cited in preceding note. Also, as to the manner of making the averment, see

Illinois. — Brown *v.* Lobdell, 50 Ill. App. 559; Case *v.* Ayers, 65 Ill. 142.

II. That said representations were (*enumerating them, as,* "that said horse was sound").

III. That in truth and in fact (*denying the truth, or asserting the falsity, of the representations, as, for example,* "that said horse was not sound").*[1]

Indiana. — Furnas *v.* Friday, 102 Ind. 129, in which the complaint held to be defective is set out.

Iowa. — Houghtaling *v.* Hills, 59 Iowa 287 (setting out the defective petition), *following* Oswego Starch Factory *v.* Lendrum, 57 Iowa 573.

Kansas. — Robbins *v.* Barton, 50 Kan. 120.

Massachusetts. — Tryon *v.* Whitmarsh, 1 Met. (Mass.) 1; Brady *v.* Finn, 162 Mass. 260; Collins *v.* Denison, 12 Met. (Mass.) 549, to the effect that it is not necessary to aver the intent precisely, holding that an allegation that "defendant knowingly made false representation by which plaintiff was induced," etc., was held to be sufficient with respect to the fraudulent intent.

Minnesota. — Haven *v.* Neal, 43 Minn. 315.

Missouri. — Scott *v.* Haynes, 12 Mo. App. 596, to the effect that it is sufficient to state facts from which the intent may be inferred without charging in terms that the false representations were made with intent to deceive.

New York. — Allegation of intent to deceive is necessary. Addington *v.* Allen, 11 Wend. (N. Y.) 374; Barber *v.* Morgan, 51 Barb. (N. Y.) 116; Evertson *v.* Miles, 6 Johns. (N. Y.) 138; Young *v.* Covell, 8 Johns. (N. Y.) 23; Zabriskie *v.* Smith, 13 N. Y. 322, to the effect that since the adoption of the code, intent to deceive may be inferred from other averments in the complaint without a positive allegation to that effect.

Ohio. — When several fraudulent acts are relied upon, intent to deceive must be averred, with relation to each and all such acts, in positive terms. Bartholomew *v.* Bentley, 15 Ohio 659 (setting out in substance defective petition); Belmont Bank *v.* Beebe, 6 Ohio 499

Oregon. — Schoellhamer *v.* Rometsch, 26 Oregon 394.

Pennsylvania. — An averment that damage resulted from the falsity of the representations voluntarily offered is equivalent to an allegation of intent to deceive. Boyd *v.* Browne, 6 Pa. St. 310. See also Griswold *v.* Gebbie, 126 Pa. St. 353.

South Carolina. — Munro *v.* Gairdner, 3 Brev. (S. Car.) 31.

Vermont. — West *v.* Emery, 17 Vt. 583.

1. Representation and its Falsity.— The misrepresentation and the fact of its falsity should be alleged. See cases cited in note 2, p. 114. Also, as to the manner of making this averment, see Hick *v.* Thomas, 90 Cal. 289; Williams *v.* McFadden, 23 Fla. 143; Endsley *v.* Johns, 20 Ill. 477; Smith *v.* Parker, 148 Ind. 127; Hayes *v.* Burkam, 94 Ind. 311; Crane *v.* Elder, 48 Kan. 259; Holst *v.* Stewart, 161 Mass. 516; Byard *v.* Holmes, 34 N. J. L. 296; Zabriskie *v.* Smith, 13 N. Y. 322; Cantner *v.* Auerbach, 20 Misc. Rep. (N. Y. Supreme Ct.) 281 (complaint indefinite and uncertain in not specifying the misrepresentation, there being two defendants, and the representations as to each defendant not being sufficiently certain); Blood *v.* Manchester Electric Light Co. (N. H. 1895), 39 Atl. Rep. 335; Specht *v.* Allen, 12 Oregon 117; Cutter *v.* Adams, 15 Vt. 240; Whitton *v.* Goddard, 36 Vt. 731; Kennah *v.* Huston, 15 Wash. 275; Loewer *v.* Harris, 57 Fed. Rep. 374; McCracken *v.* Robison, 57 Fed. Rep. 375.

Need not set forth the misrepresentation precisely as it is to be proved, provided it is substantially correct as alleged. Ladd *v.* Pigott, 114 Ill. 647.

It is sufficient to allege the substance of the representation relied upon without setting it out literally. Cutter *v.* Adams, 15 Vt. 237.

It is not sufficient to characterize the transaction as fraudulent: the facts constituting the fraud should be stated. The word "fraudulently," however, is properly used to characterize an act of fraud. West *v.* Wright, 98 Ind. 335.

Averment of Unsoundness of a Chattel.— In declarations in deceit for sale of an unsound horse, an allegation setting out the particular character of the unsoundness is not necessary; but if put in, it is mere surplusage. Fisk *v.* Hicks, 31 N. H. 535. But see Byers *v* Rivers, 5 Wkly. L. Gaz. (Ohio) 37, to the effect that an allegation that a horse was unsound without specifying in what respect is insufficient, and the court will

IV. That the plaintiff, relying upon said false representations, was thereby induced to purchase and did purchase (*naming or describing personalty*).[1]

V. That defendant well knew when he made the representations aforesaid that they were false.[2]

on motion, when necessary to enable the defendant to make a proper defense, require the petition to be made sufficiently definite to disclose the nature of the defect complained of.

1. Reliance of plaintiff upon defendant's representation should be alleged. Snow *v.* Halstead, 1 Cal. 359; Williams *v.* McFadden, 23 Fla. 143; Cheney *v.* Powell, 88 Ga. 629; Lincoln *v.* Ragsdale, 9 Ind. App. 555; Robbins *v.* Barton, 50 Kan. 120; Stetson *v.* Riggs, 37 Neb. 797; Simmons *v.* Kayser, 43 N. Y. Super. Ct. 131; Cox *v.* Highley, 100 Pa. St. 249; Sheldon *v.* Davidson, 85 Wis. 138; so as to show that it was the defendant's fraud that caused the damage to the plaintiff. The connection between the fraud and the injury must appear upon the face of the averments. Byard *v.* Holmes, 34 N. J. L. 296.

For declarations that had to be amended by the introduction of an allegation of reliance see Cheney *v.* Powell, 88 Ga. 629; Flanders *v.* Cobb, 88 Me. 488.

If the reliance of plaintiff must be inferred from the allegations, it need not be specifically averred in so many words. Windram *v.* French, 151 Mass. 548.

In some states the averment may be in the form that the plaintiff believed in the truth of the defendant's representations. Stetson *v.* Riggs, 37 Neb. 797; Lincoln *v.* Ragsdale, 9 Ind. App. 555.

An averment that "by reason of said false and fraudulent representations" plaintiff acted is a sufficient allegation of reliance. Robbins *v.* Barton, 50 Kan. 120.

2. Averment of Scienter. — The action for deceit being for the actual fraud or wrong involved in making or concealing the statements or concealing the facts complained of, allegations of knowledge should be made. Peek *v.* Derry, 59 L. T. 78; Southern *v.* How, Poph. 143; Cro. Jac. 468, and cases cited *supra*, note 2, p. 114.

For the manner of making the averment see

Alabama. — An averment of scienter is not essential where plaintiff can allege that reckless misstatement of defendant induced him to buy to his detriment. Munroe *v.* Pritchett, 16 Ala. 785. See also Jordan *v.* Pickett, 78 Ala. 331.

Florida. — Williams *v.* McFadden, 23 Fla. 143.

Georgia. — National Exch. Bank *v.* Sibley, 71 Ga. 730.

Illinois. — It is essential that there be allegations that there was knowledge on the part of the person making the representations complained of that they were false, or something tantamount thereto. Dunbar *v.* Bonesteel, 4 Ill. 32; White *v.* Watkins, 23 Ill. 480; Walker *v.* Hough, 59 Ill. 375; Fauntleroy *v.* Wilcox, 80 Ill. 477; Bond *v.* Ramsey, 89 Ill. 29; Linington *v.* Strong, 111 Ill. 152, Dwight *v.* Chase, 3 Ill. App. 67; Clement *v.* Boone, 5 Ill. App. 109; Sherburne *v.* Tobey Furniture Co., 19 Ill. App. 615; Rice *v.* Van Ackere, 22 Ill. App. 588; Knight *v.* Gaultney, 23 Ill. App. 376.

Indiana. — Allegations that the defendant made a representation as to a material matter in a contract, that the plaintiff relied upon the representation as true, that it turned out to be untrue, and that the plaintiff was damaged thereby, is sufficient, without any averment that the defendant knew the representation to be false. Furnas *v.* Friday, 102 Ind. 129; Ingalls *v.* Miller, 121 Ind. 188; Kirkpatrick *v.* Reeves, 121 Ind. 280; Slauter *v.* Favorite, 107 Ind. 291; Timmis *v.* Wade, 5 Ind. App. 139; Roller *v.* Blair, 96 Ind. 203; Bethell *v.* Bethell, 92 Ind. 318.

Iowa. — Avery *v.* Chapman, 62 Iowa 144.

Kentucky. — Trimble *v.* Reid, (Ky. 1895) 31 S. W. Rep. 861.

Maine. — McDonald *v.* Trafton, 15 Me. 226.

Maryland. — An averment of fraud and deceit in a declaration may, after verdict, become equivalent to a charge of actual scienter. Osgood *v.* Lewis, 2 Har. & G. (Md.) 495.

Massachusetts. — Averments that defendant wilfully, voluntarily, stated something to be true in a certain condition in regard to which he had su-

VI. That plaintiff by his reliance upon said representations suffered damage to the amount of *four thousand* dollars.[1]

Wherefore (*concluding as in Form No. 5926*).

perior means of knowledge, and that it was in reality not so, will supply the place of allegations of scienter and of intent. Chatham Furnace Co. *v.* Moffatt, 147 Mass. 405.

Mississippi. — Sims *v.* Eiland, 57 Miss. 84.

Missouri. — An allegation that the representations were untrue does not supply the place of an averment of scienter as of fraud. Fenwick *v.* Bowling, 50 Mo. App. 516; Austee *v.* Ober, 26 Mo. App. 665; Walsh *v.* Morse, 80 Mo. 568.

Nebraska. — No distinct averment of scienter is necessary: if it be alleged that defendant made a representation to induce plaintiff to act, and that it was false, it is enough. Stetson *v.* Riggs, 37 Neb. 797; Johnson *v.* Gulick, 46 Neb. 821.

New Jersey. — Byard *v.* Holmes, 34 N. J. L. 296.

New York. — Apparently it was not always necessary to allege a scienter: "the statements were so minutely descriptive of the land that on their face they clearly imported a knowledge of the facts." Bennett *v.* Judson, 21 N. Y. 238. But in Moore *v.* Noble, 53 Barb. (N. Y.) 425, it was held to be essential. See also Unckles *v.* Hentz, 19 N. Y. App. Div. 165, for defective complaint not alleging scienter.

Oregon. — Rolfes *v.* Russel, 5 Oregon 400.

Pennsylvania. — Cox *v.* Highley, 100 Pa. St. 249; Bower *v.* Fenn, 90 Pa. St. 359. Complaint must allege that defendant, when he made the misrepresentations, was conscious of their untruth, or was ignorant as to their truth. Wilson *v.* Talheimer, 20 Pa. Co. Ct. Rep. 203.

Vermont. — Bond *v.* Clark, 35 Vt. 577.

Virginia. — Brown *v.* Shields, 6 Leigh (Va.) 440; Trice *v.* Cockran, 8 Gratt. (Va.) 450.

Scienter is sufficiently averred by an allegation that "defendant" falsely and fraudulently "affirmed" that the article sold was his. Fenwick *v.* Bowling, 50 Mo. App. 516; Dane's Abr., c. 62, art. 1, § 2; Thomas *v.* Beebe, 25 N. Y. 244.

An allegation that by reason of said affirmation the plaintiff was "falsely and fraudulently deceived" (in the purchase of a newspaper business) was held insufficient on demurrer to supply the place of the essential express allegation that the defendant affirmed falsely, fraudulently or knowingly. Bayard *v.* Malcolm, 1 Johns. (N. Y.) 453. *Compare* also Bayard *v.* Malcolm, 2 Johns. (N. Y.) 550.

Charging that the defendant "knowingly, falsely and fraudulently" made representations is equivalent to charging that he knew them to be false. West *v.* Wright, 98 Ind. 336.

Warrantizando Vendidit. — In early *English* cases is found an action on the case "in the nature of deceit" for false express warranty, in which neither scienter nor intent was considered an essential averment (Williamson *v.* Allison, 2 East 446; Gresham *v.* Postan, 2 C. & P. 540, 12 E. C. L. 250). These cases later were frequently brought in assumpsit to take advantage of the money counts, but they remain precedents for cases in some jurisdictions where it was held that no scienter or intent need be averred in an action for false warranty, though the action be based on deceit. Mahurin *v.* Harding, 28 N. H. 128; Inge *v.* Bond, 3 Hawks (10 N. Car.) 101; Erie City Iron Works *v.* Barber, 106 Pa. St. 125; Burgess *v.* Wilkinson, 13 R. I. 646; Trice *v.* Cochran, 8 Gratt. (Va.) 442.

In such actions it was held that the declaration must contain averments of falsity of the warranty. Brown *v.* Shields, 6 Leigh (Va.) 440.

For forms in actions for breach of warranty in sales of chattels, generally, see the title SALES.

1. Damage, Averment of — *Generally.* — The declaration or complaint should always contain an averment of damage, since damage resulting from the injury is the gist of the action. As to the necessity for and the manner of making this averment see Ala. Civ. Code (1886), p. 794, No. 21; London, etc., F. Ins. Co. *v.* Liebes, 105 Cal. 203; Bodkin *v.* Merit, 102 Ind. 293; Proctor *v.* Crozier, 6 B. Mon. (Ky.) 268; McAleer *v.* Horsey, 35 Md. 439; Stetson *v.* Riggs, 37 Neb. 797; Gilcrest *v.* Nantker, 42 Neb. 564; Byard *v.* Holmes, 34 N. J. L. 296; Simmons *v.* Kayser, 43 N. Y. Super. Ct. 131; Upton *v.* Vail, 6 Johns.

(2) As to Title of Personalty Sold.[1]

Form No. 6864.

(*Title of court and cause, and commencement as in Form No. 5926.*)[2]

I. That on the *first* day of *June*, 1898, at *Northport*, in *Suffolk* county, in the state of *New York*, the defendant having offered to sell to the plaintiff a certain *tandem bicycle*, did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that said *tandem bicycle* was the property of the defendant.[3]

II. That the plaintiff, relying upon said representations, purchased the said *tandem bicycle* of the defendant, and paid him therefor the sum of *three hundred* dollars.[4]

III. That in truth and in fact, and as the defendant then well knew, said representations were false, and said *tandem bicycle* was not the property of the defendant, but was the property of one *Samuel Short.*

IV. That thereafter the said *Samuel Short* sued this plaintiff in the *county* court of said *Suffolk* county to recover the value of said *tandem bicycle.*

V. That the plaintiff gave the defendant due and timely notice of

(N. Y.) 181; Cobrick *v.* Swinburne, 105 N. Y. 503; McKinnon *v.* McIntosh, 98 N. Car. 89; Wilcox *v.* McCoy, 21 Ohio St. 655; Smith *v.* Bowler, 2 Disney (Ohio) 156; Cox *v.* Highley, 100 Pa. St. 249; Bremond *v.* McLean, 45 Tex. 11; Childs *v.* Merrill, 63 Vt. 463; Loewer *v.* Harris, 57 Fed. Rep. 375.

Illustration. — A count which ended "And the plaintiff says that by means of said false and fraudulent representations the defendant obtained from the plaintiff the sum of *two thousand* dollars, and the plaintiff is entitled to recover the same from the defendant," was held to contain sufficient averment of damages. McAleer *v.* Horsey, 35 Md. 439.

If facts averred show that damage necessarily resulted, it is enough. Wainwright *v.* Weske, 82 Cal. 193; Bartlett *v.* Odd Fellows Sav. Bank, 79 Cal. 218; Bremond *v.* McLean, 45 Tex. 10.

If there is more than one plaintiff, damages resulting to each must be averred, or facts showing on face such damage. Bartges *v.* O'Neil, 13 Ohio St. 72.

If special damages are claimed, they should be fully stated in the declaration, and will not be held redundant or irrelevant. Wilcox *v.* McCoy, 21 Ohio St. 635.

Contract need not set forth the plaintiff's declaration or complaint in an action for deceit. "If it were [necessary], it is conceded that not being done the written evidence would not be admissible. This point was ruled in Barney *v.* Dewey, 13 Johns. (N. Y.) 226. Spencer, J., said: 'It was requisite to set forth the contract between the parties, or any consideration; it is enough to state the fraud and deceit, and the damages.'" Dye *v.* Wall, 6 Ga. 584.

1. Fraud, not contract, is the foundation of actions of this character. McDuffie *v.* Beddoe, 7 Hill (N. Y.) 578.

Consideration is not necessary to the maintenance of the action. Barney *v.* Dewey, 13 Johns. (N. Y.) 224; Corwin *v.* Davison, 9 Cow. (N. Y.) 22.

2. For the formal parts of complaints or petitions in any particular jurisdiction consult the title Complaints, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title Declarations, *post*, p. 244. See also notes to Form No. 6863, *supra*.

3. Averment of Fraud. — Stating "that defendant falsely pretended to be the owner" of a certain chattel, and "that he fraudulently sold it to the plaintiff, whereby he became liable," fixes the gravamen of the action as fraud. Bayard *v.* Malcolm, 2 Johns. (N. Y.) 560; Barney *v.* Dewey, 13 Johns. (N. Y.) 224; Edick *v.* Crim, 10 Barb. (N. Y.) 445.

4. Averment of price paid goes only to the amount of damage. 1 Abb. F., p. 434.

the commencement of said action and required him to defend the same; but the defendant neglected to defend said action.[1]

VI. That thereupon the plaintiff defended said action and used all due diligence in the defense thereof.

VII. That such proceedings were afterwards had therein that the said *Samuel Short* recovered a judgment against the plaintiff for the sum of *three hundred* dollars, which this plaintiff has since paid.

VIII. That by reason of the premises this plaintiff has been misled to his damage in the sum of *five hundred* dollars.

Wherefore (*concluding as in Form No. 5926*).

Form No. 6865.

(Mass. Pub. Stat. (1882), c. 167, § 94.)[2]

[(*Title of court and cause, and commencement as in Form No. 6942.*)][3]

And the plaintiff says the defendant sold to him *ten* bags of coffee, and to induce the plaintiff to buy the same the defendant falsely represented to him that said coffee was the property of the defendant;

1. Averment of Notice. — That two owners had recovered against plaintiff on the ground that defendant was not the owner is a proper allegation; and that defendant was a witness at the trial of the owner's action is equivalent to an allegation of an averment of notice. Barney *v.* Dewey, 13 Johns. (N. Y.) 224; Corwin *v.* Davison, 9 Cow. (N. Y.) 22.

Precedent of a declaration in a similar action is found in Burgess *v.* Wilkinson, 13 R. I. 647, which, omitting the formal parts, is as follows:

"For that the said defendant on, to wit, the *first* day of *December*, 1879, at *Providence*, in said county, being possessed of three chamber sets, three feather beds, three mattresses and bedding for the same, fifty yards of English carpeting, twenty yards of paper oil carpeting, twenty yards of rag carpeting, twenty yards of straw carpeting, one cook stove, one parlor stove, sixteen chairs, one black walnut lounge, three rocking chairs, affirmed and declared to the plaintiffs that the said goods and chattels above mentioned were the property of him, the said *Daniel Wilkinson, Junior*; that he was the sole, true, and lawful owner of the same; and had in him good right, full power, and lawful authority to sell and dispose of the same, and thereby induced the plaintiffs to advance him, the said *Daniel Wilkinson, Junior*, a large sum of money, to wit, *one hundred* dollars lawful money of the United States; and the said *Daniel Wilkinson, Junior*, then and there being possessed of the aforesaid goods and chattels, gave to the said plaintiffs a mortgage of the same as security for the said sum of money advanced as aforesaid; and the said plaintiffs aver that the said goods and chattels never were the property of the said defendant, but at the time and place of the affirmation and declaration aforesaid, to wit, *December 1*, 1879, they were the proper goods and chattels of, to wit, *John Doe*, and of right to him did belong; and the said *John Doe* now takes and retains the said goods and chattels, and refuses to give and surrender them up to the plaintiffs, to the damage of the plaintiffs, as they say, *one hundred* dollars."

In this case it was held that the declaration was not in assumpsit, and if good could only be *super casum* in tort, and that when a vendor of chattels or a mortgagor in possession affirms his ownership thereof, a vendee or mortgagee damnified by such affirmation can maintain trespass on the case against the vendor or mortgagor without declaring such affirmation to have been made with knowledge of its falsity or with intent to deceive.

2. Consult Litchfield *v.* Hutchinson, 117 Mass. 195; Nowlan *v.* Cain, 3 Allen (Mass.) 261; Pearson *v.* Howe, 1 Allen (Mass.) 207; Stevens *v.* Fuller, 8 N. H. 463.

3. The matter enclosed by [ ] is not in the statutory form, but is added to complete the form.

Consult notes to Form No. 6864, *supra*.

and the plaintiff, believing that said representation was true, was thereby induced to purchase said coffee, and paid therefor to the defendant the sum of *one hundred* dollars; and said coffee was not the property of the defendant, which the defendant then knew, but was the property of one *John Den*, who has taken the same from the plaintiff.

[(*Concluding as in Form No. 6942.*)][1]

(3) As to Quality of Personalty Sold.[2]

GENERALLY.

Form No. 6866

(*Title of court and cause, and commencement as in Form No. 5926.*)[3]

I. That defendant, on the *first* day of *June*, 1898, at *Northport*, in the county of *Suffolk*, intending to deceive the said plaintiff and to induce him to purchase certain oysters, the property of this defendant, from him the said defendant, made to him, the said plaintiff, certain false representations.

II. That said representations were that said oysters were of the quality of the best *blue point* oysters.

III. That in truth and in fact the said oysters were not of the quality of the best *blue point* oysters, but were of a quality greatly inferior.

(*Continuing and concluding as in Form No. 6863, after* *.)

Form No. 6867.

(Ala. Civ. Code (1886), p. 794, No. 21.)

[(*Venue and title of court as in Form No. 5907.*)][1]

John Doe, plaintiff, against *Richard Roe*, defendant. } The plaintiff claims of the defendant *fifty* dollars, damages for deceit in the sale of a *horse* (*or as the case may be*), which the defendant, at the time of the sale, knew to be unsound.

Jeremiah Mason, Att'y for Pl'ff.

Form No. 6868.

(Sand. & H. Dig. Ark. (1894), p. 1641.)[4]

(*Title of court and cause, and commencement as in Form No. 5909*) that about the *tenth* day of *August*, 1894, he purchased of the defendant,

1. The matter enclosed by [ ] is not in the statutory form, but is added to complete the form.

Consult notes to Form No. 6863, *supra*.

2. **Action of deceit will lie** notwithstanding the sale contained a warranty of quality. Indianapolis, etc., R. Co. *v.* Tyng, 63 N. Y. 653. But the complaint should not be so framed as to constitute one either of deceit or for false warranty. Marsh *v.* Webber, 13 Minn. 109; Brown *v.* Brockett, 55 How. Pr. (Herkimer County Ct.) 32; Pierce *v.* Carey, 37 Wis. 232.

3. **For the formal parts** of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

Consult also notes to Form No. 6863, *supra*.

4. Consult notes to Form No. 6863, *supra*.

Richard Roe, a *horse*, at the price of *two hundred* dollars, then in hand paid to him, the defendant, on said purchase, fraudulently representing the *horse* to be sound, when he knew the *horse* to be unsound and diseased with the *fistula*;[1] that by reason of said unsoundness the *horse* has become worthless, and plaintiff has been put to expense in keeping and trying to cure him.

Wherefore (*concluding as in Form No. 5909*).

Form No. 6869.

(Conn. Prac. Act, p. 88, No. 132.)

[(*Commencement of writ as in Form No. 5912.*)][1]

1. On *August 2nd*, 1899, the plaintiff bargained with the defendant for the purchase of a *horse* belonging to the defendant, and the defendant to induce the plaintiff to buy said *horse* and to pay *three hundred* dollars therefor, declared to the plaintiff that said *horse* was sound in wind and limb, and free from any defect whatever.

2. The plaintiff, believing said statements to be true and induced thereby, bought said *horse* and paid *three hundred* dollars to the defendant therefor.

3. The defendant made said statements knowing them to be false, with intent thereby to induce the plaintiff to make said purchase and to defraud him.

4. Said *horse* was in fact unsound, and then, and for a long time before, had an incurable disease, called the *glanders*.

5. Said *horse* is unfit for use and of little value, and the plaintiff has expended *fifty* dollars in feeding and taking care of said *horse*, and in endeavoring to cure him of said disease.

The plaintiff claims *four hundred* dollars damages.

[(*Concluding writ as in Form No. 5912.*)][1]

Form No. 6870.

(Carroll's Civ. Code Ky. (1888), p. 390, No. 17.)[2]

(*Title of court and cause, and commencement as in Form No. 5918.*) On *May 1*, 1887, the defendant *Richard Roe*, offering to sell him a horse, fraudulently represented him to be a kind, gentle, *buggy horse*, and plaintiff, relying on said representation, bought said horse, and paid defendant therefor *two hundred* dollars; that at the time of said

1. The matter enclosed by [ ] is not in the statutory form, but is added to complete the form.

Consult notes to Form No. 6863, *supra*.

2. Consult notes to Form No. 6863, *supra*.

Another statutory form is given in the *Massachusetts* statute (Pub. Stat. (1882), c. 167, § 94), which, omitting formal parts, is as follows: "And the plaintiff says that defendant sold him a *horse*, for which the plaintiff paid him *one hundred* dollars, and to induce the plaintiff to buy said *horse* the defendant falsely represented to the plaintiff that said *horse* was sound, so far as the defendant knew, and the plaintiff, believing that said representation was true, was thereby induced to buy, and did buy, said *horse*; and said *horse* was not sound, but had a certain disease called *glanders*, which the defendant then knew."

purchase the horse was, as defendant well knew, wild and unmanageable, and would not and will not work in a buggy, by reason whereof he is worthless to plaintiff, and he has been damaged in the sum of *one hundred* dollars.

Wherefore (*concluding as in Form No. 5918*).

Form No. 6871.

(Tenn. Code (1896), § 4660, No. 14.)[1]

John Doe
against
Richard Roe.

The plaintiff sues the defendant for *fifty* dollars, as damages for a deceit in the sale of a *horse*, which the defendant sold to the plaintiff, and at the time knew to be *unsound*.

Jeremiah Mason, attorney for the plaintiff.

MISREPRESENTING VALUE OF GOOD-WILL OF BUSINESS OR TRADE SOLD.

Form No. 6872.

(*Commencement as in Form No. 5926.*)[2]

I. That on the *first* day of *June*, 1*898*, at *Northport*, in *Suffolk* county, in the state of *New York*, the defendant being engaged in business as (*stating business by name or description*), and having offered to sell out the stock, fixtures and good-will of his said business to the plaintiff, did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that the said business, as theretofore conducted by defendant, was a profitable business, and that the net profits thereof, realized by the defendant during the year ending the *first* day of *May*, 1*898*, had exceeded the sum of *ten thousand* dollars.

II. That this plaintiff, relying on said representations, purchased of defendant the stock, fixtures and good-will of defendant, and paid him therefor the sum of *fifty thousand* dollars.

III. That in truth, and as defendant then well knew, said representations were false, and said business was not and never had been a profitable business, and the defendant had not realized any profits whatever from the same during the year ending the *first* day of *May*, 1*898*.

IV. That by reason of the premises, this plaintiff was misled to his damage *fifty thousand* dollars.

[Wherefore (*concluding as in Form No. 5926*).]

1. Consult notes to Form No. 6863, *supra*.

2. For the formal parts of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

Consult notes to Form No. 6863, *supra*.

(4) As to Quantity of Personalty Delivered.

Form No. 6873.[1]

(*Title of court and cause, and commencement as in Form No. 5926.*)[2]

I. That the plaintiff, on the *first* day of *June*, 1*898*, at *Northport*, in *Suffolk* county, in the state of *New York*, bought of the defendant and defendant sold and agreed to deliver to plaintiff *one hundred barrels of oysters*, each barrel to contain *five* bushels, for the price of *five* dollars for each such barrel.

II. That the defendant afterwards, on the *tenth* day of *June*, 1*898*, intending to defraud plaintiff, fraudulently and deceitfully delivered to him *one hundred barrels of oysters*, each barrel containing only *four and a half* bushels as and for the said quantity of *one hundred barrels of oysters*, each containing *five* bushels of oysters, so bargained for and sold, and pretending it so to be though then well knowing that the said *one hundred barrels of oysters* so delivered did not contain the quantity of oysters bargained for and sold, but that each barrel of the *one hundred barrels of oysters* so delivered as aforesaid, contained only *four and a half* bushels of oysters, to the damage of the plaintiff in the sum of *one hundred and fifty* dollars.

Wherefore (*concluding as in Form No. 5926*).

(5) Illustrative Precedents.[3]

1. Another Form. — In 2 Rev. Swift's Dig., p. 526, a declaration for deceitfully selling a smaller quantity of coals than pretended is given as follows, omitting the formal parts: "That on the *first* day of *June*, 1*898*, at *Blank*, the plaintiff, at the special instance and request of the defendant, bargained for and agreed to buy of the defendant, and the defendant then and there sold to the plaintiff, *two chaldrons and a half* of coals, wharf measure, at and for the price of ——— dollars per each chaldron thereof, and the defendant afterwards, on the day aforesaid, contriving and intending to deceive and defraud the plaintiff, did fraudulently and deceitfully deliver to the plaintiff a certain quantity of coals as and for the said quantity of coals so bargained for and sold to the plaintiff as aforesaid, and by falsely and fraudulently representing to the plaintiff the quantity so delivered to be the full quantity induced the plaintiff to accept the same as such, when in fact, the coals so delivered by the defendant to the plaintiff as aforesaid, at the time of the delivery thereof were different from the full quantity which they ought to have contained, and wanted of the said quantity which they ought to have contained *twenty* bushels of coals, which he, the defendant, then well knew; and so the plaintiff says that the defendant falsely deceived and defrauded him in the said sale and delivery, and thereby he, the plaintiff, lost and has been deprived of all the benefit which he might and would otherwise have derived from the said sale, and has been otherwise greatly injured and damnified."

Substantially the same precedent, containing three counts, is given in 3 Chit. Pl., p. 388.

2. For the formal parts of complaints or petitions in any particular jurisdiction consult the title Complaints, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title Declarations, *post*, p. 244.

Consult also notes to Form No. 6863, *supra*.

3. In an action against the purchaser to recover damages alleged to have been caused by fraudulent representations, the complaint alleged in substance that defendants chartered a vessel for the use of D. and others, who were engaged, in violation of the neutrality laws, in organizing a hostile and revolutionary enterprise against a country friendly to the United States, and, with knowledge of the facts, purchased

(*a*) *In General.*[1]

arms and ammunition for such unlawful enterprise, and then, by means of false and fraudulent representations that D. was a friend about to visit different places in Nicaraugua on a pleasure trip, and desired a letter to aid him in procuring information about the people and country, induced plaintiffs to give them a letter introducing D. to N., plaintiffs' agent at Corn island, which letter they delivered to D., with another from them to N., stating they desired him to furnish provisions and supplies for said vessel, and they would honor drafts which its captain was authorized to draw upon them; that D., on his arrival at Corn island, presented the letter to N., and subsequently the captain of said vessel, "by concealing his true character, or by threats or fraud," procured from N. certain moneys and supplies belonging to plaintiffs, for which they had not been paid; that D. landed at Corn island and, with his followers, "unlawfully and improperly entered plaintiffs' buildings and property there;" that a naval officer of the United States, unjustly suspecting that plaintiffs were lending aid to the unlawful enterprise, forcibly entered upon their premises, seized one of their vessels, interrupted their business and injured their credit. On demurrer to the complaint, it was held that it failed to set forth a cause of action; that there was no relation of cause and effect between the letter of introduction and the acts resulting in loss.

1. Other Precedents. — For examples of declarations and complaints for deceit in the sale of chattels see Osgood *v.* Lewis, 2 Har. & G. (Md.) 496; Nelson *v.* Ladd, 47 N. H. 343; Mitchell *v.* Worden, 20 Barb. (N. Y.) 254; Barber *v.* Morgan, 51 Barb. (N. Y.) 117; Indianapolis, etc., R. Co. *v.* Tyng, 63 N. Y. 654; Mowry *v.* Schroder, 4 Strobh. L. (S. Car.) 74.

Sale of Pine Logs. — In Anthon's Am. Prec., p. 242, is the following declaration, omitting formal parts:

"For that the plaintiff, on *August twentieth*, A. D. 1880, at *London*, bargained with the said *Roe* [defendant] to buy of him *one hundred* pine logs, then lying at *Liverpool*, as and for pine logs sound and fit to make clear and merchantable boards, for the sum of £200, and the said *Roe* then and there sold the same to the plaintiff as and for pine logs sound and fit to make clear and merchantable boards, for the said sum of £200, then and there paid by the plaintiff to the said *Roe*; which said pine logs were there, at the time of said sale, unsound, rotten, and unfit to make clear and merchantable boards, which the said *Roe* then and there well knew. And so the said *Roe* deceitfully injured and defrauded the plaintiff, to his damage, as he says, £200."

Sale of Soap. — In Anthon's Am. Prec., p. 243, the following declaration is set forth, omitting formal parts:

"First Count. For that whereas the said *Roe* [defendant] at *Salem*, on *July first*, A. D. 1879, in consideration of $150, to him paid by the said *Doe* and *Den* [plaintiffs] undertook and promised to deliver them 2907 lbs. of best soap and 3042 lbs. weight of soap of the second quality, with boxes for the same, and to be good and merchantable soap; but the said *Roe* thereafterwards, on the same day, disregarding his undertaking aforesaid, and contriving to deceive the said *Doe* and *Den*, delivered them 5949 lbs. weight of soap, insufficiently and deceitfully made of bad and unsuitable materials, and of which the said *Roe* was well knowing.

Second Count. And for that whereas the said *Doe* and *Den* thereafterwards, viz., on the same day, bargained with the said *Roe* for a quantity of soap, to be of the best and second quality; and the said *Roe* then and there sold to the said *Doe* and *Den* other 5949 lbs. weight of soap, by warranting part thereof, viz., 2907 lbs. weight, to be of the best quality, and 3042 lbs. weight to be of the second quality: But the said *Roe* then and there, upon the bargain aforesaid, contriving to deceive and defraud the said *Doe* and *Den*, delivered to the said *Doe* and *Den* other 5949 lbs. weight of soap, insufficiently and deceitfully made, and of bad and unsuitable materials, of which the said *Roe* was well knowing and received therefor, and for the boxes containing the same, the sum of $250 in payment for the same, sold as for good and merchantable soap. And the said *Doe* and *Den* aver, that, being ignorant of the fraud and deceit of the said *Roe* in the premises, they thereafterwards, viz., on *August sixth*, A. D. 1879, shipped and exported the

Form No. 6874.

SALE OF BOILER.

(Precedent in Erie City Iron Works *v.* Barber, 106 Pa. St. 126.)[1]

[(*Title of court and cause, and commencement as in Form No. 6947.*)][1]

And also for that heretofore, to wit, on the day and year aforesaid, to wit, at the county aforesaid, the defendant being a manufacturer of a certain boiler which defendant was desirous that plaintiffs should purchase for use in a certain mill stocked with lumber and machinery, of which plaintiffs were the owners, in consideration that plaintiffs would then and there purchase said boiler for use in said mill, defendant falsely and fraudulently warranted said boiler to be equal to, to wit, flange iron, and to be entirely safe and fit for use, and the plaintiffs then and there relying upon said false and fraudulent warranty of said defendant, purchased said boiler for use in said mill, but defendant was guilty of a breach of duty, deceit and negligence in so as aforesaid warranting said boiler, because said boiler was on the contrary not equal to flange iron, and was entirely unfit and unsafe for use, of which defendant had then and there notice, and well knew at the time of making the said warranty.

[(*Signature of attorney and verification as in Form No. 6947.*)][2]

SALE OF MATTRESS INFECTED WITH VERMIN.

Form No. 6875.

(Precedent in Sherburne *v.* Tobey Furniture Co., 19 Ill. App. 616.)[3]

[(*Commencement as in Form No. 6939.*)

For that whereas on the *1st* day of *June*, 1*880*, at the city of

said two quantities of soap, delivered by the said *Roe* as aforesaid, for sale beyond the seas, viz., to *Nantz* in *France*; but the said soap being bad, unmerchantable, insufficiently and deceitfully made, the said *Doe* and *Den* there, to wit, at *Salem*, aforesaid, on *September third*, A. D. 1*879*, suffered great loss on the said soap, viz., $*500* expense thereon, and $*200* profit arising on merchantable soap; to the damage, etc."

1. This was an action of deceit to recover damages for the loss sustained by plaintiff in the partial destruction of their mill by the explosion of a boiler, which explosion was due to alleged deceit of defendant in selling to plaintiff a defective boiler, and in falsely and knowingly warranting such boiler to be safe and fit for use. The case was twice tried. At the former trial the plaintiffs obtained judgment, which was reversed. On the second trial, plaintiffs sought recovery upon their count for deceit, which as amended, was as set out in the text. They recovered judgment, which, however, was reversed on a question of evidence merely, not on account of the insufficiency of the statement. Erie City Iron Works *v.* Barber, 106 Pa. St. 126.

In Waters Patent Heater Co. *v.* Smith, 120 Mass. 444, to a declaration for breach of contract, defendant answered, setting up that the defendants were induced to enter into the contract "by the false and fraudulent representations of the plaintiff as to the capability of the said heater;" that it did not work as was represented, and that they offered to return it. A verdict for the defendant was sustained as against plaintiff's exceptions.

2. **For the formal parts** of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

Consult also notes to Form No. 6863, *supra*.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

3. This was an action for deceit. The

Chicago in *Cook* county, *Illinois*,][1] the plaintiff bargained with the defendant for the purchase of a fine wool mattress for the sum of $*8*, and for which sum the defendant undertook to make, sell and deliver to the plaintiff a mattress of clean, fine wool; that the defendant did afterward deliver to the plaintiff a mattress, which it represented to be of the quality aforesaid, said mattress being covered with cloth so that the plaintiff could not see what was contained within it; that the plaintiff believed the representations of the defendant and accepted said mattress, and paid the defendant $*8* therefor; that the plaintiff, believing it to be clean and wholesome and made of clean wool as represented by the defendant, used the same for a bed for certain members of his family, and after he had used the same for a few months he discovered that it was infested with moths and worms; that he then caused the cover of said mattress to be ripped off and thereby discovered that said mattress was not made of clean, fine wool, but of a mixture of dirt and filthy rags of all colors and kinds, and was totally unfit for a bed or to be used in the house of any person; that the plaintiff says that the defendant, by means of the promises, falsely and fraudulently and with intent to cheat the plaintiff and to obtain his money by false pretenses, deceived the plaintiff on the sale of said mattress, and thereby the said mattress, then and there, not only became and was of no use or value to the plaintiff, but became and was a nuisance and a breeder of vermin, and endangered the health and lives of the plaintiff and his family, and the plaintiff was put to great expense to clear said moths out of his house, and was greatly annoyed and his furniture was injured, to his damage of $*1,000*. [(*Signature of attorney as in Form No. 6939.*)]

SALE OF SAILOR'S SHARE IN A PRIVATEER.

Form No. 6876.

(Anthon's Am. Prec., p. 245.)

[(*Commencement as in Forms Nos. 6934 to 6952.*)][2]

For that the said *Roe* [defendant] at [*New London*, *Connecticut*, on *May first*, A. D. 18*12*,] he then being a sailor registered on board the ship called *Good Cheer*, and a discourse arising between the plaintiff and the said *Roe*, relative to the purchase of a part of the share of a common sailor in said ship, in any prizes to be taken by her in

trial court instructed the jury to find defendant not guilty. On appeal, it was held that the court erred in so instructing the jury, and judgment was reversed and the cause remanded.

1. **For the formal parts** of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra*.

2. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within or enclosed by [ ] is not in the precedent, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra*.

her then next intended cruise against the *English*, he, the said *Roe*, then and there offered to the said plaintiff to assign and sell him *one quarter* part of such share, in consideration of the sum of *eight hundred* dollars, to be paid by the plaintiff to the said *Roe*, and the said *Roe*, that he might induce the plaintiff to purchase such *quarter* part aforesaid, then and there confidently affirmed and declared to the plaintiff, that he the said *Roe* was, at that time, a sailor registered on board said ship; and he further then and there falsely and fraudulently affirmed and declared, that he had good right and authority to sell the same, or any part thereof, and thereby induced the plaintiff to purchase a *quarter* part of such share; and the plaintiff, giving credit to the said affirmation of the said *Roe*, then and there paid the said *Roe*, as a consideration for the same, the full sum of *eight hundred* dollars aforesaid; and the said *Roe* then and there pretendedly assigned and conveyed to the plaintiff the whole of one such *quarter* part as aforesaid. Now the plaintiff in fact says, that the said *Roe* was, at that time, and still is, the indented servant of one *John Den*, and that the said *Roe* had no right in any share of a common sailor as aforesaid, nor in any part thereof; and that the labour and services of the said *Roe*, as a sailor as aforesaid, were for the proper use and benefit of the said *John Den*; and that the said *Roe* had no right or authority to sell such share, or any part thereof; and that the said *John Den* afterwards claimed and received the whole benefit of the whole share aforesaid. And so the said *Roe* deceived the plaintiff, and defrauded him of the said sum of *eight hundred* dollars, which the plaintiff paid to the said *Roe* as aforesaid; to the damage [of the plaintiff, as he says, *eight hundred* dollars]. [(*Concluding as in Forms Nos. 6934 to 6952.*)]

SALE OF STEAM TUG BOAT.

Form No. 6877.

(Precedent in Wheeler *v.* Baars, 33 Fla. 697.)[1]

[(*Commencement as in Form No. 6938.*)][2]

(1.) That on *March 28th*, 1884, the plaintiff bought of defendant, as trustee of *Piaggio Bros.*, one steam tug called "*Jumbo*," for a large sum of money, viz: The sum of $4,250, and that upon said sale the defendant falsely and fraudulently represented that said steam tug was free from all liens and encumbrances, whereas in truth and in fact there was a lien upon said tug for the sum of $246, of which said lien the defendant well knew, and of which plaintiff was ignorant. That since said purchase plaintiff has been compelled to pay the full

1. **Other Precedents.** — For complaint for deceit in the sale of a boat see Brenton *v.* Davis, 8 Blackf. Ind. 317. For declaration for deceit in the sale of a schooner see Springer *v.* Crowell, 103 Mass. 65.

2. **For the formal parts** of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

The matter to be supplied between [ ] is not in the reported case.

Consult also notes to Form No. 6863, *supra*.

amount of said lien in order to prevent a sale of the said tug to pay same, which lien together with interests and costs of suit brought by the said lien holders to enforce same, and which plaintiff was also compelled to pay, amounts to $*337.54*.

(2.) (*Second count.*)[1]
(3.) (*Third count.*)[2]
(4.) (*Fourth count.*)[3]
(5.) (*Fifth count.*)[4]
(6.) (*Sixth count.*)[4]
[(*Concluding as in Form No. 6938.*)][5]

1. **The second count** was substantially the same as the first, except that it alleged that the false representation by the defendant was made in order to induce the plaintiff to purchase said tug.

2. **The third count** alleged in substance: "That the defendant, craftily and fraudulently intending to deceive he plaintiff and to benefit himself thereby, as agent of *Rinaldo Piaggio*, caused he plaintiff and others to purchase on *March 28th*, 18*84*, of the said *Rinaldo Piaggio* a steam tug called '*Jumbo*,' and in order to effect said sale falsely and fraudulently represented to plaintiff that the said tug was free from all liens and encumbrances, whereas in truth and in fact, as defendant ought to have known, there was a lien upon said tug and of which plaintiff was ignorant; and plaintiff has been compelled to pay the full amount of said lien together with the costs of suit brought to enforce the same, amounting to $*337.54*."

3. **The fourth count** alleged that the "defendant, as trustee for *Piaggio Bros.* and *R. L. Campbell*, on and prior to the sale of said tug boat to the plaintiff, falsely and wrongfully intending to deceive the plaintiff to his own profit and advantage, failed to inform plaintiff that there was a claim existing against said tug, although plaintiff particularly inquired of him whether there was any claim upon said tug, and although defendant knew at the time of said inquiry that *W. F. & J. E. Creary* had a claim against said tug for $*242.06*, and that they had brought suit thereupon, and that of the existence of such claim plaintiff remained ignorant until after his purchase of said tug, and that he was compelled to pay the judgment for $*337.54* that said parties afterward recovered on said claim against said tug in order to save her from sale thereunder."

4. **Fifth and Sixth Counts.**— Before plea by the defendant the plaintiff filed, as an amendment to his declaration, two additional counts, in substance as follows:

"(1) That the defendant as trustee for *Piaggio Bros.* and *R. L. Campbell* negotiated with plaintiff's agent, one *William Elias*, for the sale of said steam tug to plaintiff, and that during the pendency of said negotiations that were consummated by a sale on *March 28th*, 18*84*, of said tug to plaintiff, defendant falsely and fraudulently warranted said boat to be free from all encumbrances in the shape of claims, whereas in truth and in fact the firm of *W. F. & J. E. Creary* had a claim against the tug which, since said sale to plaintiff, the *Circuit* Court of *Escambia* county and the *Supreme* Court of *Florida* have adjudged to be a valid lien upon said tug for materials and repairs amounting to $*246.02*, and plaintiff was compelled to pay the full amount of same with costs of suit, amounting in all to $*337.54*." (2) The second additional count charges substantially that the "defendant as agent for *Rinaldo Piaggio*, while conducting negotiations that culminated on *March 28th*, 18*84*, in the sale of the steam tug '*Jumbo*' by the said *Rinaldo Piaggio* to plaintiff, falsely and fraudulently warranted that no claims existed against said steam tug, whereas in truth and in fact a claim of *W. F. & J. E. Creary* for materials and repairs, amounting to $*246.02*, did so exist, which, since said sale to plaintiff the *Circuit* Court of *Escambia* county and the *Supreme* Court of *Florida* have adjudged to be a valid lien upon said tug, and plaintiff has been compelled to pay same with costs of suit brought to enforce same, amounting in all to $*337.54*."

5. See note 2, p. 128, *supra*.

SALE OF WOOL ARTFULLY PACKED.

Form No. 6878.

(2 Rev. Swift's Dig., p. 527.)[1]

[(*Commencement as in Forms Nos. 6934 to 6952.*)]

That, on the *first* day of *June*, 1898, the plaintiff bargained with the defendant to buy of him a certain parcel of wool, which said wool was then packed, bound, and tied up into divers, to wit, *one hundred and twenty*, parcels, in the form, and which had the appearance of wool called *fleece wool*, and the defendant then well knowing that the said wool was deceitfully packed, bound, and tied up, and that the middle or inside of divers of the said parcels thereof was not *fleece wool*, nor good or merchantable wool, but was a wool of much less value than *fleece wool*, and not good or merchantable wool, by then and there falsely and deceitfully representing to the plaintiff the said wool, and every part thereof, to be *fleece wool*, and to be packed, bound, and tied up fairly and without deceit, and to be all good and merchantable, then and there falsely and deceitfully bargained and sold all the said wool to the plaintiff as and for good merchantable *fleece wool*, packed, bound, and tied up fairly without deceit, for a large sum of money, to wit, for the sum of ——— dollars, to be therefor paid, and the plaintiff afterwards paid the defendant for the same; and the plaintiff further says that a great part, to wit, *one hundred* of the said parcels thereof, were not *fleece wool*, nor good or merchantable wool, but were then and there wool of a much less value than *fleece wool*, and not good or merchantable wool; and so the said defendant, on the day and year aforesaid, falsely and deceitfully deceived the plaintiff, to his damage ——— dollars.

[(*Conclusion as in Forms Nos. 6934 to 6952.*)]

(*b*) *Sale of a Business.*[2]

1. A similar form is given in Sayles' Tex. Pl., § 91.

For the formal parts of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied between [ ] is not in the precedent, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra*.

2. For substance of a declaration for deceit in the sale and purchase of stock, fixtures and good-will of a business, see Packard *v.* Pratt, 115 Mass. 405.

Sale of Livery Business, etc.— In Nowlan *v.* Cain, 3 Allen (Mass.) 261, the declaration alleged that "defendant sold plaintiff *three* horses, *four* wagons, *four* harnesses, *three* slaves, and certain stable utensils, together with the good-will of his jobbing business, in *Boston*, for which plaintiff paid him $2,300, and to induce the plaintiff to make said purchase, defendant falsely and fraudulently represented to him that his business was profitable, and gave him constant employment, and that he had four stands in *Boston*, and *one* of his horses cost him $200, and was a sound and good horse, and he desired to sell it only because of his ill health and consequent inability to work: of all which the plaintiff knew nothing, but relied on the representations of the defendant, and was thereby induced to make the purchase, and the various representations were false." Verdict for plaintiff, and defendant's exceptions overruled.

Cox *v.* Highley, 100 Pa. St. 250, was

aa. BOOK AND STATIONERY BUSINESS.

Form No. 6879.

(Conn. Prac. Act, p. 88, No. 133.)

[(*Commencement of writ as in Form No. 5912.*)][1]

1. On *May 15th*, 1879, the defendant kept a circulating library and carried on the trade of bookseller and stationer at a certain building

a case for deceit. The suit was begun by a capias ad respondendum. The narr. averred that the defendant "alleged that he was possessed of a certain stable in the city of *Philadelphia* and carried on therein the business of a livery stable, and falsely, fraudulently and deceitfully represented to the plaintiff that he was the absolute owner of a certain lease of said premises which he offered to sell to plaintiff for the sum of $*234*, and thereupon to place him in quiet and peaceable possession thereof; that the plaintiff confiding in said representations purchased said lease and paid to defendant said sum of $*234*; whereas the said lease was not the property of the defendant, nor was he in the peaceable possession of said premises, but the same were in possession of one *Ranalls* to whom the defendant had a short time previously sold and delivered the same, and the said *Ranalls* refused to deliver up the same to the plaintiff."

Sale of Quartz Mill and Mining Business. — In Pedrick *v.* Porter, 5 Allen (Mass.) 324, the declaration set forth "that the defendant sold to him *one fourth* part of a certain quartz lode and quartz mill, situated in the state of *California*, and to induce the plaintiff to buy the same the defendant falsely represented to him that the said mill could crush *eight* tons of rock in *twelve* hours, at the average yield of $*10* a ton in wet crushing; that he was about to change the mill to dry crushing, and that when so changed it would pay $*25* per ton, and would crush *eight* tons in *twelve* hours; that the expenses were from *thirty* to *thirty-five* dollars only for *twelve* hours in working the lode and running the mill; and the defendant warranted the plaintiff that such *one fourth* part would yield to him (the plaintiff) a net income of *five thousand* dollars per year, or *fifteen thousand* dollars in *three* years, if the plaintiff would purchase the same, leave his home in *Massachusetts* and go to *California*."

Sale of Photograph Business. — In Taylor *v.* Saurman, 110 Pa. St. 4, "the narr. averred substantially that the defendant had stated to the plaintiff as an inducement to the purchase of his business as a photographer, that he had made money enough out of the business to retire; that his net profits in one year had been $*9,462*; that in the year preceding he had saved over expenses and costs of living $*6,200*; that he had a large copying business and a number of agents whose trade was valuable; that if plaintiff would purchase, he would not go into the business again; that the plaintiff, confiding in said representations, purchased the business. Whereas, in truth, the said business did not yield the profits represented and the defendant did not intend to part with his good will in said copying business as he fraudulently and deceitfully pretended he was going to do, but that he has ever since, fraudulently and deceitfully carried on said business, that all the representations as to the value of the business were false and known by the defendant to have been so, etc."

1. **For the formal parts** of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

Consult also notes to Form No. 6863, *supra*.

The matter to be supplied within [ ] is not in the statutory form, but should be added to complete the same.

Other Precedents. — In 3 Chit. Pl., p. 392, is found this declaration, omitting formal parts:

"For that whereas, before and at the time of the committing of the grievances by the defendant as hereinafter next mentioned, the defendant kept a circulating library, and carried on the trades and business of a bookseller, stationer, jeweller, toyman and hardwareman, at a certain messuage and

in *Norwich*, and was possessed of a lease of said building for the term of *five* years from *April 1st*, 1877, and then offered to sell to the plaintiff his interest in said unexpired lease and said library and the stock, fixtures, and good-will of said trade, and then pretended and represented to the plaintiff that the profits of said circulating library, as theretofore conducted by the defendant, had been at the rate of $*200* a year, that the number of subscribers to said library was from *150* to *160*, and that said building and trade, as theretofore conducted by the defendant, produced profits at the rate of $*800* a year.

2. The plaintiff believed said representations of the defendant to be true, and was induced thereby to purchase, and did purchase, of the defendant said lease, library, stock, fixtures, and good-will, and paid him therefor $*3,000*.

3. In fact, the profits of said circulating library had not been over $*50* a year. The number of subscribers to said library was less than *forty*, and said building and trade, as conducted by defendant, had not produced profits at the rate of $*300* a year.

4. The defendant made said false representations to the plaintiff well knowing them to be false, and with intent to induce the plaintiff to make said purchase and to defraud him.

5. Said lease, library, stock, fixtures, and good-will were not worth $*1,000* at the time of their purchase by the plaintiff, and the plaintiff has sustained great trouble and expense, viz.: $*300* in carrying on said trades, and in endeavoring to dispose of the same.

The plaintiff claims $*2,500* damages.

[(*Conclusion of writ as in Form No. 5912.*)]

premises in *Mare-street*, *Hackney*, in the county of *Middlesex*, and was possessed of a lease of the said messuage and premises, to wit, for the term of *five* years, commencing from the *first* day of *January*, in the year of our Lord 18*12*. And thereupon heretofore, to wit, on *Jan. 1st*, 18*12*, the plaintiff, at the request of the defendant, bargained with him to buy of him his interest in the unexpired lease of his said premises and the said library, with the books and shelves, as also the good-will of his said trades, at and for a certain price or sum of money, to wit, the sum of £——; and the defendant by then falsely, fraudulently and deceitfully pretending and representing to the plaintiff that the profits of the said circulating library had been and then were at the rate of near £*100* per annum, and that the said house and the said trades carried on therein produced profits more than £*25* per annum besides, and that the number of the readers and subscribers to the said library were altogether about *one hundred and fifty* or *one hundred and sixty*, and that the books in the said library amounted to *four thousand* volumes, then bargained for and sold to the plaintiff the said lease, library, books and shelves, and the said good-will, at and for the said sum of £*500*; and the plaintiff afterwards, to wit, on *January 1st*, 18*12*, paid the defendant for the same; whereas in truth and in fact the profits of the said circulating library had not been nor were at the rate of near £*100* per annum, but had been and were much less, to wit, at the rate of £*35* per annum; and whereas in truth and in fact the said house, and the said trades carried on therein, had not produced nor did produce profits more than £*35* per annum, but on the contrary thereof had produced and did produce much less, to wit, the sum of £*20* per annum; and whereas in truth and in fact, the number of readers and subscribers to the said library were much less than about *one hundred and fifty* or *one hundred and sixty*, to wit, *thirty*; and whereas in truth and in fact, at the time of the making of the false representation, the said books in the said library did not amount to *four thousand* volumes, as the defendant, at the time of his making his false and deceitful repre-

bb. COMMISSION BUSINESS.

Form No. 6880.

(Precedent in Mummery *v.* Paul, 1 C. B. 317, 50 E. C. L. 317, 50 E. C. L. 316.)[1]

[(*Commencement as in Form No. 6935.*)][2] That, before and at the time of committing the grievances thereinafter mentioned, the defendant carried on the business of a potato-salesman at a messuage and premises situate in *Manchester*, and was possessed of a lease of the said messuage and premises for a certain term, to wit, *twenty-one* years, from the *25th* of *March*, 1827, and was also possessed of certain fixtures then fixed and being in and upon the said messuage and premises, and of a horse, cart, van, utensils in trade, goods, and chattels; that thereupon, theretofore, to wit, on the *25th* of *March*, 1827, the plaintiff, at the request of the defendant, bargained with the defendant to buy of him his interest in the said lease, and the said fixtures, horse, cart, van, utensils in trade, goods, and chattels, as also the good will of the said trade and business, at and for a certain price and sum of money, to wit, 700*l.*; that the defendant, by then falsely, fraudulently, and deceitfully pretending and representing to the

sentation, well knew. And the plaintiff further saith, that the defendant, by means of the premises, on *January, 1st*, 1812, aforesaid, falsely and fraudulently deceived the plaintiff on the said sale, and thereby the said lease, trades and businesses have become and are of no use or value to the plaintiff, and plaintiff hath sustained great trouble and expense, to wit, an expense of £600, in and about the carrying on the said trades and businesses in the said messuage and premises, and endeavouring to dispose of the said lease, trades and businesses," etc.

A similar precedent is given in 2 Rev. Swift's Dig., p. 527.

1. Defendant pleaded not guilty to this declaration and issue was joined.

Consult notes to Form No. 6863, *supra*.

2. For the formal parts of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

The matter enclosed by [ ] is not in the statutory form, but is added to complete the form.

Another Precedent. — In Herbst *v.* Lowe, 65 Wis. 316, the complaint alleged, in effect, "that *November 28*, 1882, the defendant, being the agent at *Richfield, Washington* county, for the *McCormick Harvesting Machine Company*, and having a dwelling-house on two village lots therein, and a warehouse, falsely represented and pretended that he had such agency for the *five* years next ensuing, with the exclusive right to the territory for *ten* miles around, and with the right to sell it, and that he could procure the appointment of the plaintiffs as such agents for said term, and then and there proposed to sell said agency to the plaintiffs for $1,300, and said house and lots and warehouse for $1,500; that said warehouse was of the value of $300 in connection with such agency, but valueless without; that the dwelling-house and lots were worth $1,200; that the plaintiffs, believing and relying upon such representation, and pretenses, agreed to pay, for the dwelling-house, lots, and warehouses $1,500, and for such agency in the place of the defendant for *five* years, $1,300, and thereupon paid the defendant $1,300 cash for said agency, and $100 cash upon the other property, and took a conveyance of all said real estate to the plaintiff *Herbst*, and for the balance of said purchase price the plaintiff *Herbst* then gave the defendant his note for $1,400, secured by his mortgage on said real estate, which note and mortgage the defendant thereupon sold and transferred to a bona fide purchaser for value; that the plaintiffs purchased said real estate only for the purpose of securing said agency, and to be used in connection therewith; and that said representations were false, and so known to be at the time by the defendant."

plaintiff that the amounts received for commission in the course of the said business had been and were at the rate of *900*l. a year, and that the net profits of the said business had been and were at the rate of *500*l. a year, then bargained for and sold to the plaintiff the said lease, fixtures, horse, cart, van, utensils in trade, goods and chattels, and the said good will, at and for the said sum of *700*l.; and the plaintiff, afterwards, to wit, on the day and year aforesaid, paid the defendant for the same the said sum of *700*l., that is to say, by then paying to the defendant the sum of *400*l., and by then delivering to the defendant *three* promissory notes in writing, each made by plaintiff and one *Thomas Mummery*, and dated the *27th* of *May*, 18*42*, and payable to the order of the defendant — one for the payment of the sum of *103*l. *15*s., at *nine* months after the date thereof — one other for the payment of the sum of *106*l. *5*s. at *fifteen* months after the date thereof — and the other for the payment of the sum of *107*l. *10*s., at *eighteen* months after the date thereof; whereas, in truth and in fact, the amounts received for commission in the course of the said business, had not been nor were at the rate of *900*l. a year, but had been and were much less, to wit, *400*l. a year; and whereas, in truth and in fact, the net profits of the said business had not been nor were at the rate of *500*l. a year, but had been and were much less, to wit, *50*l. a year, as the defendant, at the time of making the said false and deceitful representation, well knew; and the defendant, by means of the premises, on the day and year aforesaid, falsely and fraudulently deceived the plaintiff in the said sale, and thereby the said lease, fixtures, horse, van, cart, utensils in trade, goods and chattels, trade and business, had become and were of no use or value to the plaintiff, and the plaintiff had sustained great trouble and expense, to wit, an expense of *200*l., in and about carrying on the said trade and business, and endeavoring to dispose of the same, and had been prevented from earning his livelihood, and from acquiring divers great gains and profits which he might and otherwise would have acquired, for a long time, to wit, since the *25th* of *March*, 18*27*, during all which time he, the plaintiff, had been, and was necessarily employed in carrying on the said trade and business and endeavoring to dispose of the same. [(*Concluding as in Form No. 6935.*)]

cc. LIQUOR BUSINESS.

Form No. 6881.

(Precedent in Pilmore *v.* Hood, 5 Bing. N. Cas. 97, 35 E. C. L. 43.)[1]

1. Plea and Demurrer Thereto. — To this declaration the defendant pleaded "That the defendant did not authorize *Bowmer* to communicate to the plaintiff, that the defendant had pretended and represented to *Bowmer* that the trade of the public-house in the declaration mentioned had been and then was *18*0l. per month, all retail over the counter, in manner and form as in the declaration was alleged; and that the defendant was ready to verify."

To which plea was interposed the following demurrer: "For that it was not averred in the declaration that the defendant authorized *Bowmer* to communicate to the plaintiff that the defendant had pretended and represented to *Bowmer*, that the trade of the public-house had been and then was *18*0l. per

[(*Commencement as in Form No. 6934.*)][1]

That before the committing of the grievances by the defendant, as hereinafter mentioned, by a certain indenture of lease, bearing date the *25th* of *September*, 18*19*, made between the Reverend *James Archer* and others of the one part, and *Robert Simmonds* of the other part, for the considerations therein mentioned, the lessors demised to *R. Simmonds*, his executors, administrators, and assigns, all that messuage or tenement, situate [at *London*], and then used or occupied as a public-house, or liquor-shop, together with all appurtenances thereto belonging; to hold the same unto the said *R. Simmonds*, his executors, administrators, and assigns, from the *25th March* then last past, for the term of *twenty-nine* years, at the yearly rent of *500*l. payable quarterly, and subject to the covenants and agreements therein contained; that by divers mesne assignments, the said indenture of lease and the premises thereby demised afterwards became legally and absolutely vested in the defendant for the rest, residue, and remainder of the term; and the defendant then carried on the trade and business of a publican and licensed victualler at the said messuage and premises; that afterwards, to wit, on the *first* of *November*, 18*19*, one *Robert Bowmer* had contracted and agreed with the defendant for the absolute purchase of the said lease, with the good will, and possession of the dwelling-house and premises thereby demised, and at and for a certain price or sum of money, to wit, *1175*l.; but no assignment had been made to him; that the defendant, at and before the making of the agreement with *R. Bowmer*, falsely, fraudulently, and deceitfully pretended and represented to *R. Bowmer*, that the trade of the public-house had been and then was *180*l. per month, all retail over the counter; that *Bowmer* not being able to complete the purchase, it was afterwards, to wit, on the *first* of *December*, 18*19*, agreed by and between the plaintiff, *Bowmer*, and the defendant, that the plaintiff should become the purchaser of the premises in the room and stead of *Bowmer*; and at and before the making of the last-mentioned agreement, *Bowmer* communicated to the plaintiff that the defendant had, at and before the making of the first-mentioned agreement with him, represented that the trade of the public-house had been and then was *180*l. per month, all retail over the counter; of all which premises the defendant at and before the making of the agreement secondly mentioned, had notice. That the plaintiff, confiding in the representations so made by the defend-

month, all retail over the counter; that it was not necessarily understood, intended, or implied that such an averment was contained in the declaration, and that it was not necessary to the maintenance of the action that the declaration should contain such an averment: that the plea amounted to an immaterial traverse, and was no answer to the declaration."

On joinder in demurrer, it was held that the action properly lay against defendant at the suit of plaintiff.

1. **For the formal parts** of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

The matter enclosed by [ ] is not found in the reported case, but is added to complete the form.

Consult notes to Form No. 6863, *supra*.

ant, then agreed to become the purchaser of the premises, at and for a certain price or sum of money, to wit, *1175*l. in the room and stead of *R. Bowmer*; that the plaintiff afterwards, to wit, on the *tenth* of *December*, 18*19*, paid the said sum of *1175*l. to the defendant for the same; but that the trade of the said public-house had not been nor was *180*l. per month, all retail over the counter, as the defendant at the time of his making his false and deceitful representation, and also at the time of his entering into the last-mentioned agreement, well knew; that the defendant by means of the premises, falsely and fraudulently deceived the plaintiff in the said sale, and thereby the premises had become and were of no use or value to the plaintiff; that the plaintiff had sustained great trouble and expense, to wit, an expense of *1000*l. in and about the carrying on the business of a publican and licensed victualler in the messuage and premises, and had sustained great loss in disposing of the premises; to the plaintiff's damage *£1500*. [(*Concluding as in Form No. 6934.*)]

(*c*) *Sale of Cattle.*[1]

1. For other precedents see 2 Rev. Swift's Dig. 524; Tillingh. F., pp. 311, 419; Schwartz *v.* Osthimer, 4 Ind. 110, Flanders *v.* Cobb, 88 Me. 488; Cardoze *v.* Swift, 113 Mass. 250; Stevens *v.* Fuller, 8 N. H. 463; Richardson *v.* Gilson, 55 N. H. 624; Fisk *v.* Hicks, 31 N. H. 536; Crooker *v.* Willard, 28 N. H. 134; Moore *v.* Noble, 53 Barb. (N. Y.) 425; Wilcox *v.* McCoy, 21 Ohio St. 655; Wells *v.* Cook, 16 Ohio St. 67; Wintz *v.* Morrison, 17 Tex. 374; Ewins *v.* Calhoun, 7 Vt. 79; Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383.

For a petition for deceit in the sale of sheep held insufficient on demurrer see Wells *v.* Cook, 16 Ohio St. 68. The facts in this case were that B, the owner of the sheep, apparently sound and healthy, but known to him to be diseased, represented them as sound to A, who was acting as the known agent of C, and A, confiding on such representations, bought them for C with the avowed purpose of mingling them with a larger flock belonging to C, in consequence of which mingling the united flock became diseased. A and C being still unaware of the disease, A buys the whole flock from C, suffering damage from the disease. It was held that the representations not having been made to A to induce him to act upon them affecting his own interest, he, A, could not maintain an action for deceit against B.

In Wilcox *v.* McCoy, 21 Ohio St. 655, plaintiff's petition, omitting the formal parts, stated substantially as follows: "That *Wilcox*, the defendant below, sold to him *twenty-five* head of fine wooled sheep, representing them to be sound; that they were not sound, but all, or a portion of them, had a disease known as the '*hoof rot*' and that the defendant knew it. That relying upon the defendant's representations that the sheep were sound the plaintiff took them home and turned them into a field with his other sheep, whereby they also were infected with the '*hoof rot*,' so that all of plaintiff's sheep became, in a measure, worthless, and that by reason of the diseased condition of the sheep purchased of the defendant by the plaintiff, his pasture field was rendered useless for the purpose of pasturing sheep; to the plaintiff's damage," etc. As to the validity of this petition the appellate court said: "The petition does not purport to state several causes of action, but only a single cause of action, with circumstances showing special damage. The action is for false representations that the sheep sold were sound; the circumstances showing special damage are, that plaintiff relying on defendant's representation that the sheep purchased were sound turned them into the field, whereby the disease was communicated to plaintiff's other sheep, and the pasture injured. The averments of special damage were not redundant or irrelevant matter, but with the other allegations of the petition formed a basis for the recovery of damages."

In Wintz *v.* Morrison, 17 Tex. 374, the petition alleged substantially: That "plaintiff *Morrison* in *June*, 18*54*, pur-

chased of *Wintz two hundred and thirty Mexican horses*, for which he gave *one thousand* dollars in cash, and his *two* notes for *three thousand and twenty-five* dollars and *fifty* cents, each, due at future days, to secure which he executed a mortgage on land and slaves; that the price paid and agreed to be paid, constituted a full and ample consideration for said stock, had they at the time of the trade been perfectly sound; but that they were laboring under and suffering from an infectious or contagious disease of the most malignant character, a disease almost absolutely fatal in every instance where it becomes developed, called by some '*glanders*;' that it had been existing among the horses belonging to this identical drove for *twelve* months or more anterior to said trade, and had regularly up to the time of said trade killed off numbers of them; that the drove had been reduced by this disease from *three hundred* or *four hundred* to *two hundred and thirty*, sold to plaintiff; that since they came to the hands of the plaintiff, the disease has continued regularly its ravages, proving fatal in almost every instance, until their numbers are now reduced to about half their original number; and is at the present time in existence among the stock, and will, as the petitioner believes, kill every one of them before it ceases, and probably spread the infection or contagion among the horses of his neighbors; that at the time of the purchase, *Wintz* was well knowing to the fact of the existence of said disease among said horses, and had had full knowledge of its existence among them for many months anterior to the sale to plaintiff, and that he fraudulently and unfairly failed to communicate said facts to your petitioner, but concealed the same, and from his acts and declarations led petitioner to believe that he was purchasing sound property; that the disease was not visible among them as far as the plaintiff could discover; that plaintiff had separated the drove, and done everything in his power to arrest the disease, but without avail; that soon after the purchase *Wintz* left the state, leaving no agent to act for him, and that he is ready to return such of the stock as are living."

In Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, the first count of the petition alleged that: "in *July*, 1882, the defendant, owning a herd of cattle in *Wyoming Territory*, and horses going with that herd, and all branded with the same brand, and also *80* shorthorn bulls, and *700* head of mixed yearlings, offered to sell the same with other personal property for the sum of $*400,000*; and at the same time represented to the plaintiff and its agent, that there had already been branded *2,800* calves as the increase of the herd for the current season, and that the whole branding of calves and increase of the herd for that season would amount to *4,000*, and that, exclusive of the branding for that year, the herd consisted of *15,000* head of cattle, and that there were *150* horses running with it and branded with the same brand; that had the representation that *2,800* calves had been branded been true, it was reasonable from that fact to estimate that the whole branding for that year would be *4,000* head, and that the whole herd, exclusive of the increase for that year was *15,000* head; that the defendant, when he made these representations, knew that they were false and fraudulent, and made them for the purpose of deceiving the plaintiff and its agent, and of inducing the plaintiff to purchase the herd; and that the plaintiff, relying upon the representations, and believing them to be true, purchased the herd and paid the price."

Exchange of Oxen.—In Anthon's Am. Prec., p. 240, the following declaration is given, omitting the formal parts: "For that the said *Richard Roe* [defendant] on *May tenth*, A. D. eighteen hundred and *eighty*, at *Richmond*, being possessed of a pair of oxen, one of which was unsound, and infected with a bad and inveterate sore in his left shoulder, which rendered the same ox good for nothing; and the plaintiff being then and there also possessed of another pair of oxen, of his own proper oxen, of the value of *ten* dollars, he the said *Roe*, to induce the plaintiff to exchange oxen with him, did then and there falsely and fraudulently affirm to the plaintiff, that his the said *Roe's* oxen, as far as he knew, were then well, good and sound oxen; whereupon the plaintiff, giving full credit to the said *Roe's* said affirmation, was instantly induced to, and did then and there deliver his said oxen to the said *Roe*, in exchange for the said *Roe's* oxen aforesaid. And the said *Roe* did then and there deliver his said oxen to the plaintiff, in ex-

Form No. 6882.

(Precedent in Warren *v.* Hall, 20 Colo. 508.)[1]

[(*Title of court and cause, and commencement as in Form No. 5911.*)][2]

1st. That defendants are copartners, doing business as *Hall Bros.*

2d. That on or about the *15th* day of *September*, 1*884*, the plaintiff made a contract with the defendants to purchase an undivided *one eighth* interest in a certain herd of cattle, known as the *Wilcox* herd of cattle, and certain lands, which said herd of cattle and lands were purchased by defendants, together with other persons, of said *Wilcox*.

3d. That at said time the defendants agreed with plaintiff to sell him said interest in said cattle and lands for the same sum which they, the defendants, had paid, in purchasing said interest, to said *Wilcox*, together with all expenses from the date of purchase by defendants, and interest on said purchase price from the date of said purchase by defendants to the date of sale by defendants to plaintiff at the rate of *one and one half* per cent. per month.

That at said time the defendants represented to said plaintiff that they paid said *Wilcox* the sum of $*27,000* for said interest in said cattle and lands, and the plaintiff paid said defendants the sum of $*27,500* for said interest, together with interest thereon and expenses as aforesaid.

That plaintiff relied upon the representations so made by defendants, and upon such reliance so paid said sum of money as aforesaid.

That said representation was false, and defendants did not pay said *Wilcox* said sum, but paid only the sum of $*20,000* for said interest in said cattle.

That the knowledge of the falsity of said statement and representation came to plaintiff within the last year.

change for the plaintiff's said oxen, and did also then and there pay the plaintiff the sum of *five* dollars, as boot between the said oxen. Now the plaintiff in fact says, that the said *Roe's* oxen aforesaid were not, at the time of the delivery, exchange and affirmation aforesaid, well, sound, or good; but that one of them was then and there infected with and laboured under a bad and inveterate sore in and upon his left shoulder, which made him utterly unfit for any service, and good for nothing; of which the said *Roe* was then and there well knowing. And so the said *Roe* by means of his said false affirmation, hath greatly injured and defrauded the plaintiff."

Sale of Slave. — For examples of declarations based upon the deceit in the sales of slaves see Scott *v.* Scott, 2 A. K. Marsh.(Ky.) 217; Moore *v.* Turbeville, 2 Bibb (Ky.) 602; Oldham *v.* Bentley, 6 B. Mon. (Ky.) 428; Price *v.* Read, 2 Har. & G. (Md.) 291; Inge *v.* Bond, 3 Hawks (10 N. Car.) 101; Brown *v.* Shields, 6 Leigh (Va.) 440; Rice *v.* White, 4 Leigh (Va.) 474; Trice *v.* Cockran, 8 Gratt. (Va.) 442; Boyles *v.* Overby, 11 Gratt. (Va.) 202.

In the assignment of an apprentice by his master, see Hall *v.* Gardner, 1 Mass. 172.

1. It was held in this case that a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim may be set up as a counterclaim, and it matters not, in such a case, that the plaintiff's claim is based upon a tort.

2. For the formal parts of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied between [ ] is not found in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra*.

That plaintiff is damaged by said false statement and fraudulent representations made by defendants in the sum of $7,500, with interest from said date of purchase.

Wherefore plaintiff demands judgment against defendants for said sum of $7,500, and costs of suit.

[(*Signature of counsel as in Form No. 5911.*)]

Form No. 6883.

(Precedent in Litchfield *v.* Hutchinson, 117 Mass. 195.)[1]

[(*Title of court and cause, and commencement as in Form No. 6942.*)][2] that the defendant sold the plaintiff a horse, for which the plaintiff paid the defendant *three hundred and twenty-five* dollars; that, to induce the plaintiff to buy said horse, the defendant falsely represented to the plaintiff that said horse was all right and sound every way; that the plaintiff believing that said representation was true was thereby induced to buy, and did buy, said horse; but in truth said horse was not all right and sound every way, but was lame and sore forward and was foundered, and was lame in the fore legs and shoulders, and was unsound, injured and of little value, all of which the defendant then well knew. [(*Concluding as in Form No. 6942.*)]

Form No. 6884.

(Precedent in Duncan *v.* Willis, 51 Ohio St. 433.)[3]

[(*Title of court and cause, and commencement as in Form No. 5929.*)][4]

The above named plaintiff says that on or about the *28th* day of *November*, 1*888*, this plaintiff and his brother, *R. W. Duncan*, being desirous of each purchasing from *thirty* to *forty* head light feeding hogs, the defendant represented to them that he had *one hundred* head of the kind and quality they wanted, but would not sell them in separate lots or parcels, but would sell them the entire lot, and they

1. In this case the jury returned a verdict for the defendant, but the court sustained plaintiff's exceptions on the ground that a false representation was sufficiently set forth in the declaration to constitute a cause of action without the further allegation that the defendant well knew the representation to be false. Litchfield *v.* Hutchinson, 117 Mass. 195.

An old precedent under the former practice in *Massachusetts*, of the declaration in an action on the case for deceit, is set out at length in Hall *v.* Gardner, 1 Mass. 172, which case was decided in 1804.

2. **For the formal parts** of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

The matter enclosed by [ ] is not found in the reported case, but is added to complete the form.

Consult notes to Form No. 6863. *supra.*

3. **This petition was held good** as against demurrer that it did not state facts sufficient to constitute a cause of action, and that there was a defect of parties.

4. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not found in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra.*

could divide them separately to suit themselves. The defendant represented to them that said hogs were sound, healthy and free from disease, and that he had purchased the same a few days before for the price of *five* dollars per *100* pounds. That plaintiff and his said brother, relying wholly upon the said statements and representations of defendant, and with no other knowledge of said hogs, then agreed with defendant to purchase, and then did purchase said *100* hogs of defendant at the price of $*5.12 1-2* per *100* pounds, and then paid him therefor the amount they came to, to wit, $*564.30.* This plaintiff and his said brother each to have *fifty* head of said hogs as his separate and individual property, and to feed separately on their respective farms.

That they took said hogs, each of them *fifty*, and put them on their respective farms the same day, which is about ten miles from defendant's.

This plaintiff put his *fifty* hogs on his said place, and believing from the statements of defendant that they were sound, healthy and free from disease, put them in a lot adjoining a lot in which he had *thirty* other hogs.

The plaintiff says that said hogs so purchased of defendant by plaintiff and his said brother, were not then sound and healthy nor free from disease, nor had defendant paid therefor $*5.00* per *100* pounds, but on the contrary said hogs were then, and had been for a long time before, sick and diseased, and infected with the disease known as *hog cholera.* That said *100* head of hogs had all been exposed to and infected with said disease when said defendant purchased them, which was a few days before he sold them to plaintiff and his brother. And the defendant well knew at the time he so purchased them that they had been exposed to said disease, and were infected therewith and diseased, and he purchased them as and for diseased hogs, at much less than $*5.00* per *100* pounds.

And he well knew they were not sound nor healthy nor free from disease when he so represented them to plaintiff and his brother, but fraudulently and purposely withheld from them the facts concerning said hogs and said disease, and purposely sold the same to them as free from disease, when he well knew they were not.

The plaintiff says that of the said hogs this plaintiff got, some of said *fifty* hogs died from said disease the same day they took them home, and all of them, to wit: said *fifty* head taken by the plaintiff were and became sick of said disease, and before the *10th* day of *December* several had died.

This plaintiff expended in time and medicine in and about trying to cure and prevent said disease $*12.00*, and on the *10th* of *December*, to save what he could, he sold the balance of said *fifty* hogs as and for diseased hogs, for the sum of $*78.27*, which was all they were worth for any purpose.

That his said *thirty* other hogs became and were infected with said disease from said hogs, and some have died, and all made much less valuable.

One sow, worth $*7.50*, became sick, and he disposed of her, realizing only $*3.00*, which was all she was worth for any purpose, and the damage and injury to his other hogs was and is at least $*25.00*,

besides infecting his said farm and making it dangerous to put any hogs thereon.

The plaintiff says by reason of the premises aforesaid, he has been damaged in the sum of $*500*, for which he asks judgment against the said defendant.

[Wherefore (*concluding as in Form No. 5929*).]

(*d*) *Sale of Patent-right.*[1]

1. For other precedents see Hay *v.* Landis, 17 Ind. App. 91; McKee *v.* Eaton, 26 Kan. 227; David *v.* Park, 103 Mass. 501; Kimball *v.* Bangs, 144 Mass. 321; Somers *v.* Richards, 46 Vt. 170; Butler *v.* Watkins, 13 Wall. (U. S.) 457.

In Hay *v.* Landis, 17 Ind. App. 91, the complaint in substance alleged that "*Hays* and *Grossnickle* were the owners of certain letters patent, and that they conspired with *Stockman* to cheat and defraud the plaintiff out of the sum of $*1,200*; that they induced the plaintiff to purchase and pay said sum for the letters patent, upon the representation that other parties, whom *Stockman* pretended to represent, were willing to take the same from him at an agreed price, should he procure the same * * * that the plaintiff stated to *Hays* and *Grossnickle* that the letters patent, if purchased, would be of no value to him, and that they knew that he was purchasing the same for the sole purpose of conveying the same to the persons represented by *Stockman*. That the letters patent were of no value," etc. The court was of the opinion that the complaint was sufficient.

In Kimball *v.* Bangs, 144 Mass. 321, the declaration was as follows: "And the plaintiff says, that, on or about *April 1*, 18*84*, the defendant represented to the plaintiff, that he was the treasurer and agent of the *National Heat and Light Company*; that said company owned an invention or apparatus, used as an attachment to stoves, whereby petroleum or its products were used for fuel in stoves; that said apparatus or invention was of great value; that experiments had been made therewith, which had proved successful; that in the use of said apparatus there was no dirt, smell, or smoke, or filling the pipes, as with an oil burner; that it burned a long time, to wit, *one* year, without the necessity of repairing or renewing the same; that to use said apparatus for heating purposes would not cost more than from *one half* to *two thirds* as much as wood or coal; that *four quarts and one half* of oil would run a baking fire for *nine* hours. That all of said representations were false and fraudulent, and known to be false and fraudulent by the defendant when so made; that the defendant resorted to various methods of concealing the falsity thereof from the plaintiff; that said false representations were made, and the falsity thereof concealed, as aforesaid, to induce the plaintiff to purchase of said company the exclusive right to sell said apparatus in the towns of *Woburn*, *Stoneham* and *Winchester*, in the county of *Middlesex*, in said Commonwealth, and pay therefor a large sum. That believing said representations to be true, by reason of said fraudulent acts of defendant and otherwise, the plaintiff was induced, by reason of said belief and deceptions, to purchase, and did purchase, of said company said exclusive right to sell said apparatus, and paid said company therefor the sum of *two hundred and fifty-three* dollars and *thirty-four* cents. That said apparatus and invention was of no value, and the said exclusive right was valueless, to the great damage of the plaintiff. And the plaintiff says that he bought, by reason of said false and fraudulent representations, believing them to be true, the said apparatus or attachment in large numbers, of said company, and paid said company large sums of money therefor, and sold them and put them into stoves, and spent a large amount of time and labor in doing so, and a large sum of money and much labor in trying to make them work; but they would not work, and he had to take them out and back, and repay the money he received for them; and they proved wholly worthless and valueless. And the plaintiff says he has returned said attachments, and demanded the money he paid for the same and the damage

Form No. 6885.

(Copied from record in case of Hawkes *v.* Remington, 111 Mass. 171.)[1]

(*Commencement as in Form No. 6942.*)[2]

And the plaintiff says that the defendants, in order to induce the plaintiff to become the purchaser of an interest in certain letters patent for plating with nickel, which said defendants alleged to be owned by them, and to pay to them money for said interest, falsely and fraudulently represented to plaintiff that said letters patent gave them a valid patent; that the process of plating with nickel was

he suffered by reason thereof, and the defendant and said company refused to pay him in any manner; that he was put to large expense in trying to make said attachment operate, and put a sheet-iron funnel in his chimney and a centrifugal ventilator to regulate the draft, in order to make it work well, and it would not work; and it proved worthless."

The second count was as follows:

"And the plaintiff further says, that, on or about the *first* day of *April*, 1884, the defendant sold to the plaintiff a certain license to sell exclusively in the towns of *Woburn*, *Stoneham* and *Winchester*, in the county of *Middlesex*, a certain invention or apparatus to be used as an attachment to stoves, whereby petroleum or its products were substituted as fuel for other substances; that the defendant, to induce the plaintiff to purchase the said license, represented to him that the said invention was of great value, that various experiments had been made with the apparatus, and that it had proved successful, and did all he claimed for the same; that in the use of said apparatus no dust, smoke, nor smell, nor filling the pipes, as with an oil burner, would occur; that it burned a long time, to wit, *one* year, without the necessity of repairing or renewing the same; that to use said apparatus for heating purposes would not cost more than from *one half* to *two thirds* as much as wood or coal; that *four quarts and one half* of oil would run a baking fire for *nine* hours; that the defendant resorted to various devices to conceal from the plaintiff the falsity of said representations; that the said representations were all false and fraudulent, and known by the defendant to be false and fraudulent when he made them; that relying upon said representations, and believing them to be true, the plaintiff was induced to purchase, and did purchase, as aforesaid, from said defendant the said license, believing said exclusive right to sell said apparatus to be of great value; that he paid therefor a large sum of money, to wit, $*253.34*; that the said false and fraudulent representations were made by the defendant with the intention that the same should be acted upon, and that the plaintiff should be induced thereby to pay said sum; that said apparatus was of no value whatever, and said license was wholly worthless to the plaintiff. And the plaintiff says he bought, being induced to do so by said false and fraudulent representations, the said apparatus or attachment, in large numbers, of the defendant, and paid large sums of money therefor, and sold them and put them into stoves, and spent a large amount of time and labor in doing so, and a large sum of money, and much labor in trying to make them work, but they would not work, and he had to take them out and back and repay the money he received for them, and they proved to be wholly worthless and valueless; and the plaintiff says he has returned said attachments to the defendant, and demanded the money he paid for the same, and the damage he suffered by reason thereof; and the defendant refused to pay him in any manner; that he was put to great expense by reason of said false and fraudulent representations in trying to make said attachment work, and he put a sheet-iron funnel into his chimney and a centrifugal ventilator to regulate the draft, and make it work well, and it proved wholly worthless."

1. In the original declaration there was an additional count in contract, which has been omitted.

2. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

Consult also notes to Form No. 6863, *supra*.

entirely new, that there had never been any letters patent or application therefor before the letters which said defendants represented that they had. That plaintiffs believing and trusting said representations so made by said defendants, was induced thereby to pay to said defendants towards an interest or ownership in said letters patent the sum of *$2500*; whereas in truth and in fact the said letters patent did not give a valid patent, and the process of plating with nickel was not new, and there had been letters patent granted for said process and application therefor before the letters patent which said defendants represented that they had, all which said defendants well knew when they made said representations. And plaintiff says that he has demanded of said defendants the said *twenty-five hundred* dollars, and they have refused to pay the same to plaintiff or any part thereof. And the plaintiff demands judgment in the sum of *twenty-five hundred* dollars and costs for the within named action.

(*Concluding as in Form No. 6942.*)

Form No. 6886.

(Precedent in Somers *v.* Richards, 46 Vt. 170.)

[(*Commencement as in Form No. 6950.*)][1]

That whereas, before and at the time of the committing of the grievances by the defendant, as hereafter next mentioned, the said defendant was possessed of an interest in a certain patent-right, called and known by the name of *Stanly's Patent Blast Elevator*, and the said defendant being desirous of selling and disposing of said patent-right, or some part thereof, heretofore, to wit, on the *eleventh* day of *November*, A. D. 1*868*, at *Barnet* aforesaid, wrongfully and injuriously contriving and intending to deceive, defraud, and injure the said plaintiff in this behalf, and professing great friendship with the said plaintiff, then and there falsely, fraudulently and deceitfully, represented and asserted to the said plaintiff, that said patent-right was of great value, and in great demand in the country, and that vast sums of money could be received from the sales of said patent-right and the territory embraced under the letters patent of said right, and that great sums of money had been received from the sale and disposing of said patent-right, and that the said defendant had received large sums of money from the sale thereof, and also that divers persons in said county of *Caledonia*, and elsewhere, of the plaintiff's acquaintance were on the eve of putting large sums of money into said patent-right as a safe and profitable investment; whereupon, heretofore, to wit, on the day and year last aforesaid, at *Barnet* aforesaid, the said plaintiff, confiding in the pretended friendship of the defendant, and confiding in and wholly relying upon the representations and assertions of the said defendant, at the special

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post.*

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra.*

instance and request of the said defendant, bargained with him to buy of him one undivided *eighth* interest in and to all the territory embraced and covered by said patent-right, to wit, one undivided *eighth* of the entire territory of the United States of America, excepting the states of *Vermont*, *New Hampshire*, and *Massachusetts*, at and for a certain sum, to wit, the sum of *five thousand* dollars. And the said defendant, by then and there falsely, fraudulently, and deceitfully pretending and representing to the said plaintiff, that the said false, fraudulent, and deceitful representations of the said defendant were true, then and there sold the said one undivided *eighth* interest in said patent-right as aforesaid, at and for the said sum of money, to wit, the sum of *five thousand* dollars. And the said plaintiff afterward, to wit, on the day and year aforesaid, paid the said defendant the said sum of *five thousand* dollars for the same; whereas, in truth and in fact, the said interest in and to said patent-right so purchased as aforesaid, had not been, nor was it before or at the time of the making of the said false representations and assertions, of any value, nor was said patent-right in great demand in the country, nor had large sums of money been received from the sales of said patent-right, nor had the said defendant received large sums of money from the sales thereof, nor were there divers persons in *Caledonia* county, and elsewhere, about to invest large sums of money in said patent-right, as the said defendant, at the time of his making his said false and deceitful representations, well knew. And the said plaintiff further saith, that the said defendant, by means of the premises, on the day and year aforesaid, at *Barnet* aforesaid, falsely and fraudulently deceived the said plaintiff on the said sale, and thereby said interest in said patent-right so purchased as aforesaid, is of no use or value to the said plaintiff; and the said plaintiff hath sustained great trouble, expense, and loss by reason of said false representations and assertions, to wit, *two* years' time, and a large sum of money, to wit, the sum of *one thousand* dollars, in endeavoring to sell and dispose of said *eighth* interest in said patent-right, but which, by reason of said patent-right being worthless and of no value, he, the said plaintiff, has been wholly unable to do.[1] [(*Concluding as in Form No. 6950.*)]

1. **The second count** in this declaration alleged "that the plaintiff, on, etc., at, etc., bargained with the said defendant to buy of the defendant *one undivided eighth* part of and to *Stanly's Patent Blast Elevator* for all the United States, except the states of *Vermont*, *New Hampshire* and *Massachusetts*; and the said defendant, well knowing the said elevator to be of no value, and that there was no demand for the same, and well knowing that it was of no value to the plaintiff, for sale or otherwise, in said states not excepted as above, and that it was wholly worthless to the plaintiff, by then and there warranting the said elevator to be of great value to the plaintiff for the purposes of sale, and to be in great demand all through the United States, and that great sums could be secured by the plaintiff for the sale of said patent as aforesaid, then and there deceitfully sold *one undivided eighth* part of said elevator for all the United States except the states of *Vermont*, *New Hampshire*, and *Massachusetts*, for the sum of *five thousand* dollars; which said elevator at the time of said sale, was wholly worthless to the plaintiff, and was of no value at all, and there was no demand for the same; and the plaintiff, relying upon the warranty and representations of the defendant as aforesaid, expended a large sum of money, to wit, *one thousand* dollars, in trying to dispose of the same, and two

(*e*) *Sale of Promissory Note.*

Form No. 6887.

(Precedent in Hart *v.* Tallmadge, 2 Day (Conn.) 381.)

[(*Commencement of writ as in Form No. 5912.*)][1]

That on the *9th* of *September*, 1*803*, *Thomas Lloyd, jr.*, of the city of *Hartford*, then being a known broker, did, for, and in behalf, and

years of his time, but was unable to effect any sale of the same or any part thereof, so that said elevator is of no value to the plaintiff; and so the said defendant falsely and fraudulently deceived the plaintiff."

Judgment for plaintiff in this case was affirmed.

1. Numbering Paragraphs. — This declaration was drawn before the adoption of the Practice act. Under the present practice, the statement of facts in the declaration must be divided into paragraphs, numbered consecutively, each containing, as nearly as may be, a separate allegation. Conn. Prac. Act, § 9.

For the formal parts of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

The matter enclosed by [ ] is not found in the reported case, but is added to complete the form.

Consult notes to Form No. 6863, *supra*.

Other Precedents. — See Veasey *v.* Doton, 3 Allen (Mass.) 380. Bremond *v.* McLean, 45 Tex. 11.

In Crane *v.* Elder, 48 Kan. 259, an action for deceit in the sale of certain promissory notes, the misrepresentations averred were as follows: "That said notes were all perfectly good, and would be paid promptly when due, and that *Crane* had, before that time, sold and transferred to the firm of *Hunt & Kelly*, contractors and builders, of *Ottawa*, *Kas.*, a large number of the same class of notes, that is, notes given for life insurance in the said *Temperance Mutual Benefit Union*, to wit, about $7,*000* in amount, and that they had collected nearly the entire amount of them, and that said notes had been paid promptly and without trouble to the holders, and he referred the plaintiff to the said firm of *Hunt & Kelly*, 'to substantiate' the truth of his statement that the notes he had transferred to them had been paid promptly, and without any trouble in collecting; that thereupon the said plaintiff called upon Mr. *G. A. Kelly*, of the firm of *Hunt & Kelly*, and made inquiry of them in relation thereto, and was informed by said *Kelly* that the firm of *Hunt & Kelly* had purchased notes from the said defendant to the amount of $7,*000*, and that nearly the entire amount of the notes so purchased by them were paid promptly, and with but little trouble to them; that there was only about $*200* out of said $7,*000* of notes, unpaid; that said plaintiff did not inquire of said *Kelly* what class or kind of notes they were that the firm of *Hunt & Kelly* had purchased from said *Crane*, because of the aforesaid statement made to him by the said defendant that they were of the same class with those he was offering to transfer to the plaintiff, that is, notes taken for life insurance in the *Temperance Mutual Benefit Union*, but relied implicitly on said statement, believing it to be true, and had no thought that they might be of a different class.

2. In fact, the notes taken by *Hunt & Kelly* were '*Lightning-rod notes*,' and a 'different class from' those transferred, as the defendant well knew, etc.

3. When the benefit union took the notes, *Crane* was its superintendent, had 'general charge of the business of soliciting insurance,' and 'of taking said notes;' but they were, 'or a large portion of them were, obtained from the makers by fraud and misrepresentation,' etc., as defendant well knew, and so could not be collected, although plaintiff has made great effort to collect them, and brought suits on a number of them, but was defeated, and has incurred expense and loss in such attempts; that they were not good, or collectible, as defendant always well knew.

4. *Fuller* was ignorant of all these things, when he purchased the notes; had no 'means at hand of ascertaining

by procurement, of one *Joseph Hart*, then of said *Hartford*, now absconded to parts unknown, offer for sale to the plaintiffs, through their agent, *Heman Averill* of said city, a certain instrument in writing, purporting to be a promissory note, and to have been made and executed by the defendant, for the sum of *two thousand* dollars, payable, for value received, in *ninety* days after the date thereof, at the

the facts, but relied solely and entirely on *Crane's* statements;' was 'induced thereby,' etc.; and otherwise would not have not done so; that he has received 'no consideration whatever,' for his 'residence property.' and has been damaged $*3,000*."

Sale of Bonds, etc. — For declaration and complaints in actions for false representations by defendant, whereby plaintiffs were induced to purchase bonds, or such like securities, see Nash *v.* Minnesota Title Ins., etc., Co., 163 Mass. 575; Bowen *v.* Mandeville, 95 N. Y. 237.

In Handy *v.* Waldron, 18 R. I. 567, the first count in the plaintiff's declaration sets out "that on the *24th* day of *May*, 18*93*, the defendant falsely and scandalously deceived the plaintiff by selling him *two* certain bonds of the *Atlantic and Pacific Railway Tunnel Company*, in consideration of $*2,000*, to said defendant by the plaintiff in hand paid, as and for bonds of the value of $*1,000* each, and then and there warranting the same to be of the value of $*1,000* each, to wit, of par value, when in truth and in fact the said bonds so sold and warranted, at the time of sale and warranty thereof, were not of that value, as the defendant well knew. The second count sets out that the defendant on the *24th* day of *May*, 18*93*, falsely and scandalously deceived the plaintiff by selling him *150* shares of the capital stock of the *Rhode Island Organ Company* in consideration of $*1,500* to the defendant by the plaintiff, then and there in hand paid, as and for stock of the value of $*1,500*, and then and there warranting the same to be of the value of $*1,500*, to wit, of par value, when in truth and in fact said shares of stock so sold and warranted, at the time of sale and warranty thereof. were not of that value, as the defendant well knew. The third count sets out that the plaintiff on the *24th* day of *May*, 18*93*, had bargained with the defendant to buy of him *two* $*1,000* bonds of the *Atlantic and Pacific Railway Tunnel Company* for a large sum of money, to wit, the sum of $*2,000*, and *150* shares of the capital stock of the *Rhode Island Organ Company* also for a large sum of money to wit, $*1,500*, the said sums being then and there good prices and valuable consideration, and the full par value of both said bonds and said capital stock, and the defendant then and there well knowing the said bonds and said capital stock to be of a much less value in the market than the par value thereof, then and there falsely, fraudulently and deceitfully offered for sale, and did in fact fraudulently, falsely and deceitfully sell and deliver the said bonds and said capital stock to said plaintiff, who was wholly ignorant of the premises and believed and relied on the promises and representations of said defendant, at the full par value thereof, representing that said bonds and capital stock could not be bought for less than the par value thereof, and that said capital stock had always paid *ten* per cent. per annum in dividends and had paid the same in quarterly instalments. And the plaintiff in fact saith that he afterwards learned that said bonds could be bought for a sum much less than the par value thereof, to wit, for the sum of $*550* each, and that said capital stock could be bought for a sum much less than the par value thereof, to wit, for the sum of $*3* per share, and that the same had not paid *ten* per centum per annum, of all of which he was wholly ignorant at the time of said purchase, and whereof the defendant was well knowing as aforesaid, and the plaintiff has sustained great loss and detriment in and about the purchase of said bonds and of said stock."

For material allegations in complaint for deceit in the purchase of mortgage security see Craig *v.* Ward, 3 Keyes (N. Y.) 387, in which the representation was as follows: "The defendants stated, represented and agreed to and with the plaintiff, that the said mortgage was a good and valid security in the hands of the said defendant, *William H. Ward* for the said sum of *two thousand* dollars, and that there was no usury therein or other defense thereto; and that said defendant *Ward* paid to the said *Davis*

Hartford bank, to the order of *Willoughby Lynde*, and said *Joseph Hart*, and bearing date the *9th* of *September*, 1*803*, and on the back of which instrument were written the names of the said *Willoughby* and *Joseph*, purporting to be a regular and genuine indorsement thereof, in blank, in common form, by the said *Willoughby* and *Joseph*: And the said *Averill*, as agent to the plaintiffs, as aforesaid, verily believing, that said instrument was made and executed by the defendant, and that said indorsement was made by said *Willoughby* and *Joseph*, did then and there, for and in behalf of the plaintiffs, and as their agent as aforesaid, purchase and receive of the said *Lloyd*, as agent to the said *Joseph*, and at his, the said *Lloyd's* special instance and request, the aforesaid instrument, and did pay the said *Lloyd* therefor, for the use of the said *Joseph*, *two thousand* dollars, of the money of the plaintiffs, then being in the hands of the said *Averill*, as their agent as aforesaid: And immediately after the purchase and receipt of said instrument, as aforesaid, the same was deposited, by the plaintiffs, at the said *Hartford* bank, with the cashier of said bank, that the contents thereof might be paid at said bank, according to the tenor thereof, and so continued deposited at said bank, till the end of *ten* days after the expiration of said *ninety* days, therein mentioned: And before the expiration of said *ninety* days from the date of said instrument, the said cashier gave notice to the said *Joseph*, at *Hartford* aforesaid, that said instrument was deposited at said bank, as aforesaid, and of the time when the same would become payable according to the terms thereof, and when payment of the contents thereof was expected at said bank; but the said *Joseph* altogether neglected and refused to pay the same, or any part thereof.

And the plaintiffs say, that the instrument aforesaid, and the aforesaid indorsement of the said *Willoughby's* name thereon, were and are, as they have since discovered, false and forged; that said instrument or note was not made and executed by the defendant, and that the indorsement of the said *Willoughby's* name thereon was not made nor authorized by the said *Willoughby*; but that the said

the full sum of *two thousand* dollars, the consideration money mentioned in the said bond and mortgage."

In the Sale of an Order. — Declaration for deceit in sale of order drawn by the selectmen on the town treasurer, in Bacon *v.* Sanford, 1 Root (Conn.) 164, declared substantially as follows: "that on the *17th* of *January*, *1787*, the defendant was possessed of *two* orders, drawn by the selectmen of *Woodbury*, on their treasurer: one for £*67-10-2*, dated the *12th* of *January*, A. D. *1779* — one for £*43-10-0*, dated *15th* of *April*, A. D. *1779*, both expressed to be for lawful money — drawn in favor of *Joseph Perry*, and by him endorsed to the defendant; which orders were subject to be reduced by the scale, and were worth about £*12* lawful money — which the defendant well knew — yet contriving to injure and defraud the plaintiff, did falsely affirm to *Asahel*, clerk and storekeeper to the plaintiff, to induce him to buy them, the plaintiff being then from home, that said orders were not liable to be reduced by the scale, but were equal in value to their nominal sum in lawful money — and the said *Asahel*, relying on the defendant's affirmation aforesaid, and being ignorant of their true value, did purchase said orders and paid the nominal sum in lawful money for them, out of the property of the plaintiff, etc., further alleging that he presented said orders to said town treasurer, and that he refused to accept or pay them — damage £*150*." On demurrer, the declaration was held to be sufficient, and plaintiff allowed to recover.

instrument or note, and the indorsement of the said *Willoughby's* name thereon, as aforesaid, were falsely made and forged by the said *Joseph*, for the purpose of fraudulently obtaining money and credit thereby: All which was wholly unknown to the plaintiffs, and to their aforesaid agent, and to the said *Lloyd*, till the *23d* day of *December*, now last past, as hereinafter mentioned.

And the plaintiffs further say, that at *Hartford* aforesaid, on the *21st* day of *December*, now last past, and after the aforesaid *ninety* days had expired, they, by their agent, the aforesaid *Thomas Lloyd, jr.*, (*the plaintiffs and the said Lloyd then not suspecting, that said instrument and indorsement were false and forged as aforesaid,*) gave notice to the defendant, that said instrument or note had not been paid, and that the same had become payable, and demanded of the defendant, payment of the contents thereof, and the defendant then and there (well knowing that the same was false and forged, as aforesaid, and in pursuance of a previous combination between the defendant and the said *Joseph*, to defraud the said *Joseph's* creditors, and with intent to deceive and injure the plaintiffs, and to prevent them from immediately suing out legal process against the said *Joseph*, and procuring his body to be arrested, or his property to be attached thereon, to secure the contents of the aforesaid instrument, and also with intent to procure time for the said *Joseph* to dispose of all his property, and to abscond out of the state, so that the plaintiffs might lose all remedy against said *Joseph* in the premises) did corruptly, wickedly, and fraudulently conceal from the plaintiffs' last aforesaid agent, the fact, that said instrument or note was false and forged, as aforesaid; and to prevent the said *Lloyd* from suspecting that said instrument or note was false and forged as aforesaid, did, then and there, with the same wicked and fraudulent intent, falsely and deceitfully give the same *Lloyd* (then and there acting as agent to the plaintiffs, as aforesaid) to understand and believe, that the same was a genuine and authentic instrument, and for this purpose did, with the same fraudulent intent, falsely represent to the said *Lloyd*, that he, the defendant, had then come to said *Hartford*, to make arrangements for settling the claims outstanding against said *Joseph*, and did engage and promise to the said *Lloyd*, that the defendant would soon see the said *Lloyd* again, and attend to the said demand then upon him made, by the said *Lloyd*, as aforesaid: Whereupon the said *Lloyd*, as agent for the plaintiffs, as aforesaid, confiding in the honesty of the defendant, and not doubting but said instrument was genuine, and authentic, but verily believing and expecting from the aforesaid representation and engagement of the defendant, that the defendant would soon pay and satisfy the contents of said instrument, forbore to pray out an attachment, (which he would otherwise have done without delay,) in favour of the plaintiffs against the said *Joseph*, to secure the contents of the aforesaid instrument.

And the plaintiffs say, that at the time when said demand was made on the defendant, as aforesaid, the said *Joseph* was residing in said *Hartford*, and was possessed of visible property more than sufficient to satisfy said sum of *two thousand* dollars.

And the plaintiffs further say, that immediately after said demand was

made on the defendant, as aforesaid, viz. on said *twenty-first* day of *December* last past, and also on the day next following, at *Hartford* aforesaid, the defendant did, in pursuance and execution of his aforesaid wicked and fraudulent intent, and to prevent the said *Joseph* from being arrested by the plaintiffs, or his other creditors, secretly advise, aid, and assist the said *Joseph*, to abscond out of this state; and that he the said *Joseph* did, in pursuance of said advice, and by the defendant's aid and assistance, as aforesaid, on the night of the *twenty-second* of said *December*, abscond out of the state, to parts unknown, and has ever since remained out of the state: And that before the said *Joseph* left the state as aforesaid, he had disposed of all his property, and was, and still is, altogether insolvent, and unable to pay said sum of *two thousand* dollars, or any part thereof: And that the defendant, after the said *Joseph* had absconded, as aforesaid, viz. on the *twenty-third* day of said *December*, and not before, at *Hartford* aforesaid, on demand of payment of the aforesaid instrument or note, then again made, informed the said *Lloyd*, then acting as agent for the plaintiffs, as aforesaid, that said instrument was false and forged, as aforesaid, and then and there refused, and hath ever since refused to pay the plaintiffs the contents of the same, or any part thereof, though often thereto requested, and the same remains altogether unpaid. [(*Concluding as in Form No. 5912.*)][1]

(*f*) *Sale of Shares of Stock.*[2]

1. See note 1, p. 145, *supra*.

2. **For other precedents** see Robinson's F., p. 579; Squier *v.* Plunkett, 11 Gray (Mass.) 11; Teague *v.* Irwin, 127 Mass. 217; McAleer *v.* McMurray, 58 Pa. St. 126; Warner *v.* Bates, 75 Wis. 279.

Sale of Shares in Carving Company. — In Caswell *v.* Hunton, 87 Me. 277, the declaration alleged:

"That the defendant, in order to induce the plaintiff to buy of him *twenty-five* shares in the capital stock of a corporation known as the *National Carving Company*, and pay him therefor the sum of *five hundred* dollars, falsely and fraudulently represented to the plaintiff that said *National Carving Company* was just starting into business, and needed a little more money to get the business well started; that the company then and there had large orders to fill, and that he (the defendant) was then selling treasury stock to raise money to do business to fill said orders; that the stock he (the defendant) was then selling was treasury stock of said corporation; that one *F. W. Parker*, one *Frank R. Conant*, one *J. L. H. Cobb*, and one *C. I. Barker*, were then owners of similar treasury stock purchased by them respectively of the corporation, at the same price he was paying; that he was and had been since the company came to *Maine*, about a year before, the agent of said corporation to sell its treasury stock for the purposes aforesaid; and that as such agent, he (the defendant) had sold to one *P. M. Thurlow two hundred and fifty* shares of like treasury stock at the same price he was to pay." The declaration contained all other necessary and material elements to state in legal form the alleged cause of action. The verdict was for defendant, but plaintiff's exceptions thereto were sustained.

Sale of Shares in Manufacturing Company. — In Rothmiller *v.* Stein, 143 N. Y. 582, the allegations of the complaint are substantially as follows:

"In *October*, 1891, articles of incorporation were executed by the defendants and certain other persons and filed in the proper place, which certified the forming of the *Grooved Plaster Slab Manufacturing Company*, under the laws of *New Jersey*, with a capital stock of $*150,000*, $*20,000* of which had been actually paid in cash; defendants each subscribed for fifty shares of the stock of said corporation, and each agreed to pay therefor $*5,000* in cash. Defendants and *John Burke* were afterwards elected directors, and they elected the

officers of said company, the president being one of said defendants and the secretary and treasurer the other, and they were re-elected the following year and continued to perform the duties of their offices until *November*. 1893. On or about *November 9*, 1891, said defendants certified under oath that the full amount subscribed had been paid in in cash, viz., $20,000. Shortly after the formation of the company plaintiff became the owner of *118* shares of the stock; after the formation it was solely and exclusively managed by defendants. On *May 31* 1892, they declared and paid a quarterly dividend of *two* per cent., and then stated to plaintiff that a further dividend would be declared in *October*, and that the business had become so large it would be a dividend of *twenty* per cent. Prior to *August*, 1892, plaintiff received from various persons offers to purchase his stock for $100 cash per share, but refused them on account of the defendant's statements. On *May 31*, 1892, he asked for a detailed statement of the status of affairs of the company, and defendant *Stein*, as treasurer, delivered to him a written statement which set forth his plant to be worth $4,000; merchandise, outstanding accounts and cash on hand, $41,897.73; its liabilities, $2,226.15, and that it had received in cash $48,384, and expended $29,268.52, leaving $19,115.73 cash on hand. In *August*, 1892, plaintiff, being about to leave for Europe, asked for another statement, and defendants informed him that the business had increased materially since *May 31*, 1892, and the assets were much larger than stated in the statement of that date. Upon arriving in London in *August*, 1892, plaintiff was offered for his stock *eighty* dollars per share in cash, or *fifty* dollars per share in cash and *fifty* dollars more per share on *January 1*, 1894, if the annual dividends amounted to *ten* per cent. Plaintiff, relying on defendants' statements, sold *ten* shares of his stock on the latter offer. On his return to *New York*, *October 8*, 1892, he informed defendants of the offer he had received and they told him he must not sell for less than par; that the business had increased enormously, the company having on hand a large number of orders and its assets having increased greatly, and that much larger dividends than *ten* per cent. would be declared at the annual meeting. Plaintiff, relying entirely and solely on these representations, refused the offer of *eighty* dollars per share for his stock, and accepted the other offer and sold *100* shares of his stock on those terms. The complaint further alleged that all of the defendants' statements above set forth were false and known by them to be false when made, and were made with intent to deceive the stockholders; that only $10,000 in cash had been paid in, and defendants had failed to pay the $10,000 subscribed by them, and had made false entries in the books of the company to induce the stockholders to believe they had paid their subscriptions; that at the time of the statement given plaintiff in *May*, 1892, the assets of the company amounted to only a few thousand dollars and the cash on hand to only a few hundreds; that at the time of the *August* statement as to the increase in business. the business had, as matter of fact, decreased; the company had very little money on hand, was largely in debt and actually insolvent. That the fact that no dividends were declared after *May 31*, 1892, was due solely to gross mismanagement by defendants, who squandered its moneys and, contrary to its by-laws, paid themselves large salaries amounting to thousands of dollars. Plaintiff having been induced by defendants' false statements to refuse to sell his *110* shares of stock for *eighty* dollars per share, but having sold them on terms under which he received only $5,500 in cash and was not entitled to receive any more as no dividends were declared, asked to recover $5,500 as damages by reason of said false statements."

Sale of Shares in Oil Company. — In McAleer *v.* McMurray, 58 Pa. St. 126, the declaration contained six counts. The first five counts charged substantially that the defendants "organized a company to mine oil; had it incorporated by the name of the *Olive Branch Oil Company*; became directors; represented that its land had cost and was worth $37,500, when it was worth but $8,000; issued certificates that there were *100,000* shares, on which $5 each had been paid, when the capital was less than $20,000, and the stock was of no value; that the deeds for the land falsely stated the consideration to be $37,500, when the cost was less than $10,000; that the land was of little value, and that the defendant, relying on these false repre-

sentations, bought and paid for *500* shares of the stock. The sixth count averred that the defendants, conspiring and intending to commit the frauds, etc., organized and did the other acts mentioned in the former counts, and certified under oath that *50* cents per share had been paid on the stock; that they caused to be apportioned to themselves a large number of shares, which they sold to divers persons, and the plaintiff purchased *500* shares of one *Riddle*, who represented that certificates would be delivered when the company should be incorporated; that plaintiff not knowing the facts, but confiding in the representations and honesty of the transaction, paid *Riddle* $*625* for the stock, and received a certificate for the shares; that the defendants had paid a much smaller sum than $*37,500* for the land, had taken that sum from the treasury, and after paying the smaller sum, had appropriated the residue to their own use; that *50* cents per share had been paid on only a small portion of the *100,000* shares, and that the defendants had not paid anything on their shares; that $*5* per share had never been paid to the company by any one, etc."

Sale of Shares in Patent-right Company. — In Miller *v.* Barber, 66 N. Y. 560, the complaint alleged, in substance, "that defendants falsely and fraudulently represented that they had organized a company under the name of the *Union Patent Right Company*, of which defendant *Barber* was president and the defendant *Schermerhorn* was secretary, which owned the right to sell in certain specified counties a patent-right for an invention known as 'the hay-loading pitchfork,' which was purchased cheap and was very valuable; that various individuals named and well known to plaintiff as men of character and pecuniary responsibility had taken shares, giving their notes therefor; that, relying on such statements and representations, plaintiff subscribed for *one* share of the stock, giving his note for its nominal par value, to wit, $*500*, payable to the defendants or bearer, which note was transferred to a bona fide holder before maturity, and plaintiff was compelled to, and did, pay the same; that defendants, for the purpose of cheating and defrauding plaintiff and others, had devised and carried out the scheme of organizing said company, and had procured various individuals, whose names were mentioned as aforesaid, to become apparent stockholders and to give their promissory notes for stock under the secret agreement that said notes were not to be paid, but were to be given up after being used to induce others to purchase stock, which notes were subsequently given up, and that the stock of said company and said patent and invention were utterly worthless." The complaint also alleged that upon the discovery of the fraud plaintiff tendered back the certificate of stock received by him and demanded the amount of money paid by him upon the note. Judgment for plaintiff was affirmed on appeal.

Sale of Shares in Railroad Company. — In Barnes *v.* Brown, 80 N. Y. 530, "the most material facts alleged in the complaint were these: That in *March*, 1872, the plaintiff was a director and president of *The New York City Central Underground Railway Company*, a corporation organized under the laws of this state; that before the plaintiff became such director and president, he company had made a contract with one *Byrne* to build and equip its railway, and after he became such director and president, he had purchased of *Byrne* an interest in such contract, to the extent of *forty-five* per centum thereof, which interest was of great value; that the railway company was indebted to him in the sum of $*27,500*, and that the total number of shares which had then been issued were *117*, of which he held a majority, to wit, *sixty* shares, which were also of great value; that on the *26th* day of *March*, 1872, the defendants *Brown* and *Seligman* entered into a written contract with him, whereby, in consideration of the assignment and transfer to them by him of all his claims against the railway company, and his stock therein, and his interest in the construction contract with *Byrne*, they agreed to pay him the sum of $*27,500*, and cause to be delivered to him *2,000* shares of the full-paid capital stock of the company; that at the time of entering into the contract the two defendants represented to him that in order to enable them to carry out the terms of the contract, on their part, it would be necessary for the plaintiff to resign the presidency of the corporation, and that he and some of the other directors thereof should also resign as directors, to make room for the two defendants, and such other persons as

aa. SHARES IN MINING COMPANY.

Form No. 6888.

(Precedent in Barndt *v.* Frederick, 78 Wis. 3.)[1]

[(*Title of court and cause, and commencement as in Form No. 5937.*)][2] (*After alleging in substance* "that on *October 15th*, 1*883*, the defendant sold and delivered to the plaintiff, at the county of *Waukesha*, in this state (in which county plaintiff resides), *one hundred* shares of stock in the *Arizona Peerless Silver Mining Company*, a corporation, etc., for $*3,000*, which sum the plaintiff then paid the defendant therefor," *the complaint then proceeded as follows:*) That, at the time of the sale and delivery aforesaid, said defendant falsely and fraudulently represented to the plaintiff that said company was then actually and actively engaged in the business of mining silver in the *territory* of *Arizona*, and was then the owner of a large quantity of mining property in said *territory*; that said corporation had, for a long time prior to said date, been actually and actively engaged in said mining business, and then actually had and owned a quantity of silver ore of the actual value of *one and one half million* of dollars, already excavated and upon the surface of the ground at its mines in said *territory* of *Arizona*, and ready for shipment; and that the market value of said stock was then *thirty* dollars per share. * * *[3]

they desired to associate with them, and they requested him to resign and to use his influence to cause other directors to resign; that thereafter he did resign, and procure other directors to resign, and other persons nominated by the two defendants were chosen to fill the places thus made vacant, and so plaintiff lost control, and the two defendants obtained control of the corporation; that the two defendants thereafter paid him the $*27,500*, and delivered to him certificates of stock in the company purporting to represent *2,000* shares thereof, in performance of their contract with him, at the same time representing that such stock was full-paid stock; that the plaintiff received such stock, believing that it was full-paid stock; that from the time he received it, to wit, *January 22*, 1*873*, to *August*, 1*874*, he was under the same belief; that at the latter date he learned that the stock was not full-paid stock, but that it had been unlawfully issued, without any consideration, and was fraudulent and worthless, as was well known to all the defendants; that the defendants, all of whom were at the time directors of the company, procured and caused the stock to be issued while acting as directors, for the express purpose and with the intent that the same might be used to discharge the obligation of *Brown* and *Seligman* to the plaintiff under their contract with him; and on account of the fraud thus practiced, it is alleged that he sustained great damage, which is claimed." Judgment against defendant Park affirmed; reversed as to other defendants.

1. Judgment for plaintiff in this case was affirmed on appeal.

2. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra*.

3. **It was further alleged** therein that such representations were made at and before the sale and delivery of the stock, and were so made by the defendant, who well knew that each of them was false, for the purpose of fraudulently inducing the plaintiff to purchase the stock, and the plaintiff believed and relied upon them, and was thereby induced to purchase the stock and pay therefor the said consideration, and that the stock never had any value, and was worthless.

That the defendant never learned that said representations were false and fraudulent as aforesaid, until on or about the *1st* day of *December*, 1*887*, and that thereupon, and on the *30th* day of *December*, 1*887*, he offered to return said stock to the defendant, who then and there refused to accept the same, and the plaintiff avers that he has ever since been and is now ready and willing to return said stock to

Another Precedent. — In Warner *v.* Bates, 75 Wis. 278, the complaint alleged among other things, "that on and prior to *December 8*, 1*886*, the defendants *N. D. Moore*, *Laura D. Benjamin*, and *Elizabeth M. Bates* were copartners under the firm name of *Moore*, *Benjamin & Co.*, and engaged in the business of buying and selling mining stocks at *Milwaukee*, and that the defendants, *Henry S. Benjamin*, the husband of said *Laura D. Benjamin*, and *F. A. Bates*, the husband of said *Elizabeth M. Bates*, represented and were the managers and agents of their wives respectively, being duly authorized thereto, in all of the business transactions of said firm; that the plaintiff had the closest social and most friendly relations with the defendants *Benjamin*, and they had her unlimited confidence; that at the time aforesaid the plaintiff owned real estate in *Milwaukee* worth at least $*20,000*; that the defendants were the owners of large amounts of mining stock, and, well knowing the facts above stated, did unlawfully, wickedly, and maliciously conspire and combine together to procure the plaintiff to sell and dispose of her said real estate and with the proceeds of such sale to purchase of the defendants certain of said mining stocks, and thereby to cheat and defraud the plaintiff." The complaint then alleges "that in pursuance of such conspiracy, and taking advantage of the plaintiff's confidence in the defendants *Benjamin*, the defendants importuned and solicited the plaintiff to sell her said real estate and purchase from them said stocks, and falsely and fraudulently represented to her that certain pretended corporations respectively pretending to do and carry on business, and which had respectively issued shares and certificates of stock, had each and all been duly and legally organized and incorporated; that each and all of said pretended corporations had respectively issued their said respective stocks and certificates of stock in consideration of money, labor, and property estimated at its true money value, actually received by said respective pretended corporations, equal to *seventy-five* per centum of the par value of the said respective stocks and certificates of stock of said respective pretended corporations; that at least one half of the respective capitals of said pretended corporations and each of them had been duly subscribed, and at least *twenty* per centum thereof actually paid in; and each and all of said pretended corporations owned large tracts of valuable mineral lands; that all of said lands and the lands so owned by each and all of said pretended corporations were productive of, and were constantly producing, large and valuable quantities of iron ores and other minerals; that each and all of said companies were being conducted, operated, and carried on at great profit and gain; that the said respective stocks and certificates of stock of said respective pretended corporations were of great and increasing value, that the said stocks and certificates of stock of said respective corporations were an abundantly safe and absolutely sure and paying investment for capital, from which it was impossible to suffer or sustain any loss; and that if the plaintiff would sell her said real estate, and purchase of them said stocks, she should suffer no loss therefrom. Each and all of which said several statements and representations above set forth were false, which the defendants well knew, and were by them so made as aforesaid for the purpose of deceiving, misleading, and defrauding the plaintiff, and inducing and procuring her to sell her said real estate and with the proceeds derived therefrom to purchase of the defendants the said stocks and certificates of stock by them so owned as aforesaid, and to cheat and defraud the plaintiff out of her said property and to cause her thereby to suffer great and irreparable damage, as aforesaid." The complaint alleges "that the defendants also, in pursuance of said conspiracy, represented that the said stocks and certificates of stock of said pretended corporations were respectively worth certain

the defendant; that, by reason of the premises aforesaid, the plaintiff has been damaged in the sum of *$3,000* and interest thereon from the *5th* day of *October*, 1*883*. Wherefore this plaintiff demands judgment against said defendant for said sum of *$3,000* and interest thereon from the *5th* day of *October*, 1*883*. besides the costs of this action.

[(*Signature of attorney as in Form No. 5937.*)][1]

bb. SHARES IN REAL ESTATE SYNDICATE.

Form No. 6889.

(Copied from the record in case of Powers *v.* Fowler, 157 Mass. 318.)

[(*Title of court and cause, and commencement as in Form No. 6942.*)][1] And the plaintiff says that heretofore, to wit, on the *seventh* day of *July*, 1*887*, the defendant, in order to induce the plaintiff to subscribe for shares in and to become one of a syndicate of persons to purchase certain real estate situate in the county of *Jackson* and state of *Missouri*, which is the same referred to in the other counts of this declaration, called *Grafton Place*, did falsely represent to the plaintiff that the defendant, together with one *Voorhees* and one *Gregory*, as copartners, had purchased said *Grafton Place* for a large sum of money, to wit, *$62,456*, and that they, the said copartners, held said real estate by a good and clear title, so that if the plaintiff should purchase an interest in the said real estate by becoming one of said syndicate, nothing more would need to be paid by the plaintiff than his share of the taxes assessed on said real estate, and that everything about said real estate was "straight and right," that said real estate was situate in *Kansas City*, in said county of *Jackson*.

Whereas, in fact, the said copartners and none of them had paid such sum bona fide for said real estate, and the same was encumbered by a mortgage for a large sum, to wit, for *$38,456*, and said real estate

amounts per share, when in truth and in fact they were all worthless, as the defendants well knew." The complaint then alleges "that the plaintiff, relying upon the false and fraudulent representations and pretenses aforesaid, and yielding to the solicitations and importunities of the defendants, sold her said real estate and out of the proceeds of the sale purchased the said stocks and certificates of stock in the quantities and for the sums stated, all of which sums she paid to the defendants in money; and that afterwards, still relying upon said false and fraudulent representations, she further purchased other of said stocks and certificates of stock, in payment for which she gave her promissory notes; that all of the stocks and certificates of stock so sold by the defendants are now and at all times have been absolutely null and void and of no value whatsoever; that by reason of the premises the plaintiff has suffered great damage, to wit, in the amounts paid as aforesaid for said stocks and certificates of stock, and the interest paid by her on said promissory notes, and the amount which she is still liable to pay thereon, less the amount received by her on the sale of a small portion of said stocks." In this case plaintiff's exceptions to a judgment in favor of the defendant were sustained.

1. **For the formal parts** of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

Consult notes to Form No. 6863, *supra*.

was situate near the town of *Independence*, in said county of *Jackson*, and a long distance, to wit, *nine* miles from said *Kansas City*, all of which things the defendant well knew; and the plaintiff being ignorant of the existence of said mortgage, and of the price really paid by said copartners, or any of them, and likewise being ignorant of the situation of said real estate, and relying on and believing in the representations of the defendant, and in each and every one of said representations, was induced by means of said representations and each and every one of them, to pay to the defendant for *one* share in said *Grafton Place* syndicate the sum of *one thousand* dollars.

And later, to wit, on the *fifteenth* day of *June*, A. D. 1*888*, an assessment of $*253.17* upon the said share held and owned by the plaintiff, was called for and demanded by the defendant for the purpose of paying the interest and a portion of the principal sum of said mortgages; and to induce the plaintiff to pay said assessment and with intent to deceive the plaintiff, the defendant did falsely represent to the plaintiff that the plaintiff was the only member of said syndicate who had not paid his assessment, and that the payment of said assessment was necessary to preserve the rights and interests of the plaintiff in said real estate from being taken under said mortgages, and that said real estate was situate in said *Kansas City*; whereas, in fact, several members of said syndicate had not paid their assessments on their shares, and said real estate was not situate in *Kansas City* aforesaid, all of which things the defendant well knew.

Yet the plaintiff, being ignorant of the fact, whether said assessments had been paid or not by the other members of said syndicate and still being ignorant of the situation of said real estate, and in order to protect the interests which the plaintiff had acquired through and by means of the former misrepresentations aforesaid of the defendant, from said mortgages, paid to the defendant the said assessment of $*253.17*.

And the plaintiff says that by reason of said mortgages and the situation of said real estate, his interest in said real estate and his said share in said syndicate, is of no value, and he has wholly lost the said sums of $*1,000* and $*253.17*, together with the interest thereon.

John J. Powers,
By his Attorney, *John B. Scott*.

c. In Sales of Realty.

(1) In General.[1]

1. **Misrepresentations with Respect to Realty.**—There has been some difficulty, in cases of deceit, in determining what statement of representations on the part of the defendant will be sufficient in an allegation to sustain the action, when the fraud or deceit charged is with respect to real estate. It has been stated that "in regard to affirmations and representations respecting real estate the maxim *caveat emptor* has ever been held to apply." Medbury *v.* Watson, 6 Met. (Mass.) 246. It would seem, however, that if the representation set forth was of a matter peculiarly within the defendant's knowledge, or, from the circumstances of the case, the plaintiff must rely on the defendant's statements, the usual allegations, as in other cases of deceit, would be sufficient.

In an early case, where the allegations set forth that a vendor had falsely affirmed certain things in regard to the amount of rent for which the estate was let, it was held that there the action would lie, on the ground that the allegation set forth a matter peculiarly within the defendant's knowledge, he being the lessor of the estate. Elkins *v.* Tresham, 1 Lev. 102, 1 Sid. 146, *cited* in Medbury *v.* Watson, 6 Met. (Mass.) 260.

In *Florida*, a declaration in an action on deceit for false representation concerning real estate should state distinctly that such representations were false, that they were known to be false by the vendor, that the purchaser relied on and was misled by them, and that they were representations of material facts. Williams *v.* McFadden, 23 Fla. 143.

In *Georgia*, an allegation stating that the defendant told the plaintiff that he (the defendant) had paid a certain price for a farm he was then trying to sell plaintiff, whereas, in fact, he had paid a less price therefor, and thereby induced the plaintiff to purchase the farm, was held sufficient. Green *v.* Bryant, 2 Ga. 66.

In *Illinois*, allegations in respect to misrepresentations in regard to value made by vendor would not show a sufficient ground for the action on the general principle that value is almost a mere expression of opinion, and the antagonistic position of the parties is enough to put the vendee upon his guard; but when the representation is outside the domain of judgment and opinion and the allegation is "that the vendor falsely represented a fact, as, of quantity, grade, boundary, and the like, inducing reliance and action thereon by one, without knowledge of the falsehood or the present opportunity or ability of verification, and under circumstances justifying belief, and damage results in consequence, the action will lie." Endsley *v.* Johns, 120 Ill. 481.

In *Kansas*, the following allegations in a case for deceit in regard to sale of land were held sufficient: "that said defendant, well knowing that he had no right or title to said land, and for the purpose of cheating and defrauding plaintiff, fraudulently concealed said fact from plaintiff. And plaintiff says, that at the time of said purchase, and at the time of the execution and delivery of said deed of conveyance by defendant to plaintiff, the defendant, for the purpose of inducing plaintiff to purchase said land and take said deed of conveyance for the same as aforesaid, did then falsely and fraudulently represent, that he was the owner in fee-simple of the same, and had the legal title thereto, when he well knew that he was not the owner of said land and had no right or title whatever to the same." Claggett *v.* Crall, 12 Kan. 393. Consult the precedent in this case set out in Form No. 6893, *infra*.

Consult also Form No. 6863, *supra*, and notes thereto.

Misrepresentations Involving Value and Rental. — In setting forth the misrepresentations, care should be taken that the allegation does not contain mere expressions of opinion in statements involving value. Harvey *v.* Young, Yelv. 20; Deming *v.* Darling, 148 Mass. 504.

In this class of cases, allegations setting forth the previous rental of property or the price paid by the present owner, being matters peculiarly within the defendant's knowledge, are generally held sufficient. Dobell *v.* Stevens, 3 B. & C. 623, 70 E. C. L. 201. But see Holbrook *v.* Connor, 60 Me. 578.

Action for Fraudulently Procuring Release. — In Stevens *v.* New York, 84 N. Y. 297, the complaint alleged in substance "that prior to *July*, 1866, plaintiff was the owner of certain premises which were described situate in the city of *New York*, which were a portion of a street which had been closed, and a new street opened, and thus the premises were relieved from the public easement; that plaintiff was ignorant of these facts; and that in *May*, 1866, defendant offered for sale, at public auction, certain lands adjoining said old street, and included in such sale the premises before described, and that one or more of the purchasers declined to take title, on the ground that the plaintiff, and not the defendants, was the owner of such premises; and that thereupon defendants employed an agent to obtain for them the plaintiff's title, of all which plaintiff was ignorant until *May*, 1869. That in *July*, 1866, the defendants applied to the plaintiff for a release and conveyance of his title, and at the time of such application, fraudulently, and with intent to deceive the plaintiff, kept concealed from him the fact of the opening of *Seventy-eighth* street, and also the closing of the old street. And, further, falsely informed the plaintiff that he had some slight

Form No. 6890.

(*Title of court and cause, and commencement as in Form No. 5926.*)[1]

I. That the defendant on *January twentieth*, 1897, at *Albany* in the county of *Albany*, intending to deceive the said plaintiff and to induce him to purchase a certain lot of land situated in *Boston*, in the *Commonwealth* of *Massachusetts*, the property of the said defendant, from him the said defendant, made to him the said plaintiff certain false representations.

II. That these representations were that said land was[1] (*Here set forth representations*), whereas said land was not (*Here set forth representations*).

III. That plaintiff relied on said representations.

IV. That plaintiff was thereby induced to purchase and did purchase said land, and did then pay therefor to said defendant the sum of *fifty thousand* dollars.

V. That defendant well knew when he made the representations aforesaid that they were false.

VI. That plaintiff by his reliance upon said representations suffered damage to the amount of *fifty thousand* dollars.

Wherefore (*concluding as in Form No. 5926*).[1]

claim to the said portion of said street, but that it was a mere equitable claim, and of no value, and asked him to execute a release or deed thereof. And that the plaintiff, misled, deceived and induced by such fraudulent concealment and such false and fraudulent statements and misrepresentations, which he believed to be true, and relied upon, executed and delivered such release without any consideration. And that the defendants then and there presented and left with him $25 for his trouble, in spite of his remonstrance that it was no trouble at all. That at the time of executing such release, the premises were worth $200,000, and judgment was asked for this amount." A judgment dismissing the complaint in this case was affirmed.

For example of a declaration in an action on the case for fraud in procuring and pleading a release of a covenant see Coleman *v.* Wolcott, 4 Day (Conn.) 6.

Declaration in action for fraudulent representations in regard to redeeming mortgaged property held sufficient upon demurrer, see Raymond *v.* Sturges, 23 Conn. 135.

1. For the formal parts of complaints or petitions in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations in any particular jurisdiction consult the title DECLARATIONS, *post*, p. 244.

Consult notes to Form No. 6863, *supra*.

Precedents. — See Long *v.* Woodman, 58 Me. 49; Lamborn *v.* Moore, 6. Harr. & J. (Md.) 422; Flanagan *v.* Pearson, 42 Tex. 2.

Sale of Farm. — In Green *v.* Bryant, 2 Ga. 66, the declaration, omitting the formal parts, alleged: "That the plaintiff and the defendant were brothers in law; that the plaintiff, residing at the time in the county of *Burke*, was desirous of removing to some of the southwestern counties, and, in consideration that he would move to the county of *Lee*, where the defendant resided, he, the defendant, proposed to him that he would purchase a plantation there, owned by a man named *Andrews*, for him (the plaintiff) and that he should have the plantation at the price that the defendant might be compelled to pay for it; that the plaintiff, to be near his brother in law and to have the comfort and satisfaction of his society, and confiding in his good intentions, acceded to the proposition. That some time after this understanding was entered into, the defendant informed him that he had bought the plantation and that he and his brother had paid for it about the sum of *three thousand* dollars; and that confiding in the truth of this statement, he executed to the defendant and his brother his notes for some *twenty-seven hundred* dollars, which he paid. That the representation of de-

(2) As to Boundaries, Location, etc.

Form No. 6891.

(Precedent in Newell *v.* Horn, 47 N. H. 380.)

[(*Commencement as in Form No. 6945.*)][1]

In a plea of the case for that whereas the said defendant, to wit, at *Dummer*, in said county, to wit, on the *fourth* day of *September*, A. D. 1854, in consideration of a certain price, to wit, *one thousand* dollars paid by the plaintiff to the defendant, did bargain, sell and convey unto the plaintiff, a certain lot of land situated in said *Dummer*, and numbered *sixty-six*. (*Amendment:* and a certain other parcel of land, situate in *Milan*, aforesaid, lying southerly of said lot No. *66*, and adjoining the same, containing *three and one-half* acres, more or less; and also a certain other parcel of land, situate in *Dummer*, aforesaid, lying westerly of said lot No. *66*, and adjoining the same, containing *five* acres, more or less.) And upon making said bargain, sale and conveyance, the said defendant did then and there warrant that the true and original line and boundary of said lot of land, included a certain field and tract of woodland on the easterly end thereof, containing *thirty* acres; and a certain parcel of woodland on the northerly side of said lot containing *twelve* acres; and also a certain other parcel of land on the westerly end thereof, containing *ten* acres, all of the value of *five hundred* dollars. Yet the plaintiff avers that the said three parcels of land above described were not, at the time of said bargain, sale and conveyance, included within the true and original line and boundary of said lot, numbered *sixty-six*, (*Amendment:* and said other two parcels of land above described

fendant that he had paid *three thousand* dollars for the land was false and fraudulent. That the defendant had paid for it only some *twenty-two hundred* dollars, and that he knew that his statements about the price paid for the land were false; that they were made to deceive and defraud the plaintiff and that the plaintiff was damaged the sum of *fifteen hundred* dollars." This declaration was held good on demurrer.

Sale of Oil Lands.— In Burns *v.* McCabe, 72 Pa. St. 309, the declaration was that the defendants represented to the plaintiff that they had entered into an agreement with *Daniel Smith* to purchase from him a piece of oil land, of *8* acres, in *Columbia* county, *Ohio*, for $*26,000*, and that they desired to form a company to pay for said land and complete said purchase, the terms of which were *one-half* cash and *one-half* in *seven* months; that on these representations the plaintiff agreed to become a purchaser with the defendants, and others, of the said land, and to take *one* share of $*500* in the company so formed, *one-half* to be paid in cash, and the other *half* in *seven* months; in pursuance of this agreement the plaintiff paid the defendants $*250*, and gave his note for $*250*, payable in *seven* months. The plaintiff averred that the representations were untrue; that the land was not good oil territory, was not situated in the place represented, and that defendants had not agreed to pay *Smith* $*26,000*, but only the sum of $*4,000*, and therefore an action had accrued to the plaintiff to have from the defendants the said sum of $*250*."

1. For the formal parts of complaints or petitions, generally, see the title Complaints, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title Declarations, *post*, p. 244.

The matter to be supplied within [ ] is not in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra*.

Other Precedents. — See Buford *v.* Caldwell, 3 Mo. 478; Curtis *v.* Burdick, 48 Vt. 167.

adjoining said lot No. *66*,) but were then and there parcels of other and adjoining lots of land claimed and owned by other persons, as the said defendant then and there well knew, whereby the plaintiff, upon said bargain, sale, conveyance and warranty, was then and there greatly deceived and defrauded, to the damage of the said plaintiff, as he says, the sum of *six hundred* dollars. [(*Concluding as in Form No. 6945.*)]

Form No. 6892.

(Precedent in Schoellhamer *v.* Rometsch, 26 Oregon 394.)[1]

[(*Title of court and cause, and commencement as in Form No. 5931.*)][1]
That plaintiff, who is a native of *Germany*, and understands but little of the English language, arrived in *Portland* with her three children on the *fifth* of *May*, eighteen hundred and *ninety-three*, and took a room at a lodging-house kept by the defendant; at the time of her arrival, and for several days thereafter, she was sick and suffering in both body and mind, and by reason thereof incapable of exercising sound judgment, or asserting her own will in business affairs against the representations, wishes, importunities, and constraint of others, and wholly ignorant of the location and value of real estate in and about *Portland*, as defendant well knew; that on the day after her arrival, while she was in said condition at defendant's lodging-house, he knowingly and falsely stated and represented to her that a certain tract of land containing *ten* acres, of which he was the owner, was free from all incumbrances, and was situated within *eight* miles of the City of *Portland* by the usually travelled route, and worth not less than *fifteen hundred* dollars in the market at that time, and urged and importuned her to purchase the same at the price of *fourteen hundred and fifty* dollars, and surrender to him in part payment thereof a draft or certificate of deposit on a certain bank for *seven hundred* dollars, which she then owned and held; that plaintiff refused to make such purchase or payment, and repeatedly requested defendant to desist from his efforts to induce her to do so on account of her sickness and inability to attend to business matters, but defendant continued his importunities, and also employed harsh language and other means of intimidation and coercion toward the plaintiff, to constrain and compel her to make said purchase and payment, whereby she was greatly annoyed, harassed, perplexed, confused, and rendered wholly incapable of exercising her judgment or will in reference to such purchase or payment, and defendant then and there well knew the same. That said representations of the defendant were false, and that said tract of land was then incumbered by mortgage liens to the amount of over *seven hundred* dollars, and could not be reached by any prac-

1. **Judgment for plaintiff was affirmed,** the court holding that a complaint alleging that defendant made representations concerning realty which he knew to be false, for the purpose of inducing and which did induce the plaintiff to contract to purchase realty to his injury and damage, is sufficient, without a direct allegation that the representations were made with an intent to deceive. Schoellhamer *v.* Rometsch, 26 Oregon 394, *distinguishing* Rolfes *v.* Russel, 5 Oregon 400.

ticable route from the City of *Portland* in a less distance than *thirteen* miles, and was not of the value of *fifteen hundred* dollars, or of any greater value than *four hundred* dollars, all which defendant then and there well knew; that when such contract was executed plaintiff had not seen the land, and had no other knowledge or information as to its location, condition, or value than the statements and representations of the defendant, which she relied upon and believed to be true, as defendant well knew; that on the said next day after her arrival at *Portland* plaintiff was wrongfully induced, constrained, and coerced against her will, and without her consent, by said false statements, representations, harsh language, and intimidation made to and exercised toward her by defendant as aforesaid, to deliver up said draft or certificate of deposit to defendant, and to receive from him a certain pretended bond for a deed for said tract of land, conditioned for a conveyance thereof upon payment by plaintiff to him of the sum of *fifteen hundred* dollars, with interest on deferred payments at the rate of *seven* per cent. per annum, and reciting the payment of *five hundred and fifty* dollars, being the portion of the proceeds of said draft or certificate of deposit retained and converted by defendant to his own use; that as soon as plaintiff recovered from her sickness, and discovered the true location and condition and value of the land, and the falseness of said statements and representations of defendant, and prior to the commencement of this action, she rescinded said transaction, and every part thereof, and so notified defendant, and tendered and offered to return to him his bond for the deed, and demanded the repayment to her of the said sum of *five hundred and fifty* dollars and interest from *May sixth*, eighteen hundred and *ninety-three*, at the rate of *eight* per cent. per annum, but defendant refused to receive said bond for a deed, or to repay plaintiff said sum of *five hundred and fifty* dollars with interest or any part thereof; and that by reason of the premises defendant is justly indebted to plaintiff in the sum of *five hundred and fifty* dollars and interest thereon from said last mentioned date at the rate of *eight* per cent. per annum.

[Wherefore (*concluding as in Form No. 5931*).][1]

(3) As to Title.

Form No. 6893.

(Precedent in Claggett *v.* Crall, 12 Kan. 393.)[2]

[(*Venue and title of court and cause as in Form No. 5917.*)][1]

1. **For the formal parts** of complaints or petitions, generally, see the title Complaints, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title Declarations, *post*, p. 244.

The matter to be supplied between [ ] is not in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra*.

2. This action was not one for breach of warranty, but an action for fraud. It was not brought on the covenants of the deed, but for the fraudulent representations whereby plaintiff was induced to part with his money for nothing. The court sustained the proposition that such action would lie unless cut off by some statutory provision cited. Eames *v.* Morgan, 37 Ill. 260; Watson *v.* Atwood, 25 Conn. 313. Kan. Gen. Stat. (1868), c. 22, § 20, did not affect this action.

The plaintiff complains of the defendant, and says, that on or about the *twenty-fourth* of *May*, 1*864*, he purchased of the defendant, and defendant sold and conveyed to him by deed of general warranty of that date, (a copy of which is hereto attached as part hereof,) at the price of $*300*, cash in hand then paid by plaintiff to said defendant, the following described parcels and tracts of land, to-wit, (*describing 120 acres in Jackson county, state of Kansas*;) that at the time of said purchase, and at the time of the execution of said deed of conveyance, said defendant was not the owner of the said land, and had no right or title whatever to the same, he the said defendant having on or about the *fifth* of *March*, 1*861*, sold and conveyed said tract of land, by deed of warranty (a certified copy of which is hereto attached and filed as part hereof) to one *G. W. Gillespie*, of which fact plaintiff had no knowledge, and did not learn the same until as hereinafter stated; and said defendant, well knowing that he had no right or title to said land, and for the purpose of cheating and defrauding plaintiff, fraudulently concealed said fact from plaintiff, and plaintiff says, that at the time of said purchase, and at the time of the execution and delivery of said deed of conveyance by defendant to plaintiff, the defendant, for the purpose of inducing plaintiff to purchase said land and take said deed of conveyance for the same

Other Precedents. — See Cooper *v.* Bushley, 72 Pa. St. 252; Schoellhamer *v.* Rometsch, 26 Oregon 394 (complaint set out in Form No. 6892, *supra*).

In West *v.* Wright, 98 Ind. 336, plaintiff instituted an action to recover damages which he suffered by the fraud of defendant, in the purchase of a tract of land from him as executor of the will of a deceased owner. Following the allegations of the sale, the description of the land, the payment of the full amount of the purchase-money, which was equal to the value of the land, the complaint proceeds as follows: "That said defendant, at the time of said purchase of said lands, knowingly, falsely and fraudulently represented to said plaintiff that said lands were clear of all encumbrances whatever; that there was not a debt against said lands, and further stated at said time to said plaintiff, that if anything should come up against said lands, he would stand responsible for said indebtedness, whatever it might be, and thereby induced said plaintiff, by reason of his false and fraudulent representations, to purchase said lands of said defendant as aforesaid, without first examining the records of said county as to said lands; that at the time said plaintiff purchased said lands he lived in *Wayne* county, *Indiana*, and still lives in said county and State, a distance of *twenty* miles from said lands; that he relied wholly on said defendant's representations as to said lands; that he had always supposed said lands were clear of all encumbrances as represented by said defendant to said plaintiff until the auditor of *Henry* county, *Indiana*, advertised said lands for sale; that said plaintiff did not know that there was any encumbrance on said lands until after he had fully paid the price agreed upon for said lands, and the auditor of said county advertised said lands for sale on a school fund mortgage on said lands, which is filed herewith, made a part hereof, and marked 'Exhibit *A*'; that at the time said plaintiff purchased said lands of said defendant, the said school fund mortgage was on said lands, and had been on said lands since the *16th* day of *January*, 18*65*; that said mortgage, interest and costs was *four hundred and forty-four* dollars ($*444*); that it was due and unpaid; that said plaintiff was compelled to pay, and did pay, said mortgage, interest and costs, or suffer said lands to be sold therefor."

For example of a complaint, held bad on demurrer, in an action of deceit, brought by a husband and wife, relating to the sale of land which it was claimed was induced by the fraudulent representations of defendant concerning his wife's title, etc., see Barrett *v.* Tewksbury, 18 Cal. 334.

as aforesaid, did then falsely and fraudulently represent that he was the owner in fee-simple of the same, and had the legal title thereto, when he well knew that he was not the owner of said land, and had no right or title whatever to the same, and well knew that he had already conveyed said land by deed of warranty to the said *Gillespie* as hereinbefore stated. And plaintiff says that, relying upon said statements, he did purchase said land, believing, as defendant stated, that he had the title thereto, and did take said deed of conveyance as before stated and paid defendant the *$300*, as hereinbefore stated, and as recited in said deed. And plaintiff further shows to the court and says that he was, at the time of said purchase and execution and delivery of said deed, and still is, a citizen and resident of *Washington* county, state of *Maryland*; and relying on defendant's statements and warranty aforesaid, and believing that he was the owner in fee-simple of said land, he has paid the taxes on said land as follows, to-wit, (*stating payments from 1864 to 1869, amounting to $80*;) and that in the spring of 1871 the plaintiff for the first time discovered that defendant had practiced a fraud upon him, and then first learned that defendant had no title to said premises at the time of plaintiff's purchase of the same and of the execution and delivery of said deed to him, and then first discovered that defendant's representations and warranty, made at the time of said purchase and execution of said deed, were false and fraudulent, and then learned that defendant had conveyed said land to said *Gillespie*, before the sale and conveyance made by him to plaintiff. And plaintiff says that said land has been wholly lost to plaintiff; that one *Wyatt*, the vendee of said *Gillespie*, now claims to be the owner in fee-simple of said land, and to have the legal title right thereto, and is in possession of the same; and plaintiff says that by reason of the fraudulent representations of defendant, as herein stated, and the fraud and deception practiced on him by defendant, he has been damaged in the sum of *$600*. Wherefore [(*concluding as in Form No. 5917*).][1]

(4) As to Quality, etc.

(*a*) *Generally.*[2]

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra*.

2. **Allegations as to Quality, Boundaries and Description Involving Matters of Fact.** — Where such allegations set forth misrepresentations of material facts, as being made of defendant's own knowledge, respecting property he desires to convey, they will generally be sufficient. Coon *v.* Atwell, 46 N. H. 510; Starkweather *v.* Benjamin, 32 Mich. 305; Savage *v.* Stevens, 126 Mass. 207; Stewart *v.* Stearns, 63 N. H. 99. But when the misrepresentations set forth are of assertions which relate to matters of opinion about which men in the usual course of business might differ, such as the "value of land or its adaptation to a particular mode of culture, or the capacity of the soil to produce crops or support cattle," they will usually be considered as insufficient. Gordon *v.* Parmelee, 2 Allen (Mass.), 212; Coon *v.* Atwell, 46 N. H. 510; Starkweather *v.* Benjamin, 32 Mich. 305.

Form No. 6894.

(*Title of court and cause as in Form No. 5926.*)[1]

The plaintiff complains, and alleges:

I. That on or about the *first* day of *June*, 1*898*, the defendant proposed to the plaintiff that they should purchase, on joint account, some coal lands, and a charter for a coal company in *Maryland.*

II. That the defendant informed the plaintiff that the *Diamond Coal Company* had a charter and some valuable coal lands, which could be purchased for *twenty thousand* dollars and no less.

III. That the defendant at the same time represented to the plaintiff that he should pay *five thousand* dollars in cash, and his promissory note for *five thousand* dollars, as his share of the said purchase money.

IV. That the plaintiff was thereby induced to give to the defendant his share of the purchase money, *five thousand* dollars in cash, and his promissory note, dated the *first* day of *June*, 1*898*, payable *six* months thereafter, for *five thousand* dollars.

V. That all the said representations of the defendant were false, and he knew them to be so.

VI. That the said lands were not coal lands, and were not worth more than *three thousand* dollars.

VII. That the defendant purchased the same, with the charter aforesaid, for *two thousand* dollars in cash, certain bonds worth not more than *five hundred* dollars, and his own note for *five hundred* dollars; and gave no other consideration for the same.

Wherefore the plaintiff demands judgment for *eight thousand* dollars damages.[2] (*Concluding as in Form No. 5926.*)

1. For formal parts of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

Consult also notes to Form No. 6863, *supra.*

2. Or the prayer may be, instead of as in the text, as follows:

"1. That the said note of the plaintiff be surrendered to him;

2. For *three thousand* dollars damages."

Precedents — *Generally.* — See Bostwick *v.* Lewis, 1 Day (Conn.) 250; Way *v.* Cutting, 20 N. H. 187; Bartges *v.* O'Neil, 13 Ohio St. 73.

In Busch *v.* Wilcox, 82 Mich. 324, the declaration, omitting the formal parts, alleged substantially as follows: "The defendant, well knowing the premises, to wit, at the city of *Detroit*, in said county, on, to wit, the *20th* day of *September*, 18*83*, falsely and deceitfully represented to the said plaintiff that he, said defendant, was possessed of certain lands hereinafter described, situated in the county of *Chippewa*, in said State, upon which there was a large quantity, to wit, *six million* feet, of pine timber, a large proportion of which, to wit, *one-half*, was *cork* pine, and the balance *sap* pine, the said defendant then well knowing that it was more expensive, and cost, to wit, *one* dollar a *thousand*, more to lumber *sap* pine than *cork* pine." (*After setting forth the contract, plaintiff further averred that*) "The said plaintiff afterwards, relying upon the statements made by said defendant, and believing such representations to be true, and in the performance of his said contract, to wit, on the *1st* day of *October*, 18*83*, incurred large obligations, and employed a large force of men, to wit, *three hundred* men, for a long space of time, to wit, for *six* months, and sent the said men, with a large force of teams, sleighs, supplies, and other things necessary to enable him to cut into sawlogs, haul, and put afloat from off said lands, at the time and in the manner mentioned in said contract, *seven million* feet of pine; and, in further performance thereof, erected camps, cut, opened, and constructed roads through said lands, and made all the necessary

Form No. 6895.

(Precedent in Kenner *v.* Harding, 85 Ill. 270.)[1]

and other arrangements to cut, haul, and put afloat said *seven million* feet; whereas, in truth and in fact, there was not *seven million* feet of pine timber upon said lands, as the said defendant, at the time of making the said false and deceitful representations, well knew; that, on the contrary, there was but, to wit, *3,500,000* feet of pine timber upon said lands; and whereas, in truth and in fact, *one-half* of the same was not *cork* pine, and the same was all *sap* pine,—all of which was well known to the said defendant at the time he made said false and deceitful representations. By means of which said several premises the said plaintiff was then and there put to great and unnecessary costs and expense, and then and there lost and was deprived of the profits, benefit, and advantage which he otherwise would have derived and acquired from the performance of the said contract, to wit, to his damage," etc.

Sale of Oil Well. — The declaration in such case, omitting the formal parts, was as follows:

"For that whereas at *Boston* in our county of *Suffolk* on the *twenty-eighth* day of *February* in the year eighteen hundred and *sixty-five*, the said defendant represented that he was the owner of *one third* share of the *Winthrop Petroleum Oil Company* of *Boston*, and the said defendant being desirous of disposing of and selling his said interest in said company subsequently, to wit, at said *Boston* on said *28th* day of *February*, wrongfully and injuriously contriving and intending to deceive, defraud and injure the said plaintiff in this behalf, then and there falsely, fraudulently and deceitfully represented and asserted to the said plaintiff, that said company was incorporated under the laws of *Pennsylvania*; that said company owned in fee simple *one hundred* acres of land on *Oil Creek* in *Crawford* county, *Pennsylvania*; that *Oil Creek* railroad passed near said land; that there were streams and runs upon said land that were tributaries of *Oil Creek*; that said land was of great value as oil-producing territory, and that geologists so reported, and was heavily timbered with oak, whitewood and pine timber; that the capital stock of said company to the amount of *two hundred thousand* dollars was all paid in, and that the stockholders would not be subject to any further assessment; that said company had ordered first-class engines and tubing, and had erected and were erecting derricks on said premises for the purpose of developing the same; that there were oil-wells or an oil-well already flowing upon said premises, and that said *one-third* share was of great value, to wit, of the value of *one thousand* dollars. Whereupon the said plaintiff, confiding in the said representations and assertions of the said defendant at the special instance and request of the said defendant, paid the said defendant *one thousand* dollars for the said *one-third* share of the *Winthrop Oil Company* of *Boston*. Whereupon in truth and in fact at the time of making said representations and assertions said company was not incorporated, did not own said *one hundred* acres of land, and the land of said company (if any) was not situated upon or near said *Oil Creek* railroad. That there was not upon any of the land any large area of flat land which might afford boring surface, nor any streams or runs which were tributaries of *Oil Creek*; that said land furnished no evidence and geologists had made no report as to value of said land for oil-producing purposes, and that the same was not heavily timbered as declared above; that the capital stock to the amount aforesaid on said *27th* day of *February* was not paid in; that no engine or tubing were ordered and that no derricks were erected or being erected on said premises for the purpose of developing the same; that there were no oil-wells or well flowing upon said premises. And that said land owned or claimed by said company was entirely worthless for the purposes of said company as an oil-producing company, and that said *one third* share of the *Winthrop Petroleum Oil Company* was of no value to said plaintiff, as the said defendant at the time of making his said false, fraudulent and deceitful representations well knew, and the plaintiff hath sustained great loss, trouble and damage thereby."

This declaration was copied from the record in the case of Fisher *v.* Mellen, 103 Mass. 503. A verdict for the plaintiff in that case was sustained against the exceptions of the defendant.

1. A judgment in favor of plaintiff was sustained, the court holding that where

[(*Commencement as in Form No. 6939.*)][1]

(*The sixth count of the declaration was as follows:*)

And also for that, whereas, heretofore, to wit: on the *first* day of *January*, A. D. 1874, at and within the county of *McDonough*, aforesaid, the said plaintiff bargained with the said defendant to buy of him, in exchange for other property of plaintiff, a certain other parcel of land of said defendant, known and described as the south-east quarter of the north-west quarter of section *twenty-one* (*21*), in township *five* (*5*) north, in range *three* (*3*) west, and situate, lying and being in said county of *McDonough*; and said plaintiff, in purchasing said lands, as aforesaid, from said defendant, was desirous of doing so for the sole purpose of selling the same again in the market, or exchanging the same again for other property, at or about the reasonable market value of said lands so being then and there bargained for of said defendant, and which the defendant well knew; and said plaintiff avers that he was ignorant of the condition or value of said land, or of other similar land in the neighborhood where the land aforesaid was situated, and had never seen nor been informed of the market value of said land of said defendant, and was residing and doing business a long distance, to wit: *seven* miles from said land; and said defendant, then and there well knowing the premises and the facts aforesaid, and also then and there well knowing that said land was of little or no value, to wit: not exceeding in value the sum of *four hundred* dollars, and then and there craftily and subtly intending to cheat, deceive and defraud said plaintiff in the sale of said land to him as aforesaid, then and there falsely, fraudulently and deceitfully affirmed, stated and represented to said plaintiff that said land was worth the sum of *twelve hundred* dollars in the market, and that he, the defendant, had been offered, by one *William Delay*, who resided near and owned lands adjoining the said land of said defendant, and whom said plaintiff then and there believed to be a responsible and reputable man, the sum of *twelve hundred* dollars for said land, to wit: *four hundred* dollars payable in *four* horses, and *eight hundred* dollars payable in promissory notes; but that he, the defendant, was then about to remove from his farm in the country into the city of *Macomb*, and could not, therefore, well handle said horses, and had therefore declined the offer of said *Delay*, but then and there, for the fraudulent purpose of throwing said plaintiff off his guard, and to prevent him from making further investigation as

the vendor of land represented to the purchaser thereof who was unacquainted with the value of the same that he had been offered twelve hundred dollars for the land by a certain person, and procured such person to make the same statement to the purchaser, whereby he was induced to buy the land, and it appeared that the offer was a mere pretense, and the consideration worthless notes and other property greatly in excess of its value, the vendor was liable to the vendee in the action for fraud and deceit.

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied in [ ] is not in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra*.

to the market value of said land, requested and advised said plaintiff to inquire of said *Delay* as to the market value of said land.

And said plaintiff avers, that afterwards and during the pendency of said negotiations between said plaintiff and defendant in regard to the purchase of said land by plaintiff of said defendant, and before the consummation thereof, to wit: on the day and year aforesaid, at the county aforesaid, and the said plaintiff being then and there wholly ignorant, and unsuspecting any fraud and conspiracy between said defendant and said *Delay*, to deceive, cheat and defraud said plaintiff in said purchase as hereinafter mentioned, he, the said *Delay*, called at the store where said plaintiff was then staying, and, as plaintiff avers, at the instigation of said defendant, and then and there, in answer to plaintiff's inquiries of him, the said *Delay*, concerning the market value of said land, and of his offer to purchase the same of said defendant, which said inquiries were made by plaintiff of said *Delay*, as requested by said defendant, as aforesaid, he, the said *Delay*, then and there falsely, fraudulently and deceitfully represented and stated to said plaintiff that he, said *Delay*, had recently offered to purchase said land of said defendant at the price, and for the sum of *twelve hundred* dollars, payable in *four* horses at *one hundred* dollars each, and the balance of said purchase money in promissory notes; and that said land was reasonably worth *twelve hundred* dollars in the market. And said plaintiff avers that, confiding in the said statements and representations of said defendant, and said *Delay*, so made, as aforesaid, and believing the same to be true, and made in good faith, he did then and there consummate said negotiations with said defendant, and buy of said defendant said lands, at said sum of *twelve hundred* dollars, and pay him therefor the price aforesaid in other property, at its reasonable cash value, and reasonably worth more than the value of said lands; and said plaintiff in fact saith that the said representations of said defendant, as to the market value of said lands, and as to what he had been offered for the same by said *Delay*, were false and fraudulent, and known by said defendant to be so at the time he made the same, and were so made by said defendant to deceive, mislead and defraud said plaintiff. That said defendant had not been offered bona fide *twelve hundred* dollars by said *Delay* for said land; but on the contrary, said defendant, for the fraudulent purpose of deceiving and defrauding said plaintiff as to the market value of said land, and to give color to any statement he might make to said plaintiff as to his having been offered *twelve hundred* dollars for said land, had, before referring said plaintiff to said *Delay*, to inquire as to the market value of said land, as aforesaid, and before telling said plaintiff what said *Delay* had offered him therefor, as aforesaid, falsely, fraudulently and deceitfully conspired with said *Delay* to the effect that said *Delay* should offer said defendant *twelve hundred* dollars for said land, *eight hundred* of which was to be paid in promissory notes which said *Delay* then had against third parties, whose names are unknown to plaintiff, but the makers of which were then and still are insolvent, and said notes then and still are worthless, and at the time well known to be so by both said defendant and said *Delay*, and

the other *four hundred* dollars payable in *four* horses which said *Delay* then and there had, but which were of little or no value, to wit: not exceeding in value, altogether, the sum of *two hundred* dollars, at the time said pretended offer was made by said *Delay* to said defendant, as aforesaid, and which was then and there well known to said defendant, and it was at the time agreed and understood between said defendant and said *Delay* that said offer was a fictitious one, and should not and was not to be accepted by said defendant; and said plaintiff avers that the foregoing was the sole and only offer of *twelve hundred* dollars, or of any other sum near that amount, said *Delay* ever made to said defendant for said land. And said plaintiff avers, that at the time of his making said bargain and purchase, he was wholly ignorant of the fraudulent combination and conspiracy between said defendant and *Delay* to deceive, cheat and defraud him in the purchase of said land, and of their false and fraudulent statements and representations in regard to the same, and was so situated that he could not personally examine said land and learn from other sources as to its market value, and was, by the said trick, fraud and artifice of said defendant, as aforesaid, kept from making further investigation in that behalf, but confided in, believed and relied upon said statements and representations, aforesaid, in that respect, all of which said defendant well knew to be false, deceitful and fraudulent at the time of the making of the same; and said plaintiff further said, that the said defendant, by means of the premises, on the day and year aforesaid, at the county aforesaid, falsely and fraudulently deceived the said plaintiff on said sale, and whereby said plaintiff has been greatly wronged, injured and damnified, to wit: to the amount of *one thousand* dollars. [(*Concluding as in Form No. 6939.*)]

(*b*) *Mining Property.*

Form No. 6896.

(Precedent in Ahrens *v.* Adler, 33 Cal. 609.)[1]

[(*Title of court and cause as in Form No. 5910.*)][2]

August Ahrens, the plaintiff in this suit, complains of *Bar Adler*, the defendant, and for cause of action alleges: That on the *31st* day of *July*, A. D. 18*63*, and also on divers days and times previous thereto, as well as after that date, and up to the *10th* day of *October*, 18*63*, at

1. **Judgment for plaintiff was affirmed on appeal,** the court holding that the complaint alleging that the defendant by false misrepresentations as to the value of mines induced the plaintiff to purchase the same, and that defendant gave plaintiff a deed for the same and received the consideration agreed on, and also claiming general damages exceeding the consideration, and averring an offer to redeem the land, sets up an action *ex delicto* and not *ex contractu*, and that the averment of an offer to return the deed is not an averment of the rescission or an offer to rescind the contract. Ahrens *v.* Adler, 33 Cal. 608.

2. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied between [ ] is not in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra*.

the City of *San Francisco*, the defendant, *Bar Adler*, having offered to this plaintiff that he would convey, by a certain instrument commonly called a mining deed or conveyance, the undivided one half part of the interest which he, the defendant, then possessed in the following enumerated veins or lodes of rock, containing, as defendant alleged, precious metals of gold, silver, and copper, situate in the then Territory, now State, of *Nevada*, described as follows, to wit: (*Here was described in detail the various veins and lodes*), upon condition that this plaintiff should render services and perform labor by himself and servants between that date and the *16th* day of *November*, 18*63*, as house builder and mechanic, on certain buildings the property of the defendant, which he was then about to commence the construction of, situate on the north side of *Sacramento* street, between *Dupont* and *Stockton* streets, in the City of *San Francisco*; and also furnish materials to be used in the construction of said buildings, such as brick, lumber, lime, and such other materials as are generally used in the construction of brick buildings, to the defendant, to the extent, price and sum of *one thousand four hundred* dollars, at the then gold market price for such labor and materials; did willfully, knowingly, falsely and fraudulently, and with intent to cheat and defraud the plaintiff, falsely and fraudulently represent, say and declare to this plaintiff that the interest which the defendant then offered to convey to plaintiff in said several mines, lodes or ledges was of great value; that the said interest was of the market value of *three thousand* dollars; that the said mines were well known; that the defendant then took from his pocket and delivered to plaintiff, for the purpose and with intent fraudulently to induce plaintiff to purchase said interest, a piece or sample of very rich gold bearing quartz, rock, or ore (which is here produced); and the defendant then stated to plaintiff, that of his own knowledge the specimen or sample of rock in question had been taken from the said *Minnehaha Mine* or *Ledge*; that he had taken it therefrom; and that said specimen in point of richness and value was scarcely a fair average specimen or sample of the ore of said mine; that the said mine was a large one; that the lode or ledge was from *fourteen* to *twenty* feet in thickness at the croppings or surface; that it grew wider all the way below the surface to the depth of *one hundred and thirty* feet, to which depth the mine had been opened; that said mine contained tens of thousands of tons of rock or ore as rich, if not much richer, in gold than the sample or specimen shown as aforesaid; that said ledge or lode then commanded in the market here *one hundred* dollars per foot; that the defendant had examined said several mines; that he found that they were one and all rich in gold, silver, and copper; that he found the said *Mountain Queen Ledge*, *Lode*, or *Mine* was richer even than the *Minnehaha Ledge* or *Mine*; that he would guarantee to the plaintiff that the *Minnehaha Ledge* would be worth and command in this market *one thousand* dollars per foot within the *sixty* days thence next ensuing; that he would warrant that the interest which he proposed to convey to plaintiff in said several mines or lodes as aforesaid, before the close of the year 18*63*, would command in this market *forty thousand* dollars to *sixty*

thousand dollars; that if plaintiff would take said interest and pay the consideration aforesaid, and if afterwards plaintiff should think he made a bad bargain, that he (the defendant) would bring forthwith a good, wealthy man to plaintiff who would take said interest off plaintiff's hands, and pay him *fourteen hundred* dollars therefor, and a large profit besides; that the defendant was a wealthy Jew; that he knew plaintiff was not a Jew, but that plaintiff's wife was a Jewess, and because plaintiff's wife was a Jewess the defendant was plaintiff's friend, and that the defendant honestly desired to help plaintiff; that if plaintiff would take the defendant's sacred word of honor in said matter and purchase said mining interests, this plaintiff would at once become wealthy; that plaintiff should keep quiet about said affair; that the offer which he then made to plaintiff in point of liberality was such an one that he would make to no one but plaintiff; that he would not like that said offer would be noised about, for fear that his (the defendant's) wife might hear of it; that if she should hear of it she would lock him out of doors; that she was in the habit of serving him in that manner very often; that she generally served him rightly.

That plaintiff, relying upon said representations, on the *31st* day of *July*, 1*863*, accepted the defendant's said offer, and entered into a building contract or agreement with the defendant, whereby plaintiff agreed to render and perform by himself and servants, labor as house builder and contractor, and to furnish building materials as aforesaid, and to work up the same into and about the two brick buildings, the property of the defendant aforesaid, to the value, at the market price for such labor and materials, of *one thousand four hundred* dollars (*$1,400*).

That the plaintiff fully, in all respects, furnished the materials for, and performed the labor on, said buildings, to the value, at the gold market price, of *one thousand and four hundred* dollars; and the plaintiff duly performed all the conditions of said agreement on his part to be kept and performed, and on the *10th* day of *October*, 1*863*, plaintiff became entitled to a deed of said mining interest from the defendant, and afterwards, on the said *10th* day of *October*, 1*863*, the defendant, in consideration of the sum of *one thousand four hundred* dollars, which had been previously paid to him in building materials and labor as aforesaid, made and delivered to plaintiff a deed or conveyance of the mining interest aforesaid. That in truth, and as the defendant then and all the time well knew, the said mining interest was not of great value, or of any value whatsoever; that the same was worthless and unsalable; that said sample or specimen of quartz had not been taken by defendant from the *Minnehaha Ledge*; that defendant had not visited or examined said mines; that the said mines were unknown; that said specimen or sample was not an average sample of the ore of said *Minnehaha Mine*, or of any said mines or lodes; that in truth the said specimen proves to be a piece of *California* gold bearing quartz; that the said *Minnehaha Mine* is not a large one; that there was no such mine; in fact, that said mine is not *fourteen* to *twenty* feet in thickness at the surface, nor does the same grow wider below the surface of the earth; that said mine had not been opened;

that said mine does not contain *tens of thousands* of tons of rock or ore as rich as the specimen shown by defendant, or any rock of that quality or richness, or of any richness whatever; that said ledge or mine did not then or at any time sell for *one hundred* dollars per foot; that the defendant had not examined any of said mines or lodes; that none of said mines were or are rich in gold, or silver, or copper; that the *Mountain Queen Ledge* was not rich; that there was no such mine; that the *Minnehaha Ledge* did not at any time command *one thousand* dollars a foot in this or any other market, or any other price per foot; that the said mining interest did not at any time during the year 18*63* command *forty thousand* dollars, or *sixty thousand* dollars, or any other price; that in due time plaintiff did think he had made a bad bargain, and requested defendant to produce a man who would take said interest off plaintiff's hands for *one thousand four hundred* dollars; that defendant did not produce such man or any man; that defendant did not desire to help plaintiff; that plaintiff did take and act upon defendant's sacred word of honor on said matter.

And the foregoing is the sequel; that plaintiff did not become wealthy by the purchase of said mining interest; that the said mining deed has not been recorded; that within *thirty* days after the delivery thereof by defendant to plaintiff, this plaintiff discovered for the first time that he had been misled and defrauded by the defendant in the premises; as that is to say, that said mining interest was absolutely worthless, and never had been of any value whatsoever.

That by reason of the premises herein above stated, this plaintiff has been misled, cheated, wronged, and defrauded by the defendant, to plaintiff's damages in the sum of *two thousand five hundred* dollars. Wherefore, plaintiff demands judgment against the defendant in the sum of *two thousand five hundred* dollars, with costs.

[(*Signature of attorney as in Form No. 5910.*)][1]

(*c*) *Timber Culture Claim.*

Form No. 6897.

(Precedent in Davis *v.* Jenkins, 46 Kan. 19.)[2]

[(*Title of court and cause, and commencement as in Form No. 5917.*)][1]

Plaintiff, on or about the *8th* day of *October*, 18*86*, bargained with the said defendant to buy of him a relinquishment of a certain tree claim

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not found in the reported case, but should be added to render the form complete.

Consult also the notes to Form No. 6863, *supra*.

2. **Where one claiming to possess the right to a timber-culture claim** fraudulently misrepresents the location and quality of the land to one who, relying upon his misrepresentations, purchases his relinquishment, the purchaser is entitled to recover actual damages notwithstanding the fact that the purchaser, in making his entry, filed an affidavit in the United States land office that the land was prairie land, and not timber land. Davis *v.* Jenkins, 46 Kan. 19.

and piece or parcel of land of the said defendant, which relinquishment he, said defendant, represented to own and control, and the land included in said claim and relinquishment thereto to be good, level, prairie sod and tillable land, and situated in *Finney* county, *Kansas*, *six* miles west of *Ivanhoe*, and suitable for timber culture and agricultural purposes, and especially desirable and would just suit the plaintiff, who then and there expressed a desire to purchase, enter and cultivate a claim under the United States land laws, known as timber-culture claim.

Plaintiff, further complaining of the defendant, says that at the time of said bargaining, said defendant well knew that each and all of his representations so made as aforesaid by said defendant were false; that the said plaintiff, then confiding in the truth of said representations, and believing them to be true, and supposing that said defendant actually owned and controlled said relinquishment, and that the land included in said claim so relinquished was good, level, prairie sod and tillable land, and was situated in *Finney* county, *Kansas*, *six* miles west of *Ivanhoe*, and was suitable for agricultural and timber-culture purposes, agreed to pay for said relinquishment and claim the sum of $*75*, and did then pay said defendant the sum so agreed upon as aforesaid, and did use and exhaust his (said plaintiff's) rights under the timber-culture laws on said tract of land, defendant representing that he had just filed a relinquishment thereto in the U. S. land office so plaintiff could file and enter same as tree claim; whereas, in truth and in fact, the said defendant did not own nor control, and had not owned nor controlled, any such relinquishment; that the land represented to be included in the claim conveyed by said defendant as aforesaid was unappropriated public domain, and had never been entered under any of the public land laws, and was not good prairie sod and tillable land, situated in *Finney* county, *Kansas*, *six* miles west of *Ivanhoe*, but was rough, hilly, mountainous sand hills, and untillable piles of pure sand, and was situated ——— miles south of *Hartland*, in *Hamilton* county, *Kansas*, in the country known as the sand hills, and is unfit for agricultural purposes and for timber-culture purposes, and is wholly worthless; whereby the said plaintiff has sustained damages to the amount of $*1,500*, to wit: The sum so paid as aforesaid, to wit, $*75*; (2) the value of said plaintiff's rights under the timber-culture laws, to wit, $*750*; and (3), the difference in value between *160* acres of good, level, prairie sod and tillable land, situated as represented by said defendant (less the government price), and *160* acres of rough, hilly, mountainous sand-hills, and untillable piles of pure sand, situated as the facts show it, less the government price therefor.

Wherefore, the said plaintiff prays judgment against said defendant for the said sum of $*1,500*, his damages so as aforesaid sustained, for costs of suit, and for all other and further proper relief.

[(*Signature of attorney as in Form No. 5917.*)]

(*d*) *Exchange of Lands.*

Form No. 6898.

(*Title of court and cause as in Form No. 6942*)[1] that he the said *Roe*, intending to deceive and defraud him the said plaintiff and to induce him to purchase a certain estate in the town of *Tamworth* in the state of *New Hampshire*, the property of him the said defendant, made to him the said plaintiff certain false and fraudulent representations.[2] That these representations were, that the estate in *Tam-*

1. For the formal parts of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

Consult also the notes to Form No. 6863, *supra*.

2. Deceit in Exchange of Lands. — The false representations set out in the text are taken from Savage *v.* Stevens, 126 Mass. 207, which was an action in tort for false and fraudulent representations made by defendant, whereby plaintiff was induced to exchange an estate in Boston for an estate in Tamworth, New Hampshire.

Precedents. — For example of declaration for deceit in the exchange of lands, held sufficient to support a verdict not having been demurred to, see Brady *v.* Finn, 162 Mass. 261.

In Bish *v.* Van Cannon, 94 Ind. 264, the charging part of the complaint for damages for fraud practiced upon the plaintiff by defendant in the exchange of lands was as follows: "That the plaintiff, on the *9th* day of *October*, 1877, was the owner of the northeast fractional quarter of section *22*, township *24*, range *7* east, containing *134* acres, of the value of $*6,000*, situate in *Franklin* township, *Grant* county, *Indiana*. And the said defendant knowing that said plaintiff was desirous of exchanging or trading the same for western lands, and said *Bish* being the owner of lands in the State of *Kansas*, to wit, the north half of section *21*, township *13*, range *10* south, containing *320* acres, more or less, proposed to trade or exchange his said *Kansas* land for said plaintiff's said *Grant* county land. Said plaintiff further states that said defendant, for the purpose of inducing said plaintiff to make said trade, sale or exchange with him for his said *Kansas* land, did, on said *9th* day of *October*, 1877, falsely and fraudulently represent to said plaintiff that his said *Kansas* land, above described, contained over *200* acres of first-class bottom or farm lands, with a small creek or branch running across the west end; that there was a big spring on said land that never was known to fail since the country was settled; that said spring afforded water sufficient for an ordinary herd of cattle the year round; and that the remainder of said land was first-class slope farm land, all clear of rock except a little piece or patch in southwest corner, and that was scattered over with loose limestone rock that could easily be picked up on the top of the ground; that there was no rock sticking up on the top of the ground at all; that there was more rolling land in cultivation in *Washington* township, *Grant* county, than there was in the half section; that there was cotton-wood timber along the creek eight inches through and under, and tall and nice, and the underbrush sufficient for shade; that it was worth $*10* per acre; that if the land was not as he represented it to be, he would make it so; and that he had been on the land and all over it, and that it was precisely as he represented it to be, and even better than he said it was.

Said plaintiff further states that he informed said defendant at the time, that he knew nothing about the land nor its value, nor its situation, nor condition; that he desired to sell, trade, or exchange his farm for good western land well adapted to farming purposes, well watered, with sufficient timber, to move to and make a home out of, and that if he so traded with or exchanged lands with him, he would rely entirely upon his statements and representations concerning the same.

Said plaintiff further states that said defendant, for the purpose of cheating and defrauding this plaintiff out of his said above described *Grant* county land, so made said false and fraudulent statements and representations as aforesaid, knowing the same to be false in every particular, and well

worth was located only *two* and *one-half* miles from *Ossipee Centre.* That it consisted of *forty* acres of land in a good state of cultivation; that there was a house built thereon within *five* or *six* years and a good barn upon the land, that the taxes assessed for that year amounted to *one hundred and ninety* dollars; that before the exchange

knowing that said plaintiff was wholly relying upon the statements so made by said defendant to him at the time of, and prior to, said trade and exchange.

Said plaintiff further charges that said defendant's statements were false in this, that there was no bottom or first-class farm land on said *Kansas* land; that there was no small creek or branch; that there was no spring whatever on the same; that there was no first-class slope land on it; that there was no timber or shade on it; that it was worthless, being broken and hilly, covered all over with rock so as to be totally unfit for cultivation or farm purposes in any manner whatever, and that the same was of no value, all of which facts said defendant well knew. Yet plaintiff avers that by the fraudulent means aforesaid the defendant had perpetrated a great fraud upon him, whereby he sustained damages in the sum of $*8,000*, for which he demands judgment and other proper relief."

In this case it was held that a complaint for damages for fraud practiced upon the plaintiff by the defendant in the exchange of land is insufficient if it contain no allegation that such exchange had ever been made, or that no loss otherwise had been sustained by reason of the fraud set up.

In Pursley *v.* Wikle, 118 Ind. 139, the complaint alleged substantially the following facts: "That, on the *4th* day of *February*, 187*8*, he was the owner in fee and in possession of a certain tract of land in *Howard* county, *Indiana*, describing it, which had for many years been occupied by him and his family as a homestead; that defendant represented to him that he was the owner of *one hundred and forty* acres of land in the State of *Illinois*, and proposed to exchange his said land in *Illinois* for the plaintiff's said land in *Howard* county; that in order to induce plaintiff to accept said proposition and make said exchange, the defendant then and there represented and stated to the plaintiff that *one hundred* acres of his said land in *Illinois* consisted of a *seventy-acre* tract and a *thirty-acre* tract; that said *seventy-acre* tract was dry prairie land, situate on a fine public highway, and was within a few yards of a good railroad station; that the same was all inclosed and cut up into fields with first class rail fences in good condition; that the soil was dry, black loam, and that the whole *seventy* acres was in a high state of cultivation; and that there was a good farm-house thereon, nearly new, and in a good state of preservation; that the said *thirty-acre* tract was located within *one-half* mile of said *seventy-acre* tract, on the same public highway, and was well and heavily timbered with oak, ash, walnut and poplar timber of fine quality and size; that the remaining *forty-acre* tract was situate just *three* miles from said *seventy-acre* tract, and was fine, black, rich soil; that it was inclosed by a first class rail fence, and was divided up into three fields and was all in a fine state of cultivation; that there was a first-class farm-house, and a fine apple orchard of good, healthy bearing apple trees, and stable and outbuildings on said tract; that the title to said land was perfect in him and unincumbered; that there was no break in it from the president down; that all said land was worth $7,*000*, and would sell for that amount at any time; that the plaintiff had no knowledge of the quality or condition of said land or of the improvements thereof or the title thereto, except as stated to him by the defendant; that fully relying on said representations and statements so made to him by the defendant, and believing them to be true, he accepted the defendant's proposition, and that he and said defendant fully completed said trade according to the terms thereof; that after completing said trade the plaintiff learned, to his surprise, that said representations so made by the defendant to him were wholly false in this: That in truth and in fact said *seventy-acre* tract was not all inclosed and cut up into fields by first class rail fences in good condition, but, on the contrary, there were no inside fences at all, and the outside fencing was nearly rotted down; that on the north end and west side the fences were entirely gone;

and delivery of the deeds, the defendant told the plaintiff that he had never seen the *Tamworth* estate, and referred the plaintiff to *three* other persons, some of whom made substantially the same statement; that, after the deeds of exchange were passed, the plaintiff went for the first time to *Tamworth*, and found that the land was sterile, that there were no fences, that there was an old barn nearly gone, that the house was probably *one hundred* years old, and was greatly dilapidated, without whole windows or doors, and that the taxes were less than *three* dollars; that the defendant never produced any insurance policy, but said there was one of $*1,000*, but it was of no use to transfer it as it expired soon; and that the estate was situated *eighteen* miles from *Ossipee Centre*; that all these the defendant well knew when he made the misrepresentation as aforesaid; that the plaintiff relying upon the representations of the defendant as aforesaid was induced to exchange an estate in *Boston* of great value for the aforesaid estate in *Tamworth, New Hampshire*, (*concluding as in Form No. 6942*).[1]

(*e*) *Misrepresentations by Defendant's Agent.*

Form No. 6899.

(Precedent in West Florida Land Co. *v.* Studebaker, 37 Fla. 29.)[2]

[(*Commencement as in Form No. 6938.*)][1]

that the whole of said *seventy* acres was not in a high state of cultivation, but, on the contrary, no part of it was in a high state of cultivation, and not more than *twenty* acres of the same had ever been in cultivation; said land was not high, dry prairie land, situate on a public highway within a few yards of a good railroad station, nor was said soil dry, rich, black loam, but, on the contrary, was low, wet, white clay, situate more than a *half* mile from any road or highway, and more than *three* miles from any railroad station; that the only farm-house on said *seventy-acre* tract was a small shanty, one story high, sided up and down with undressed oak boards and covered with clapboards three or four feet long; that the same was not ceiled or plastered, had no windows, and the only door to the same was constructed of clapboards; that said house was wholly unfit to be inhabited; and that said *thirty-acre* tract of land was situate more than *three* miles from said *seventy-acre* tract, was not on any public highway and had no timber on the same, except a few scrubby jack-oaks of no value; that said *forty-acre* tract was situate *forty* miles from said *seventy-acre* tract, and was in two separate tracts, and was not owned by the defendant; that there was no building on the same, except a small log cabin very much dilapidated; that there was no orchard on the same of any value; that the fences on the same were almost worthless; that there was a valid mortgage lien on the same which plaintiff was compelled to pay, at an expense of $*450*, to save said land; that said *three* tracts of land were not worth $*1,200*, and that by reason of all said facts the plaintiff has been damaged in the sum of $*6,000*." In this case it was held that an action to recover damages resulting from the fraudulent representations of the defendant in an exchange of lands is not based upon the contract of exchange, but upon the fraud by which plaintiff was induced to make the contract.

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not found in the reported case, but should be added to complete the form.

Consult also the notes to Form No. 6863, *supra*.

2. **In a suit against a corporation for**

That the defendants by their agent, *Dr. J. W. Chiles*, did in the town of *West Milton*, *Ohio*, on the ——— day of *May*, A. D. 18*88*, sell to plaintiff the following described lands, namely: the south-west quarter (S. W. 1-4) section No. *thirty-three* (*33*), township *five* (*5*) north, of range *fourteen* (*14*) west, containing *one hundred and sixty* (*160*) acres by government survey; said above described lands being located and situated near the town of *Bonifay*, in the county of *Holmes*, State of *Florida*, for which plaintiff agreed to pay the sum total of *twelve hundred* dollars; that subsequent to said purchase of said land of defendant, only a few days thereafter, namely, on the *18th* day of *May*, 1*888*, he paid to the defendant's said agent *four hundred* dollars cash, and gave his *two* certain promissory notes for *four hundred* dollars each, making the sum of *twelve hundred* dollars, the amount which he had promised to pay for said land; said notes maturing, one in *twelve* months from date, and one in *twenty-four* months from date, each bearing ——— per cent. interest per annum. At the same time of making and delivery of said notes he made and executed a mortgage on said described land to secure the payment of said notes subsequently to the payment of the said *four hundred* dollars, and the making and delivering of the said *two* promissory notes and mortgage. The said defendant by their said agent delivered a deed to said described land. That at the time and before he purchased said lands of defendants, their said agent, *Dr. J. W. Chiles*, represented to plaintiff that *Bonifay*, a town in the aforesaid county and State, was a thrifty town of several hundred people, and the county seat of *Holmes* county, *Florida*, and that this land was situated on the public highway road leading out of said town by the court house, and only *one* mile, and the said land was covered with a heavy growth of black walnut, red cedar, white holly, cypress, oak, and large heavy pine timber, and the timber on said land had never been cut, but was in its virgin state, and that the timber was all valuable and that he could find ready sale in *Bonifay* as aforesaid for said timber, and that he could easily and readily sell the pine timber for more than enough to more than pay for one-half the defendants asked for the land; that the pine timber on said land was large and valuable, and that there was a great quantity of it, and that he could sell this heavy timber alone for more than enough to pay one-half of the amount they asked for said land. That relying upon those representations made by defendant's said agent, he was induced to purchase of defendants these said described lands, and to pay *four hundred* dollars cash, and to give his *two* certain promissory notes and mortgage aforesaid; that said land was situated a great distance from said plaintiff at the time he made said purchase, he being at the time a resident of the State of *Ohio*, and several hundred miles from said land, and that it would have been inconvenient and expensive for him to have given the said land a personal examination before purchasing; that all of said representations as to *Bonifay* being a

fraud and deceit in the sale of land, it was held in this case that an allegation that defendant made fraudulent representations upon which suit is brought through its agent does not make the declaration for that reason demurrable.

thrifty town of several hundred people, and the county seat of *Holmes* county, *Florida*, and that said described land was situated *one* mile from town on a public highway road leading out of said town by the court house, and that the land was covered with heavy growth of black walnut, red cedar, white holly, cypress, oak and heavy pine timber, and that the timber on said land had never been cut, but was in its virgin state, and that the timber was all valuable, and he could find ready sale in *Bonifay* for said timber, and that he could sell the pine timber for enough to more than pay one-half the amount they asked for said land; that the pine timber on said land was large and valuable, and that there was a great quantity of it, and that he could sell this heavy pine timber alone readily for more than enough to pay one-half of the amount of price asked for said land, was untrue and basely false, and that they were known to be untrue and false at the time they were made by defendant's said agent; that plaintiff relied on and was induced by these said representations, and that said representations were of material facts, therefore by reason of said false and untrue representations, which induced plaintiff to purchase said land, he had been damaged in the sum of *twelve hundred* dollars, and brings this suit and claims of defendant the sum of *twelve hundred* dollars. [(*Concluding as in Form No. 6938.*)]

Form No. 6900.

(Precedent in Rhoda *v.* Annis, 75 Me. 18.)[1]

[(*Commencement of writ as in Form No. 6940.*)][2] In a plea of the case, for that on the *twelfth* day of *April*, A. D. 1879, at said *Sebec*, in consideration that the plaintiff, at the special instance and request of said defendant, would buy, and take conveyance from said defendant of a certain farm or tract of land situated in said *Sebec*, hereinafter described, for the sum of *nine hundred* dollars, to be paid by plaintiff to said defendant, the said defendant, in order to induce the plaintiff to make such purchase and take such conveyance, and contriving and intending to cheat and defraud the plaintiff, then and there knowingly, falsely and fradulently and deceitfully represented and warranted to the plaintiff that said farm for several years then last past had produced and cut *eighteen* tons of hay each year, that *eighteen* tons of hay had been and were in the years immediately preceding annually cut and taken from said farm; that that part of said farm which was down to grass, and upon which said *eighteen* tons of hay

1. **General issue was pleaded** and a verdict rendered for the plaintiff. Defendant's exceptions, to the effect that none of the allegations in the writ of misrepresentations made was sufficiently formal and definite to require the defendant to answer, and that the alleged representations were so indefinite and so clearly the expression of an opinion that they were not actionable, if false and fraudulent, and further, that some of them were not sufficiently negative in the declaration, were overruled. The representations complained of were made by the defendant's son acting on his behalf.

2. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not found in the reported case, but should be added to complete the form.

Consult also the notes to Form No. 6863, *supra*.

were so represented to have been cut as aforesaid, was almost entirely free from rocks and stones, and of smooth surface, and could be easily plowed with a span of horses, no stones interfering with said plowing; that there were then *fifty* acres of cleared land upon said farm, *twenty-five* acres of which were under a high state of cultivation; that there was a good amount of pasturage upon said farm, and that in the season preceding, to wit: of A. D. 1878, *forty* sheep, *two* horses, *three* cows and *six* young cattle were pastured through the whole pasturing season upon said farm; that there were standing upon said farm certain valuable ash trees, to wit: a large lot of ash trees, worth more than *one hundred* dollars, that she had been offered *one hundred* dollars for said trees, but considered them worth more to the farm, as the cutting of said trees would greatly depreciate the value of faid farm; that said ash trees were growing very rapidly, and were annually increasing in value by a large per centum of their then value, and that said farm was then worth *nine hundred* dollars ($*900*); and plaintiff says if said representations and warranty had been true, said farm would then have been worth a large sum, to wit: the sum of *nine hundred* dollars; and the plaintiff avers that he, being ignorant of the premises, and giving full credit to said false and fraudulent and deceitful warranties and representations of the said defendant, and being thereby induced to purchase the same, he did then and there purchase and take a conveyance of said farm or real estate of said defendant, and did then and there pay therefor to said defendant said sum of *nine hundred* dollars, as said defendant had specially requested as aforesaid, said conveyance from said defendant to the plaintiff being by her warranty deed. * * * And now the plaintiff avers that in truth and in fact said farm or tract of land, at the time of the false, fraudulent and deceitful representations and warranty aforesaid, and at the time of the said conveyance thereof to the plaintiff, did not cut or produce *eighteen* tons of hay each year, and for several years then last past, and preceding said purchase of said farm by the plaintiff, had not produced and cut *eighteen* tons of hay annually or at any one season, but in truth and in fact during said times produced but *eight* tons of hay annually; that in truth and in fact, that portion of said farm upon which said *eighteen* tons of hay were alleged to have been so cut as aforesaid was not then almost or nearly free from rocks and stones, and could not be easily plowed with a span of horses, but in truth and in fact was then exceedingly stony and covered and filled with large rocks and stones, rendering it exceedingly difficult to plow or cultivate said land; and in truth and in fact, there were not *fifty* acres of cleared land upon said farm, but in truth and in fact, there were but *thirty-five* acres of cleared land upon said farm; and in truth and in fact *twenty-five* acres of said land were not then under a high state of cultivation, but in truth and in fact there were then only *ten* acres thereof under a fair state of cultivation, and the remainder of the cleared land of said farm was very poor and barren; that in truth and in fact there was not a good amount of pasturage upon said farm, and *forty* sheep, *two* horses, *three* cows, and *six* young cattle, were not pastured during the whole of the season preceding, upon said farm, but in truth and in fact the

pasture land upon said farm was exceedingly poor and barren, and incapable of producing sufficient grazing for said stock any considerable length of time, and in truth and in fact, but *twenty-four* sheep, *three* cows, and *two* horses, were pastured there in a small portion of said season or 1878; and in truth and in fact, there were not valuable ash trees growing upon said farm, worth a large sum of money, to wit, *one hundred* dollars and increasing rapidly in value, and for which defendant had been offered *one hundred* dollars; but on the contrary there were but a small number of ash trees thereon, worth *fifteen* dollars only, and for which said defendant had never been offered *one hundred* dollars; and in truth and in fact, said farm, at the time of said false, fraudulent and deceitful warranties, representations and conveyance, so made as aforesaid, was not worth a large sum of money, to wit, *nine hundred* dollars, but in truth and in fact, was then and there worth no more than *four hundred* dollars, at most, — of all which the said defendant was then and there well knowing; whereby the plaintiff, upon said representations and warranties of said defendant, and upon said conveyance of said land, and said payment therefor as aforesaid, was then and there greatly deceived and defrauded, whereby an action has accrued to said plaintiff to recover of said defendant the loss and damage which the said plaintiff has sustained, by reason of the false, fraudulent and deceitful representations and warranty of said defendant, as aforesaid, which loss and damages he alleges to be the sum of *five hundred* dollars. [(*Concluding as in Form No. 6940*)].

(5) As to Quantity.[1]

Form No. 6901.

(*Title of court and cause, and commencement as in Form No. 5926.*)[2]

1. **Precedents.** — Declaration for deceitfully selling land as and for a greater quantity than it really contained, set out in 2 Rev. Swift's Dig., p. 527, which, omitting the formal parts, is as follows: "That on the [*first* day of *June*, 1898,] at [*Jacksonville*, in the state of *Florida*,] he, the plaintiff, bargained with the defendant to buy of him a certain piece of land lying in [said city of *Jacksonville*, *Florida*, (*Here may be set out a description of the land*);] and the defendant then and there, well knowing the said close to contain a much less quantity than *three* acres of land, to wit, the quantity of *two* acres *and a half* of land only, by then and there falsely and fraudulently representing to the plaintiff that the said close contained *three* acres of land, then and there falsely and deceitfully sold the said close to the plaintiff, at and for the sum of *two thousand* dollars, to be therefor paid by the plaintiff to the defendant, and which was then and there accordingly paid for the same, when in fact the said close, so as aforesaid sold to the plaintiff by the defendant, did not contain *three* acres of land, but contained a much less quantity than *three* acres, to wit, the quantity of *two* acres *and a half* only, which the defendant well knew, by means whereof the plaintiff lost great gains and profit which he otherwise would have made from the purchase of said close, and has been falsely and fraudulently deceived and injured by the defendant, to his damage *two thousand* dollars."

A similar precedent containing two counts for deceitfully selling land as and for a greater quantity than it really was may be found in 3 Chit. Pl., p. 391.

2. **For the formal parts** of complaints or petitions, generally, see the title Complaints, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title Declarations, *post*, p. 244.

Consult also the notes to Form No. 6863, *supra*.

I. That the plaintiff, on the *first* day of *June*, 1*898*, bargained with the defendant to buy of him a piece of land of the said defendant, situate in (*describing land*), which said piece of land the defendant then, with intent to deceive and defraud the plaintiff, falsely and fraudulently represented to him to contain *ten* acres, when the defendant then well knew that it contained only *eight* acres.

II. That the plaintiff, then confiding in the truth of said representations, and supposing said piece of land to contain the said quantity of *ten* acres, agreed to pay for said land, and did then pay therefor to the said defendant the sum of *one thousand* dollars.

III. That in truth the said piece of land did not contain *ten* acres, but only *eight* acres, whereby the said plaintiff has sustained damages, to the amount of *two hundred and fifty* dollars.

Wherefore (*concluding as in Form No. 5926*).

d. In Leases.

Form No. 6902.

(Copied from the record in the case of Cutter *v.* Hamlen, 147 Mass. 471.)[1]

(*Title of court and cause as in Form No. 6942.*)[2]

Plaintiff's Declaration.

And the plaintiff says the defendant let to him by a written lease, dated *Jan. 21*, 1*885*, a dwelling-house situated on *Allen* street, in said *Boston*, and numbered *60* in the numbering of said street, to be occupied and used by the plaintiff and his family as a dwelling-house; and to induce the plaintiff to hire said house, the defendant falsely represented to him that the drains and water-closets of said house were in perfect order and condition, and that said house was sweet and healthy, and relying upon the truth of said representations, the plaintiff was thereby induced to hire and did hire said house, and moved into the same with his family, consisting of his wife and *four* children. And said drains and water-closets were not in good order and condition, but were imperfect and defective, and said house was unhealthy and infected with a certain disease called *diphtheria*, all of which the defendant well knew; and the plaintiff using said house with his said family, was thereby personally made sick with *diphtheria*, and suffered greatly therefrom, and still so suffers, and has been incapacitated from pursuing his calling or any business, and has been put to great expense for care and medical attendance, and made helpless for life; his family were all made sick thereby, and one of said family, a son,

1. **An action for deceit in letting a dwelling-house,** infected with diphtheria, causing injuries to the person, survives by force of Mass. Pub. Stat. (1882), c. 165, § 1. So held in Cutter *v.* Hamlen, 147 Mass. 471.

2. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

Consult also the notes to Form No. 6863, *supra*.

Other Precedents. — For example of petition based on deceit in the lease of certain alleged mineral wells, etc., see Losch *v.* Pickett, 36 Kan. 218, which was held to be bad on demurrer.

For substance of complaint in an action to recover damages for alleged fraud relating to a lease see New York, Land Imp. Co. *v.* Chapman, 118 N. Y. 289.

died from said disease, and the plaintiff was put to great expense in caring for him while sick, and burying him after death and has lost his services and those of the other members of said family. And the plaintiff was at all times referred to herein in the exercise of due and proper care.

By his Attorney,
S. S. Thomas.

e. Relating to Personal Character, Ability, Credit or Status.

(1) Of Defendant.

(*a*) *Generally.*[1]

Form No. 6903.

(*Title of court and cause, and commencement as in Form No. 5926.*)[2]

1. That said defendant on the *fifteenth* day of *October*, 1897, at *Albany*, in the county of *Albany*, made to him, the said plaintiff, certain false representations, intending thereby to injure and defraud him, the said plaintiff, and to induce him to sell the said defendant goods and merchandise to the value of *five thousand* dollars.

2. That these representations were that he, the said defendant, was a man of wealth and property and possessed of a large store and business in the city of *Boston* and *Commonwealth* of *Massachusetts.*

3. That these representations were false, and that the said defendant at the time he made the aforesaid representations was not possessed of any property whatever, whether in *Boston* or anywhere else.

4. And that these representations were false as aforesaid, the said defendant well knew at the time he made them.

5. That the said plaintiff was, however, induced thereby to sell and did sell to the said defendant goods to the value of *five thousand* dollars, for which he has never received any return whatever.

6. That by such sale and by his reliance upon the defendant's false representations aforesaid he was damaged *five thousand* dollars.

Wherefore (*concluding as in Form No. 5926*).[2]

(*b*) *As to His Authority.*[3]

FALSELY REPRESENTING THAT DEFENDANT WAS AUTHORIZED TO RECEIVE CERTAIN STONE.

1. For declaration for deceit, held to be bad on demurrer, consisting of fraudulent representations as to defendant's standing and credit made to plaintiff, see Potts *v.* Chapin, 133 Mass. 276.

2. **For the formal parts** of complaints or petitions, generally, see the title Complaints, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title Declarations, *post*, p. 244. Consult also the notes to Form No. 6863, *supra*.

3. **Claiming to be the Agent of Another.** — For substance of declaration for deceit based on fraudulent representations by one that he was the agent of another, whereby plaintiff was induced to sell goods, see Moore *v.* Meacham, 10 N. Y. 208.

Form No. 6904.

(Precedent in Randell *v.* Trimen, 18 C. B. 786, 86 E. C. L. 786.)[1]

[(*Commencement as in Form No. 6935.*)][2] That, whereas, before and at the time of the committing of the grievances thereinafter mentioned, a church was in course of being erected and built in the district of *Werneth*, in the parish of *Oldham*, to be called *St. Thomas's* church, of which district the *Rev. Thomas Ireland* was incumbent and minister, and was active in causing the said church to be built; and the defendant had been and was employed as architect to superintend the said works and buildings; the said defendant, so being such architect employed as aforesaid, did falsely and fraudulently represent and pretend that he was authorized by the said *Rev. Thomas Ireland* to order, and did order, certain stone of the plaintiffs for the building of the said church, for and on account of, and to be charged to, the *Rev. Thomas Ireland* and others, the committee for *St. Thomas's* church, *Werneth*, *Oldham*, and did then falsely and fraudulently write and send to the plaintiffs the following letter, viz., "*9 Adam* St., *Adelphi*, *Nov. 8*, 1853. Gentlemen — To-morrow I should be glad for you to send *700* feet of stone, the remainder of the *1,000*, to *Oldham*; but this must be for the *Rev. Thomas Ireland* (meaning the said *Rev. Thomas Ireland*) and others, the committee for *St. Thomas's* church, *Werneth*, *Oldham*. At the same time, I hope it is on its way by water. Yours truly, *A. Trimen*. To Messrs. *Randell & Co.*" (meaning the plaintiffs): That the plaintiffs, relying on the said representation of the defendant, and believing that the defendant had authority from the said *Rev. Thomas Ireland* to order the said stone for the building the said church for and on account of and to be charged to the said *Rev. Thomas Ireland* and the said committee, forthwith upon the receipt of the said letter and order of the defendant did send and deliver the *700* feet of stone so ordered as aforesaid, to *Oldham*, for the said *Rev. Thomas Ireland* and others, the committee for *St. Thomas's* church, *Werneth*, *Oldham* aforesaid, and the same was there used and worked up in building the said church; whereas, in truth and in fact the defendant was not, as he then very well knew, authorized by the said *Rev. Thomas Ireland* to order the said stone, or any stone, for or on account of, or to be charged to, the said *Rev. Thomas Ireland* and others, the committee of the said church, or any of them, or to write or send the said letter

1. **Counts for goods sold and delivered,** money received by the defendant for the use of the plaintiff, and money found due upon an account stated, were also set out in this declaration. To the first count the defendant pleaded not guilty, and to the residue of the declaration, never indebted. Verdict for plaintiff on the first count. Whereupon rule was obtained upon plaintiff to show cause why there should not be a new trial, etc. Rule discharged. Randell *v.* Trimen, 18 C. B. 786, 86 E. C. L. 786.

A declaration for falsely representing himself as authorized to receive goods at wharf is set out in 3 Chit. Pl., p. 398.

2. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not in the reported case, but should be added to complete the form.

Consult also the notes to Form No. 6863, *supra*.

to the plaintiffs; but then very well knew that the said representation was false: That the said *Rev. Thomas Ireland* having refused to pay for the said stone, and the same being wholly unpaid for, they, the plaintiffs, trusting in the said representation, sued the said *Rev. Thomas Ireland* in this court in an action for the price of the said stone, amounting to *73*l. *18*s., which the said *Rev. Thomas Ireland* defended, and denied his liability thereon; which came on to be tried at the sittings in the *Guildhall* of the city of *London*, on the *12th* of *May*, 1*855*, when a verdict passed thereon for the said *Rev. Thomas Ireland*, by reason of the (*now*) defendant not having been authorized by the said *Rev. Thomas Ireland* to order the said stone for or on account of, or to be charged to, the said *Rev. Thomas Ireland* and the said committee, or to write or send to the plaintiffs the said letter; and judgment was afterwards signed against the plaintiffs; whereupon, and by reason of the premises, the plaintiffs had not only lost the said price of the said stone, which had not yet been paid, but also had expended and had become liable to pay divers large sums of money, amounting, to wit, to *200*l., in unsuccessfully suing the said *Rev. Thomas Ireland*, and also had become and were liable and bound to pay the further sum of *65*l. *8*s., to the said *Rev. Thomas Ireland* for his costs in defending the said action. [(*Concluding as in Form No. 6935.*)][1]

(*c*) *As to His Being Married.*

Form No. 6905.

(Precedent in Withee *v.* Brooks, 65 Me. 14.)[2]

[(*Commencement of writ as in Form No. 6940*)][1] that the plaintiff, *January 3rd*, 1*868*, at *Winthrop*, a single woman, became acquainted

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not found in the reported case, but should be added to render the form complete.

Consult also the notes to Form No. 6863, *supra*.

2. **Defendant demurred to this declaration** on the ground that the cause of action did not survive. The presiding justice *pro forma* overruled the demurrer and defendant excepted. Exceptions were overruled on the theory that an action on the case is maintainable by a woman against a man for his deceit by which she is led into a void marriage with him, and that such action survives against his administrator; the court holding that "the alleged misrepresentations contain all the elements necessary to make them actionable. They are not matters of opinion, estimate, intention, or promise; but are representations of existing facts, clear and explicit, such as were material to enable the plaintiff to act in the matter intelligently, of vital importance as the determining ground of her action and such as might well induce her belief. At the same time, they were facts necessarily within the knowledge of the defendant's testator, and well calculated to produce as a proximate result the damage claimed, so far as the loss of labor is concerned."

Marriage Performed by Unauthorized Person.—In Haggin *v.* Haggin, 35 Neb. 376, an action sought to be maintained by a wife against her husband to recover damages, the petition was as follows: "The plaintiff *Lovisa E. Haggin* complains of the defendant *Isaac Haggin* and says, that on the *22d* day of *June*, A. D. 1*886*, she was, as the wife of said defendant, divorced from said defendant by a decree of district court of said *Saline* county, *Nebraska*, and that the

with *Parker M. Withee*, a doctor, practicing medicine, then in life and health; that he contriving and designing maliciously to injure the plaintiff and to deprive her of her time and personal labor and means of support, and also, in the event of her marriage with him,

said plaintiff recovered a judgment of $*300*, her alimony against said defendant, at the same time and in said court and that thereafter, to-wit, on or about the *17th* day of *August*, 18*86*, the said defendant again proposed marriage to said plaintiff and was accepted by said plaintiff, the said defendant telling said plaintiff at the time that it would be necessary to go to the state of *Kansas* to have the marriage ceremony performed, by reason of having been divorced in the state of *Nebraska*, and that plaintiff, believing the story of the said defendant, and relying on the same, was induced to, and did go with said defendant to the said state of *Kansas* on the *20th* day of *August*, A. D. 18*86*; and that on the *20th* day of *August*, A. D. 18*86*, at the *American House*, in the city of *Washington*, in the county of *Washington*, in the state of *Kansas*, the said defendant had a marriage ceremony performed by a reputed clergyman, between said plaintiff and defendant, the said plaintiff believing the representations of said defendant made at said time, that said marriage was in accordance with the laws of the said state of *Kansas* and was made by a licensed clergyman and one duly empowered by the laws of the said state of *Kansas* to perform the said marriage rite, or ceremony, and that said marriage was on the part of said defendant made in good faith and for the purpose of living with said plaintiff as her husband, yet the said plaintiff avers that said marriage was not made in accordance with the laws of the state of *Kansas*, and was not performed by a licensed clergyman, nor by any one else having authority or the right to marry people, all of which said defendant well knew at the time, and that said marriage was a mock or false marriage ceremony, arranged and performed by the said defendant and the said reputed clergyman, who was a stranger to said plaintiff, for the purpose of basely deceiving said plaintiff, and to practice a fraud upon her and to induce said plaintiff, through the belief that she was the wife of said defendant, to receipt the aforesaid judgment for alimony in full, and to induce said plaintiff to go to the state of *Kansas* to live, where said defendant agreed to go and live with the plaintiff as soon as he could arrange his business in *Nebraska*.

And the plaintiff further avers, that believing that she was the wife of said defendant, and that she was honestly and legally married to said defendant, she did, on the day following said supposed marriage, viz., the *21st* day of *August*, A. D. 18*86*, come back to *Saline* county, *Nebraska*, and lived and cohabited with the said defendant as his wife and did, at the solicitation of said defendant, and without value received and without receiving any pay therefor, on or about *August 20*, 18*86*, receipt the judgment docket of the district court of *Saline* county, *Nebraska*, for the said $*300* alimony, and that at the solicitation and request of said defendant, she went, on the *24th* day of *September*, 18*86*, to the said state of *Kansas* to live, where she remained without any means whatever except what she obtained by working out for other people, and being entirely destitute she was unable to return to *Saline* county, *Nebraska*, until the *14th* day of *November*, 18*87*. Plaintiff further avers that said defendant now refuses to acknowledge said plaintiff as his wife, or to acknowledge the marriage ceremony as aforesaid as legal and binding, and denies that he is in any way bound to her, the said plaintiff. And said plaintiff further avers that she has, by reason of the fraud practiced upon her as aforesaid, in said false marriage, and by reason of the premises herein, been damaged in the sum of *five thousand* dollars. Wherefore plaintiff prays judgment against said defendant in the said sum of *five thousand* dollars, her damages so as aforesaid sustained, and the costs of this suit, and for such other and further relief as the nature of her case and equity may require." Judgment was rendered for plaintiff below, but on appeal the court held that the wife could not recover from her husband upon the cause of action therein stated, but that she was entitled to have satisfaction of the former judgment for alimony set aside and judgment reinstated on the theory that the marriage, though solemnized by an unauthorized person, was valid.

to deprive her of any share of his property, and of the rights by law of a widow in the event of his decease, falsely and deceitfully pretended himself to be sole and unmarried and, making many protestations of his affections for her, requested the plaintiff to marry him; that the plaintiff consenting, the plaintiff and said *Parker M. Withee* were by the fraud and deceit of said *Withee* joined in marriage; that she cohabited with him until *July 5*, 1872, when he died, possessed of personal estate of the value of *$1,000*, and of real estate of the value of *$2,500*; that the said *Withee* on the said *third* day of *June* and ever since up to the time of his death was a married man and had a lawful wife living other than herself, of which she was ignorant during his life time, by means whereof he had injured her, destroyed her peace of mind, deprived her of her rights as his widow [(*concluding as in Form No. 6940, laying damages at two thousand dollars*).][1]

(2) Of Defendant's Company or Firm.[2]

Form No. 6906.

(Precedent in Brown *v.* Lobdell, 50 Ill. App. 560.)[3]

[(*Commencement as in Form No. 6939.*)][1]

Lobdell, Farwell & Company, a corporation organized and existing under the laws of the State of *Illinois*, plaintiff, by *Hamline, Scott & Lord*, its attorneys, complains of *Spencer A. Brown* of an action on the case.

For that whereas the defendant on, to wit, the early part of *December*, 1891, in the county aforesaid, then being the president of the *Union Grain Company*, a corporation organized and existing under the laws of the State of *Illinois*, applied at the office of the plaintiff, who was then and is now engaged in buying and handling commercial paper, to thereafter engage in the business of discounting for him the notes of said *Union Grain Company*, to be indorsed and guaranteed by the firm of *S. A. Brown & Company*, of which said firm defendant informed the plaintiff he was the leading member; and to induce the plaintiff to discount for him such paper, falsely

1. **For the formal parts** of complaints or petitions, generally, see the title Complaints, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title Declarations, *post*, p. 244.

The matter to be supplied within [ ] will not be found in the reported case, but should be added to complete the form.

Consult also the notes to Form No. 6863, *supra*.

2. **Precedents.** — For form of declaration held to be bad for deceit against one for false oral assurances concerning the credit and ability of a corporation of which he was the treasurer, made in order to induce plaintiff to receive a note of the corporation, see McKinney *v.* Whiting, 8 Allen (Mass.) 207.

For count in declaration in action for deceit for false representations made by defendant as to the solvency of a bank, the defendant being a director of the bank, see Cowley *v.* Smyth, 46 N. J. L. 383.

3. **Necessary Averments.** — "The false representations, the knowledge by the plaintiff in error that they were false, their falsity in fact, the materiality of the representations, the reliance upon them by the defendants in error, and consequent damage, all sufficiently appear in the declaration." Brown *v.* Lobdell, 50 Ill. App. 559.

represented and stated to the plaintiff that he was worth in the neighborhood of *eight hundred thousand* dollars; that the business of his said firm of *S. A. Brown & Company* was in good condition; that the *Union Grain Company* had a capital of *$200,000*; that *$100,000* had been paid in cash; and was possessed of a large amount of accumulated profits. And the plaintiff avers that on the faith of said representations and statements, this plaintiff shortly thereafter, relying implicitly upon all the statements so made as aforesaid by said defendant, and believing said statements to be true, began to discount for said defendant the paper of the *Union Grain Company*, and indorsed and guaranteed by said firm of *S. A. Brown & Co.*, of which said defendant was the principal partner; and on the *17th* day of *March*, 1*892*, relying upon and believing in the truth of said false statements, plaintiff discounted for said defendant a note bearing date *March 17*, 1*892*, made by said *Union Grain Co.*, payable to the order of said *S. A. Brown & Co.*, in the sum of *$2,500*, *ninety* days after its date, and indorsed in blank and guaranteed by said firm of *S. A. Brown & Co.*, of which said firm said defendant was the principal partner, and advanced to said defendant for said note of *$2,500* the sum of *twenty-five hundred* dollars (*$2,500*).

And plaintiff avers that on the *22d* day of *March*, A. D. 1*892*, plaintiff, relying upon the aforesaid false representations of said defendant, and believing them to be true, discounted for said defendant a note, dated *March 22d*, 1*892*, made by the said *Union Grain Company*, in the sum of *twenty-five hundred* dollars (*$2,500*), *ninety* days after its date, and indorsed in blank and guaranteed by said *S. A. Brown & Co.*, of which said defendant was the principal partner, and advanced to said defendant for said note the sum of *twenty-five hundred* dollars.

But the plaintiff avers that the representations hereinbefore alleged to have been falsely made by said defendant to said plaintiff, to wit, that defendant was worth in the neighborhood of *eight hundred thousand* dollars (*$800,000*); that the business of *S. A. Brown & Co.* was in good condition; that the capital of the *Union Grain Company* was *$200,000*, of which *$100,000* had been paid in cash, and that the said *Union Grain Company* was possessed of a large amount of accumulated profits, were each and all false when so made, and were at that time known by said defendant to be false, and were made by said defendant for the purpose of deceiving and defrauding this plaintiff; but on the contrary, that said *S. A. Brown & Co.*, of which said defendant was a partner, said defendant and said *Union Grain Company* were each and all insolvent at the date of said statements and have so remained ever since.

And plaintiff avers that at the maturity of said notes the same were not paid, and are still in the possession of the plaintiff unpaid; that long prior to their maturity said *S. A. Brown & Co.*, of which said *S. A. Brown* was the principal partner, said *Union Grain Company*, and said defendant failed in business and were closed up by process of law, and all of their property subject to execution has long since been sold, and said notes are absolutely worthless. And

so the defendant deceived and defrauded the plaintiff to the damage of the plaintiff in the sum of $*500,000*, and therefore it brings its suit.

[(*Concluding as in Form No. 6939.*)][1]

COMPLAINT FOR DECEIT IN SALE OF STOCK IN A CORPORATION BASED ON FALSE REPRESENTATION OF DEFENDANT, THE PRESIDENT OF THE CORPORATION, THE REPRESENTATIONS BEING MADE WITH RESPECT TO THE CONDITION OF THE CORPORATION.

Form No. 6907.

(Precedent in Whitner *v.* Perhacs, (Supreme Ct.) 11 N. Y. Supp. 756.)[2]

[(*Title and commencement as in Form No. 5926.*)][1]

Plaintiff complains and says that she purchased from defendant *sixty-six and one-third* shares of the capital stock of the *New England Biscuit Bakery of New York* of the par value of $*6,666.66*, being *one-third* of the capital stock of said company. That at that time, and for a long time previous thereto, defendant was president of said biscuit company, which was a corporation created under the laws of the state of *New York*, and doing business in the city of *New York*. That plaintiff at said time was personally unacquainted with the financial resources, standing, and condition of said company, and with the condition, extent, and profits of its business. That previous to said purchase, she had frequent interviews with the defendant, its president, in reference to her proposed purchase, and made inquiries of him as to its assets, liabilities, business, and financial condition. That said defendant stated and represented to her at said interviews that said company was doing a large and very profitable business, which was rapidly increasing; that its stock was fully paid stock; that its indebtedness in all was only $*3,500*; that said company owned all the fixtures, machinery, and plant used by it, and in its possession; that said company had outstanding bills receivable, book-accounts, and claims owing to it, amounting to $*13,000*, all or very nearly all of which were perfectly good and collectible, and that the profits of said business were and had been large and increasing, and were such that plaintiff could properly draw and receive therefrom at least $*30* per week for services she proposed to render to said company in and about its business in the event she should purchase said stock. That plaintiff wholly relied upon and believed all of said statements and representations of defendant, and was thereby induced to purchase said stock, and to devote her time to the interests of said business. This plaintiff further alleges that said

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not in the reported case, but should be added to complete the form.

Consult also the notes to Form No. 6863, *supra*.

2. **As against a motion to make the complaint more definite** and certain by specifying the nature and grounds of the special damages alleged, it was held that but one cause of action was set up in the complaint, and that the motion should be denied, the proper remedy being an application for a bill of particulars.

representations were untrue, and known by defendant to be untrue, and made with intent to deceive and defraud plaintiff, and to induce her to purchase said stock at the price aforesaid; and that she was thereby defrauded and deceived, and induced to purchase said stock. Defendant further alleges that the actual indebtedness of said company, at the time aforesaid, was about *$12,000* instead of *$3,500*, as stated by defendant, and that the business done by said company was neither large nor profitable; that the said company did not own all the machinery, fixtures, and plant in its possession, and used by it, but that an elevator of the value of *$500*, two boilers of the value of *$1,000*, and a drop machine of the value of *$745*, then in its possession, and used by it, were not owned by it; that the bills receivable and the debts owing to said company did not amount to *$13,000*, but were only about *$6,500*, and that of said last amount only about *$2,000* was collectible. Plaintiff further alleges that she gave all her time and ability to the service of the said company from *January 7*, 1*889*, to *January 15*, 1*890*, and was engaged in its business at least *13* hours per day; that so far from being able to draw *$30* per week from the profits of said business, she was enabled to draw and did draw only *$350* in all, which was all that the profits of said business would enable or entitle her to draw, although the business and its profits continually improved from the time of her said purchase till its close; that the plaintiff had been damaged by the misrepresentations and false statements of the defendant, as aforesaid, in the sum of *$9,000*, for which sum she demands judgment against the defendant. Wherefore the plaintiff demands judgment against the defendant for the said sum of *$9,000*, with the costs of this action. [(*Concluding as in Form No. 5926.*)]

(3) Of Parties to Commercial Paper.[1]

Form No. 6908.

(Anthon's Amer. Prec., p. 240.)

(*Commencement as in Form No. 6942.*)[2] For that the said *Roe*

1. **Precedents.** — For substance of declaration for deceit, for concealing the insolvency of the maker of a note transferred to plaintiff, see Smith *v.* Latour, 18 Pa. St. 244.

In Andrews *v.* Jackson, 168 Mass. 266, the declaration for deceit alleged that the plaintiff sold and conveyed to the defendant certain real estate, situated in Medford "for the sum of *nineteen hundred* dollars, and received in payment thereof *fourteen hundred* dollars in cash, and *four* certain promissory notes, all signed by one *H. Joseph*, amounting together to the sum of *six hundred and fourteen hundredths* dollars; that the defendant, to induce the plaintiff to convey said real estate to him, falsely represented to the plaintiff that the maker of said notes was a man of property, and that said notes were as 'good as gold'; that your plaintiff believing said representations to be true was thereby induced to convey such real estate to the defendant; that said representations were false, and were known to the defendant to be false, and by reason thereof the plaintiff suffered great damage." Plaintiff recovered, which was sustained as against the exceptions of the defendant.

2. **For the formal parts** of complaints or petitions, generally, see the title Complaints, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title Declarations, *post*, p. 244.

Consult also the notes to Form No. 6863, *supra*.

[defendant] on *April fifteenth*, A. D. 1890, at *Boston*, being possessed of a promissory note, whereby one *Den*, of *Lowell*, promised to pay to the said *Roe*, or order, *one hundred* dollars on demand, with lawful interest for the same until paid; and the said *Roe*, knowing that the said *Den* had absconded, and that neither he nor his estate could be come at, to be attached, nor the said *one hundred* dollars, nor the interest thereof, could be recovered; and intending, and fraudulently contriving to defraud and deceive the plaintiff, the said *Roe* thereafterwards, on the same day, falsely affirmed and declared to the plaintiff, that the said promissory note was made and given by one *Den*, of *Lowell*. And the plaintiff, giving credit to the said declaration of said *Roe*, and knowing the said *Den*, of *Lowell*, to be a person of substance, and well able to pay the said *one hundred* dollars and the interest thereof, then and there bought the said promissory note of the said *Roe*, and paid him in neat-cattle the value of the said *one hundred* dollars, and the interest thereof then due. And the said *Roe* then and there sold the said note to the plaintiff for the price aforesaid, as a note made and given by the said *John Den*, of *Lowell*; the said *Roe*, at the same time, well knowing that the same note was not made and given by the said *Den*, of *Lowell*, and that it was worth nothing; and hereby deceived the plaintiff, and defrauded him of *one hundred* dollars. (*Signature of plaintiff's attorney as in Form No. 6942.*)

(4) Of Intending Purchaser or Customer.[1]

(*a*) *Generally.*

Form No. 6909.

(*Title of court and cause, and commencement as in Form No. 5926.*)[2]

I. That on the *first* day of *June*, 1898, at *Northport*, *Suffolk* county, in the state of *New York*, the defendant, with intent to deceive and defraud the plaintiff, falsely and fraudulently represented to him[3]

1. **To support this action** it would seem from Ames *v.* Milward, 2 Moore 713, 8 Taunt. 637, 4 E. C. L. 234, that there must have been some fraud or intention on the part of the defendant to deceive. In a later case, in Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 113, it was held that where a party recommends an agent by making statements, which he knows to be false, he is responsible in damages for the misconduct of the agent, although it be not shown that the representation was given from malice, or with a view to the pecuniary interest of the party recommending. See also precedents in Pasley *v.* Freeman, 3 T. R. 51; Eyre *v.* Durnsford, 1 East 318; Haycroft *v.* Creasy, 2 East 92; Tapp *v.* Lee, 3 B. & P. 367, in which, too, the principles upon which this action is founded are stated. See also Lyde *v.* Barnard, 1 M. & W. 101; Haslock *v.* Fergusson, 7 Ad. & El. 86, 34 E. C. L. 41; Swann *v.* Phillips, 8 Ad. & El. 457, 35 E. C. L. 436. A representation made by defendant as to the credit of a firm in which he was a partner has been held to be a representation as to credit of "another person" within the meaning of 9 Geo. IV, c. 14, § 6. Devaux *v.* Steinkeller, 6 Bing. N. Cas. 84, 37 E. C. L. 291, 8 Dowl. 33.

2. **For the formal parts** of complaints or petitions, generally, see the title Complaints, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title Declarations, *post*, p. 244.

Consult also the notes to Form No. 6863, *supra*.

3. **Intent to Deceive.** — The declaration should set forth that the representations

that one *Samuel Short* was in good credit and safe to be trusted, and worth the sum of *ten thousand* dollars over and above his debts and liabilities.[1]

II. That the plaintiff relying on said representations, sold and delivered *five hundred* law-books, of the value of *twenty-five hundred* dollars, to said *Samuel Short* for a credit of *one* year; but although said term has expired, said *Samuel Short* has neglected and refused to pay for said goods.

III. That in truth, and as defendant then well knew, said *Samuel Short* was, at the time of such representations, insolvent, and not in good credit, nor safe to be trusted, nor worth anything over and above his debts and liabilities.[2]

IV. That by means of said premises the plaintiff has wholly lost said goods, and the value thereof, to his damage *twenty-five hundred* dollars.[3]

Wherefore (*concluding as in Form No. 5926*).[4]

Form No. 6910.

(Precedent in Bowen *v.* Carter, 124 Mass. 426.)[5]

[(*Commencement as in Form No. 6942.*)][6]

were made with intent to deceive and defraud, but this need not be set forth specifically if it is averred in substance. Zabriskie *v.* Smith, 13 N. Y. 322.

Allegation that person making misrepresentation was benefited is not necessary. Pasley *v.* Freeman, 3 T. R. 51; Weatherford *v.* Fishback, 4 Ill. 170; Upton *v.* Vail, 6 Johns. (N. Y.) 181; Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 113; Corbett *v.* Brown, 8 Bing. 33, 21 E. C. L. 211.

1. The representation must be stated, to enable the court to judge whether it was sufficient to mislead. Addington *v.* Allen, 11 Wend. (N. Y.) 386; Wells *v.* Jewett, 11 How. Pr. (N. Y. Supreme Ct.) 242.

The representation precisely as laid need not be proved *in hæc verba.* Endsley *v.* Johns, 120 Ill. 469.

That representation was in writing need not be alleged in the absence of statute to the contrary. Duppa *v.* Mayo, 1 Saund. 276, note 1; Chalie *v.* Belshaw, 6 Bing. 529, 19 E. C. L. 158; notwithstanding 9 Geo. IV, c. 14, § 6, requires such representation to be in writing and signed by defendant.

Variance. — Testimony to the effect that defendant said that a third party was doing a fair business does not support an allegation to the effect that such person was fit to be trusted and that goods might be safely sold to him on credit. Cutter *v.* Adams, 15 Vt. 237.

2. The fraud and scienter, though the party had no personal interest in practicing it, seem to constitute the ground of the action, the gravamen being the deceit, and the scienter the gist of the action. Corbett *v.* Brown, 8 Bing. 33, 21 E. C. L. 211. And as the improper motive is the gist of the action the allegation of the scienter is in this case material; the term "falsely" or "fraudulently" would, however, be sufficient. Corbett *v.* Brown, 8 Bing. 33, 21 E. C. L. 211; Craft *v.* Boite, 1 Saund. 242*a*, note 2; 2 Chit. Pl., p. 523.

3. Some loss or damage must be alleged. Pewtress *v.* Austin, 2 Marsh. 219; also *supra*, note 1, p. 118.

4. See note 2, p. 188, *supra.*

5. In this case the superior court sustained a demurrer and ordered judgment for the defendant. The supreme judicial court, however, on plaintiff's appeal, overruled the demurrer, saying "that the declaration charges that certain representations of facts were made by the defendant which are alleged to be false and fraudulent, and we cannot declare as a matter of law that the plaintiff should have made further inquiry."

6. For the formal parts of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, *p.* 244.

(*First count.*)[1]

(*Second count as amended was as follows:*)

And the plaintiff says that on or about the *first* day of *July*, 1875, he took an order from one *Osborne N. Sargent* of *Boston*, for certain goods as set out in the bill of particulars hereunto annexed, to be

The matter to be supplied within [ ] is not in the reported case, but should be added to complete the form.

Consult also the notes to Form No. 6863, *supra*.

1. **The first count** is not set out in the reported case.

Other Precedents. — See Otis *v.* Raymond, 3 Conn. 413; 2 Rev. Swift's Dig., p. 529; Potts *v.* Chapin, 133 Mass. 276 (setting out defective declaration in full); Sims *v.* Eiland, 57 Miss. 83; Addington *v.* Allen, 11 Wend. (N. Y.) 374; McCracken *v.* West, 17 Ohio 16 (based on deceit consisting of an introduction by letter of the bearer to such merchants as he may desire, describing him as a man of property, held to be bad on demurrer, the person having such letter not having delivered it to the persons to whom it was directed but used it to obtain credit elsewhere, the court holding that the persons giving the credit could not maintain an action for deceit, although the representations in the letter were untrue); Boyd *v.* Browne, 6 Pa. St. 310; Cutter *v.* Adams, 15 Vt. 237; Ewins *v.* Calhoun, 7 Vt. 79.

In Robbins *v.* Barton, 50 Kan. 124, the material allegations of the petition were as follows: "*Barton Bros.*, plaintiff, sues *W. W. Robbins*, defendant, and makes this petition that on or about the *fifteenth* day of *January*, 1888, they were induced by the following false and fraudulent representations of the defendant, who was at the time a banker at *Norwich*, *Kansas*, in regard to the financial standing of one *H. G. Gorton*, made to the agents and servants of the plaintiffs to sell and ship to said *H. G. Gorton* a bill of goods to the amount of $*624.84*; that said false and fraudulent representations were as follows, to wit: The defendant said: 'I consider *H. G. Gorton* perfectly good for a bill of goods to the amount of $*624.84* — *H. G. Gorton* is safe.' That defendant well knew at the time of making said representation to the agents and servants of the plaintiffs that said *H. G. Gorton* was not able to pay for said goods, and was not fit to be trusted on credit, and that the said *H. G. Gorton* was, at the time of making the purchase of said stock of goods, insolvent and wholly irresponsible financially, and was at the time of making said representations by the defendant to the agents and servants of the plaintiffs aforesaid, and was known to the defendant at the time to be so. * * * And by reason of said false and fraudulent representations of said defendant plaintiff sold and shipped said bill of goods to *H. G. Gorton*, giving him credit therefor, and said *Gorton* has failed and refused to pay the plaintiffs the amount of said goods. * * * That by reason of said false and fraudulent representations plaintiffs have been damaged in the sum of $*624.84*." Judgment was for plaintiffs. It was held that the allegation in the petition was sufficient, especially when challenged after answer, the court saying: "The further objection is made that the statement charged in the petition, 'I consider *H. G. Gorton* perfectly good for a bill of goods to the amount of $*624.84* — *H. G. Gorton* is safe,' is a matter of opinion, and not a statement of a fact. It is true that the mere expression of an opinion is no fraud, though it be false. 'The question,' says Chief Justice Marshall in Russell *v.* Clark, 9 Cranch (U. S.) 69, 'how far merchants are responsible for the character they give each other is one of much delicacy, and of great importance to the commercial world. That a fraudulent recommendation (and a recommendation known at the time to be untrue would be deemed fraudulent) would subject the person giving it to damages sustained by the person trusting to it, seems now to be generally admitted."

In Ballard *v.* Lockwood, 1 Daly (N. Y.) 159, the plaintiff's cause of action was stated in the following paragraph of his complaint: "The plaintiffs are informed, and believe, and aver the fact to be, that at or about the time of the sale of said goods by the plaintiffs to the said *Thomas Gill*, and the making of representations hereinbefore referred to by the said *Lockwood Brothers*, the said *Gill* was indebted to the said *Lock-*

manufactured by the plaintiff in accordance with certain samples, then and there exhibited to said *Sargent* by the plaintiff, and to be delivered by the plaintiff to said *Sargent* in said *Boston*, in the course of *November*, 1875, on a credit of *thirty* days from the delivery thereof. That in *November*, 1875, the plaintiff, having manufactured

wood Brothers in the amount of *thirteen thousand* dollars, or thereabouts, and was well known by the said *Lockwood Brothers* to be insolvent, and unable to pay his debts, and with a view to obtain payment of their own debts, it was agreed between the said *Gill* and the said *Lockwood Brothers*, that the said *Gill* should endeavor to purchase goods from various merchants in the city, and should refer to the said *Lockwood Brothers* as to his responsibility, and that the said *Lockwood Brothers* should represent him to be solvent and in good credit. and that such goods, when purchased, should be transferred to the *Lockwood Brothers* in payment of their debts, or sold at auction by them, and the proceeds applied to the payment of their debt; and the plaintiffs believe, aver, and charge the fact to be, that the application of the said *Gill* to the plaintiffs to purchase said goods, the reference to the said *Lockwood Brothers*, and the statements made by the said *Lockwood Brothers*, were all made in pursuance of such fraudulent agreement, and were a device and contrivance between the said *Lockwood Brothers* and the said *Gill* to obtain the goods of the plaintiffs, to be applied to the payment of the debt of the said *Lockwood Brothers*." This complaint was held to be sufficient, the court stating that it was not necessary to aver that the representations on which plaintiffs parted with their goods were false, it being sufficient to allege that they were made by defendant well knowing them to be untrue.

In Anthon's Amer. Prec., p. 244, is given the following delaration, omitting the formal parts: "For that whereas on *March 6* at *Boston* a certain discourse was moved and had between the plaintiff and one *Richard Fen* and the said *Richard Roe* [defendant] of and concerning the plaintiff's selling to the said *Richard Fen* certain goods and wares, of which the plaintiff was then possessed, of the value of *five hundred* dollars and of and concerning the said *Richard Fen* purchasing the same upon credit, and giving his promissory note for the same, payable with interest in *one* month; and the plaintiff, not knowing the circumstances of said *Richard Fen* and whether he was of ability to pay the same sum, declined and refused to trust the said *Richard Fen* with the said goods and wares, or to take his promissory note therefor, unless he could be well assured of said *Richard Fen's* ability to pay the same sum. And the said *Richard Roe* then and there, well knowing that the said *Richard Fen* was not of sufficient ability to pay the said sum, and was not worth one cent in the world, and well knowing that the said *Richard Fen* intended never to pay the same sum, but to cheat the plaintiff thereof, he the said *Richard Roe* then and there falsely and fraudulently affirmed to the plaintiff, that the said *Richard Fen* was a person of interest, and of sufficient ability to pay the said sum, and that the plaintiff need not be afraid to give him credit, or to take his promissory note, payable in *one* month therefor. And the plaintiff avers, that he, believing and trusting in the said false information of the said *Richard Roe*, did then and therecredit the said *Richard Fen* for divers goods and wares, to the value of *five hundred* dollars and then and there took his promissory note, of that date, for the payment of the same sum in *one* month from the date of said note, and interest for the same till paid; and that the said *Richard Fen* was not then worth one cent, which the said *Richard Roe* well knew: And the plaintiff has never been able to find the said *Richard Fen* since, who has absconded, although he has spent much money in seeking to find him; and so has totally lost the said sum and interest; to the damage of the plaintiff, as he says, *one hundred* dollars."

In Robinson's Forms, p. 585, the following precedent is given, omitting the formal parts:

"And thereupon the said plaintiff saith, that the said plaintiff, before and at the time of the committing of the grievance by the said defendant as hereinafter mentioned, was, and from thence, hitherto, has been, and still is, a druggist, and the trade and business of a druggist hath, for and during all

said goods, was ready to deliver the same to said *Sargent*, when said *Sargent* informed him by letter that he did not want said goods, and instructed him not to deliver them. That thereupon the plaintiff, being unable to account for this conduct on the part of said *Sargent*, and being anxious to know if said conduct proceeded from any

that time, used, exercised and carried on, and still doth use, exercise and carry on, at the city of *B*———, in the state of *M*———, to wit, at the county of *H*———; and the said defendant, before the time of committing the grievance by the said defendant as hereinafter mentioned, was a druggist, and the trade and business of a druggist had, used, exercised, and carried on at the city of *R*———, in the state of *V*———, to wit, at the said county of *H*———; and the said defendant, before the time of the committing of the grievance by the defendant, as hereinafter mentioned, had dealt with, and was trusted by, the said plaintiff, for divers goods, wares and merchandize, on credit, in the way of the said trade and business; and at the time of the committing of the said grievance by the defendant, as hereinafter mentioned, one *W. G. C*——— was using, exercising and carrying on the trade and business of a druggist, in the same house and place in which, before that time, the said defendant had used, exercised and carried on the said trade and business; and the said *W. G. C*——— was desirous to deal with, and be trusted by the said plaintiff, from time to time, for divers goods, wares and merchandize, on credit, in the way of the said trade and business; and thereupon the said defendant, heretofore, to wit, on the *26th* day of *August*, 1833, at the said county of *H*———, contriving and intending to deceive and defraud the said plaintiff, and wrongfully, deceitfully and fraudulently, to induce, persuade and encourage the said plaintiff to deal with the said *W. G. C*——— in the way of his trade and business, and to sell and deliver to the said *W. G. C*———, from time to time, divers goods, wares, and merchandize, upon trust and credit, wrongfully, deceitfully and fraudulently, then and there, made a representation in writing, which writing was signed by him, and by the said writing, then and there, wrongfully, deceitfully and fraudulently, represented and affirmed to the said plaintiff, in substance, that ill health having compelled him the said defendant to retire from business, he had sold out his entire stock to Mr. *W. G. C*———, who had then been in his employment for several years past; that the said *W. G. C*——— would probably want some articles in the plaintiff's way, and that he the defendant did not hesitate to express his conviction that he the [said] *W. G. C*——— would be found punctual in any engagement he might make with the said plaintiff, thereby, then and there, wrongfully, wilfully, deceitfully and fraudulently conveying to the plaintiff this meaning, that the said *W. G. C*——— had bought and paid for, and was the owner of the defendant's entire stock of goods, wares and merchandize, and was fit to be trusted with goods on credit. And the said plaintiff saith, that at the time of the said representation and affirmation, and from time to time afterwards, to wit, until the ——— day of ———, the said *W. G. C*——— applied to the said plaintiff for goods to be sold to him the said *W. G. C*——— on credit, in the way of the said plaintiff's trade and business of a druggist; and the said plaintiff, being unacquainted with the circumstances of the said *W. G. C*———, except through the said representation and affirmation of the defendant, living at a distance from the said *W. G. C*———*'s* place of residence, and not knowing anything to the contrary of the said representation and affirmation, but confiding in and giving credit to the same, and believing therefrom that the said *W. G. C*——— had a capital equal to the value of the said stock of goods, wares and merchandize, and was fit to be trusted with goods on credit, afterwards, to wit, on the said *26th* of *August*, 1833, at the city of *B*——— in the state of *M*———, to wit, at the county of *H*———, aforesaid, and at divers other days and times, between that day and the ——— day of ———, by means used in consequence of the said representation and affirmation, was induced to give credit to the said *W. G. C*———, and did, in consequence of the said representation and affirmation, sell and deliver to him divers goods, on credit, to a large amount, to wit, to the

inability on the part of said *Sargent* to meet his payments, and not knowing whether to rescind his contract with said *Sargent* or not, inquired of the defendant for some explanation of said conduct and respecting the character and circumstances of said *Sargent*; and the defendant, in order to induce the plaintiff to sell and deliver

amount of $*2000*, to wit, at the county of *H*——— aforesaid: whereas, in truth and in fact, the said *W. G. C*———, at the time of the said representation and affirmation, had not paid the said defendant for the said stock, but then stood indebted to him for the same in a large sum of money, to wit, in the sum of $*7291.65* cents, and it had been understood and agreed between the said *W. G. C*——— and the defendant, before the time of the said representation and affirmation, that the said *W. G. C*——— should give a lien on the said stock for the purpose of securing the payment of the said large sum of money: and whereas, in truth and in fact, the said *W. G. C*——— at the time of the said representation and affirmation, was not fit to be trusted by the said plaintiff with goods on credit, and the said defendant knew at that time that he was not. And the said plaintiff further saith, that the sum of money for which goods were sold and delivered as aforesaid by the plaintiff to the said *W. G. C*———, is still wholly due and unpaid to the said plaintiff; that after the making the said representation and affirmation, to wit, on the *18th* of *February*, 1*834*, the said defendant procured a deed to be executed by the said *W. G. C*——— to one *J. M*———, as trustee for the said defendant, for the purpose of securing to the said defendant the payment of the said large sum of money, in which the said *W. G. C*——— stood indebted to him, by which deed there was conveyed all the said *C*———'*s* stock in trade, as an apothecary and druggist; that subsequently, to wit, on the *30th July*, 1*834*, the said defendant sold or caused to be sold, the whole stock on which the said deed was given, or so much thereof as remained at the time of the sale, and the whole proceeds thereof were applied towards the payment of the said large sum of money, in which the said C——— stood indebted to him; that the said *W. G. C*——— is wholly insolvent, and the said plaintiff is wholly unable to obtain from him payment of the money which remains due and unpaid to the said plaintiff for the goods sold and delivered as aforesaid, to wit: at the county of *H*——— aforesaid.

And the said plaintiff also saith, that he, the said plaintiff, before and at the time of the committing of the grievance by the said defendant, as hereinafter in this count mentioned, was, and from thence, hitherto hath been, and still is a druggist, and the trade and business of a druggist hath, for, and during all that time, used, exercised and carried on, and still doth use, exercise and carry on, at *B*——— in the state of *M*———, to wit, at the said county of *H*———; and the defendant, before the committing of the said grievance hereinafter mentioned, had been a druggist, and the trade and business of a druggist had used, exercised and carried on at *R*——— in the state of *V*———, to wit, at the said county of *H*———; and the said defendant, before the committing of the said grievance hereinafter mentioned, had sold to one *W. G. C*——— all the stock in trade which he had as a druggist in the said city of *R*———, to wit, in the county of *H*———, and the said *W. G. C*——— in consequence of his purchase of the said stock, had, before the committing of the said grievance by the said defendant, become indebted to the defendant, and, at the time of the committing of the said grievance, was still indebted to the defendant in a large sum of money, to wit, in the sum of $*7291.65* cts., and before the committing of the said grievance by the said defendant, as hereinafter mentioned, it had been understood and agreed between the said *W. G. C*——— and the defendant, that he the said *W. G. C*———, for the purpose of securing the payment of the said large sum of money, would thereafter execute a mortgage, or deed of trust, or other lien on the stock in trade which he might have at the time of executing the same; and the said *W. G. C*———, after the said sale to him by the defendant, was desirous to deal with, and to be trusted by the said plaintiff, from time to time, for divers goods, wares and merchandize on credit, in the way of his trade and business; and there-

said goods to said *Sargent* on credit, falsely represented to the plaintiff in writing, that he knew very little of said *Sargent's* business, that he had no reason to doubt said *Sargent's* responsibility, that his rent and other payments due to him, said defendant, by said *Sargent*, had been made promptly by said *Sargent*, and that he did not fully

upon the said defendant, heretofore, to wit, on the *26th* of *August*, 1833, at *R*———, to wit, in the said county of *H*———, again colluding and intending to deceive and defraud the said plaintiff, and wrongfully, deceitfully and fraudulently to induce, persuade and encourage the said plaintiff to deal with the *W. G. C*——— in the way of his trade and business, and to sell and deliver to the said *W. G. C*——— divers other goods, wares and merchandize upon trust and credit, then and there, wilfully, wrongfully, deceitfully and fraudulently in writing, signed by the said defendant, by the name of *H. C. M*———, represented to the plaintiff, by the name of Mr. *N. B. W*——— that ill health having compelled him, the defendant, to retire from business, he had sold out his entire stock to Mr. *W. G. C*——— who had then been in his employment for several years past; that Mr. *C*——— would probably want some articles in the plaintiff's way, and that he the defendant did not hesitate to express his conviction that Mr. *C*——— would be found punctual in any agreement be might make with the plaintiff; and the said defendant, then and there, knowing that the said *W. G. C*——— was indebted to him, in consequence of the said purchase of the said stock, in a large sum of money, to wit, the sum of $*7291.65* cts., and that it had been understood and agreed that a mortgage, or deed of trust, or other lien should be given as aforesaid, then and there, although it was material that the said plaintiff should be informed of the same, wilfully, wrongfully, deceitfully and fraudulently withheld, suppressed and concealed from the plaintiff, the fact that the said *W. G. C*——— stood indebted to him the defendant in the said large sum of money, and wilfully, wrongfully, deceitfully and fraudulently withheld, suppressed and concealed from the plaintiff, the fact that the said *W. G. C*——— was to execute a mortgage, or deed of trust, or other lien on the stock, as aforesaid, for the purpose of securing to the defendant payment of the said large sum of money, and wilfully, wrongfully, deceitfully and fraudulently withheld, suppressed and concealed from the plaintiff, that the said *W. G. C*——— was indebted to the defendant in any sum of money, or was to execute any mortgage, deed of trust or other lien whatever, for the purpose of securing any sum of money to the defendant. And the said plaintiff saith, that the said *W. G. C*———, then and there, applied to the said plaintiff to deal with him, in the way of the said plaintiff's trade and business, and then and there, and at divers other times, applied to the said plaintiff to be trusted by the said plaintiff, for divers goods, wares and merchandize, on credit, in the way of the said trade and business; and the said plaintiff carrying on his business at a distance from the said *W. G. C*———, and having no knowledge of his circumstances, except that derived from the said representation of the defendant, supposing that the information given by the defendant to him was a fair representation of what the said defendant knew concerning the circumstances of the said *W. G. C*———; that the said defendant had stated nothing which was false, and suppressed nothing which he ought to have disclosed, and believing from the said representation that the said *W. G. C*——— was a trustworthy person, did, in consequence of the said representation, so made by the defendant, and of the said defendant's withholding, suppressing and concealing the material facts hereinbefore, in this count, mentioned, afterwards, to wit, on the day and year last aforesaid, and for a long time, to wit, on divers other days and times between the day last aforesaid and the ——— day of ———, at *B*——— in the state of *M*———, to wit, at the said county of *H*——— deal with the said *W. G. C*——— in the way of his trade and business, and give credit to the said *W. G. C*———, and sell and deliver to him divers other goods, on credit, to a large amount, to wit, to the amount of $*2000*, to wit, at the said county of *H*———. And the said plaintiff further saith that the said *W. G. C*———

comprehend said letter from said *Sargent* to the plaintiff; and thereupon the plaintiff, believing said representations to be true, was induced to sell and deliver, and did sell and deliver, said goods to said *Sargent*, and was induced to give and gave the said *Sargent* credit for the price of said goods for *thirty* days from delivery thereof; but when the defendant made the representations aforesaid, he was fully and thoroughly acquainted with said *Sargent's* business, and had reason to doubt said *Sargent's* responsibility; his rent and other payments due to the defendant had not been promptly paid by said *Sargent*, and said defendant did fully comprehend said letter from said *Sargent* to the plaintiff, and said *Sargent* was then insolvent, and not fit to be trusted with goods on credit, all whereof the defendant well knew.

And the plaintiff further says that he has not been paid for said goods, nor for any part thereof, and is unable to obtain payment therefor, and he is likely to lose the same, wherefore the plaintiff says he is damaged to the amount of the price of said goods as set forth, and the interest thereon, and therefore he brings his suit.

And the plaintiff says, that on or about the *first* day of *July*, 1875, the defendant, fraudulently intending to deceive and injure the plaintiff, and to get the plaintiff's goods into his own possession and to enjoy the same, requested the plaintiff to manufacture for, and sell and deliver to, one *Osborne N. Sargent*, on credit, certain goods as specified in the account hereto annexed, and the defendant then, though knowing that the said *Sargent* was in bad and insolvent circumstances, and unfit to be trusted with goods on credit, but fraudulently intending as aforesaid, falsely and fraudulently represented to the plaintiff that the said *Sargent* was a good man in good circumstances, and fit to be trusted with goods on credit.

And the plaintiff says that in consequence of the representations so made by the defendant, he, believing the said *Sargent* to be in good circumstances and fit to be trusted as aforesaid, contracted with said *Sargent* to manufacture for, and sell and deliver to him, on a credit of *thirty* days from delivery, goods in accordance with the samples then and there by the plaintiff to him exhibited and as set forth in the account hereto annexed, to be delivered in the following *November*.

And the plaintiff further says that thereafter, and before said goods

hath not, nor hath any other person, on his behalf, paid to the plaintiff the said last mentioned sum of money, so due to him for the said last mentioned goods, or any part thereof; but, on the contrary hereof, since the said representation so made by the defendant, to wit, on the *18th February*, 1834, a deed was made by the said *W. G. C*——— to one *J. M*———, conveying all the stock in trade which the said *C*——— had at that time, in trust, for the purpose of securing to the defendant the payment of the said large sum of money, which was due from the said *W. G. C*——— to the defendant, and after the said deed was made, to wit, on the *30th* of *July*, 1834, the said stock in trade so conveyed, or so much thereof as then remained, was sold, and the proceeds thereof applied to pay, or towards the payment of, the said large sum of money due from the said *W. G. C*——— to the defendant, and the said *W. G. C*——— is now insolvent, and the plaintiff is wholly unable to obtain from him payment of the said sum of money, so due to him for the said last mentioned goods, or any part thereof, to wit, at the said county of *H*———: wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of $2000, and therefore he brings suit, etc."

were sold and delivered to said *Sargent*, and about the end of the month of *October* following, said *Sargent* wrote to him telling him that he did not want said goods, and instructed him not to deliver them, and the plaintiff, being unable to account for this conduct on the part of said *Sargent*, and being anxious to know if said conduct proceeded from any inability on the part of said *Sargent* to pay for said goods, and not knowing whether or not to rescind his contract with said *Sargent*, inquired of the defendant for some explanation of said conduct, and respecting the character and financial circumstances of said *Sargent*, and the defendant, fraudulently intending as aforesaid, falsely and fraudulently represented to the plaintiff in writing that he knew very little of said *Sargent's* business, that he had no reason to doubt said *Sargent's* responsibility, that his rent and other payments due to him, said defendant, by said *Sargent*, had been paid promptly by said *Sargent*, and that he, said defendant, did not fully comprehend said letter from said *Sargent* to the plaintiff; and thereupon the plaintiff, believing said representations to be true, was induced to sell and deliver, and did sell and deliver, said goods to said *Sargent*, and was induced to give and gave the said *Sargent* credit for the price of said goods for *thirty* days from said delivery; but when the defendant made the said representations aforesaid, he was fully and thoroughly acquainted with said *Sargent's* business, and had reason to doubt *Sargent's* responsibility; his rents and other payments due to the said defendant had not been paid promptly by said *Sargent*, and said defendant did fully comprehend said letter from said *Sargent* to the plaintiff, and said *Sargent* was then insolvent and not fit to be trusted with goods, all whereof the defendant then knew, but in representing as aforesaid, the defendant fraudulently intended as aforesaid.

And the plaintiff says that on or about the *sixteenth* day of *November*, 1874, said *Sargent* had mortgaged to the defendant all the goods and merchandise then in his possession, and also any other goods which, from time to time during the existence of such mortgage, should be purchased by said *Sargent* and put in, to replace any part of the stock then in his possession so mortgaged, which might be disposed of, and had agreed that if said goods were diminished faster than the amount secured by said mortgage was paid, that he would furnish further security whenever requested, said mortgage running for a period of four years from this date; and the defendant, well knowing the existence of said mortgage and its provision at the time aforesaid, fraudulently intending as aforesaid, falsely said and represented to the plaintiff as aforesaid.

And the plaintiff further says that thereafter and immediately upon the delivery of said goods in *Boston* to said *Sargent*, the defendant, fraudulently intending as aforesaid, procured said *Sargent* to mortgage to him, on the *twenty-fourth* day of *November*, 1875, certain stock acquired after the execution of the mortgage heretofore mentioned, and including the goods so sold and delivered to said *Sargent* by the plaintiff; and thereafter, on or about the *first* day of *December*, 1875, the defendant, fraudulently intending as aforesaid, foreclosed his said mortgages, and took possession of the goods so mortgaged, including the goods so sold and delivered by the plaintiff.

And the plaintiff further says that he has not been paid the price of said goods, and by reason of the aforesaid false and fraudulent representations of the defendant, he has been damaged to the amount of $*245.47*, said sum being the value of the goods aforesaid, and is also entitled to interest on the same. [(*Concluding as in Form No. 6942.*)][1]

(*b*) *As to Amount of His Property.*

Form No. 6911.

(Conn. Prac. Act, p. 80, Form No. 120.)

[(*Commencement of writ as in Form No. 5912.*)][1] 1. The plaintiff, at the time of the grievances herein complained of, was a wholesale grocery merchant.

2. On *May 15th*, 1879, the defendant introduced to the plaintiff, as a customer, *John Stiles*, who wished to procure goods on credit, and the defendant then represented to the plaintiff that he had no doubt said *Stiles* would pay for any goods he might buy, and said *Stiles* then said, in the presence of and uncontradicted by the defendant, that he, *Stiles*, was worth $*5,000*.

3. The plaintiff believed the representations of the defendant to be true, and that said *Stiles* was worth $*5,000*, and was thereby induced to sell, and did sell to said *Stiles*, a stock of general groceries to the amount of $*1,000* upon a credit of *thirty* days.

4. In fact, said *Stiles*, at the time of said representations, was insolvent, as the defendant then knew, and the defendant did not believe that said *Stiles* would pay for said goods, and, with intent to defraud the plaintiff, refrained from informing him that said *Stiles'* assertion of his solvency was false.

5. The defendant made said false representations with intent to induce the plaintiff thereby to sell said goods on credit, as aforesaid, and to defraud him.

6. Said *Stiles*, immediately after the purchase of said goods, transferred them to the defendant, who received them in part payment of a debt owing him from said *Stiles* at the time of said purchase, knowing when he received them, that they were the goods bought of the plaintiff, as aforesaid, and that said *Stiles* had not paid for them.

7. Said credit given to *Stiles* has expired, and he has not paid for said goods.

The plaintiff claims $*1,100* damages.

[(*Concluding as in Form No. 5912.*)][2]

Form No. 6912.

(Mass. Pub. Stat. (1882), c. 167.)

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not in the statutory form, but should be added to complete the form.

Consult also the notes to form No. 6863, *supra*.

[(*Title of court and cause as in Form No. 6942.*)][1] And the plaintiff says the defendant, to induce the plaintiff to sell property on credit to one *Sam Carr*, falsely represented to the plaintiff in writing that said *Sam Carr* was a man possessed of a large property and able to pay his debts (a copy of which writing is hereto annexed). And thereupon the plaintiff, believing said representation to be true, was induced to sell and did sell, to said *Sam Carr* the goods mentioned in the account hereto annexed and gave the said *Sam Carr* credit for the price of said goods, being *one hundred* dollars for the term of six months from the *first* day of *May*. And said *Sam Carr* was not a man of property, nor able to pay his debts, but was insolvent, which the defendant then knew. And the plaintiff has not been paid for said goods, and is unable to obtain payment therefor of said *Sam Carr*. [(*Concluding as in Form No. 6942.*)][1]

Form No. 6913.

(Precedent in Eyre *v.* Dunsford, 1 East 318.)[2]

[(*Commencement as in Form No. 6934.*)][1]

That before the committing of the grievance after mentioned, to wit, on the *24th* of *May*, *1799*, at *London*, etc., one *William Thompson* then of *Hamburg* applied to the plaintiffs (traders) and requested them to export, sell, and deliver to him, goods of great value upon credit; and thereupon, the plaintiffs being unacquainted with the credit,

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not in the statutory form, but should be added to complete the form.

Consult also the notes to form No. 6863, *supra*.

2. **There were other counts** to the same effect varying the words spoken, and to the declaration general issue was pleaded. Verdict for plaintiff with damages to the amount of loss sustained. Rule obtained to show cause why there should not be a new trial was discharged.

Another Precedent. — In Corbett *v.* Brown, 8 Bing. 33, 21 E. C. L. 211, the declaration, omitting the formal parts, was as follows: "That the plaintiffs, before and at the times of the committing the grievances by the defendant as thereinafter mentioned, had been, and still were, warehousemen, and the trade and business of warehousemen for and during all that time had used, exercised and carried on, and still did use, exercise and carry on, at *London*; that the plaintiffs, so being warehousemen, and so using, exercising, and carrying on the said trade and business, one *Henry Brown*, before the committing of the grievance by the defendant thereinafter next mentioned, on the *15th* of *April*, 1830, at *London*, applied to the plaintiffs, and then and there stated, that he was about to commence business at *Norwich*, and that he had *300*l. capital, his own property, to commence business with, at *Norwich*, and then and there requested the plaintiffs to sell goods to him *Henry Brown* in the way of the plaintiffs' trade and business of warehousemen, and then and there referred the plaintiffs to the defendant to corroborate the statement of him, *Henry Brown*, that he had capital *300*l. of his own property, to commence business with at *Norwich*, whereof the defendant afterwards, and before the sale of the goods by the plaintiffs to the said *Henry Brown* thereinafter next mentioned, on *June 5*, 1876, at *London*, had notice, and was then and there requested by the plaintiffs to inform them if the said *Henry Brown* had *300*l. capital, his own property, to commence business with, at *Norwich*. Neverthe-

circumstances, and character of *Thompson*, and whether they might safely sell and deliver to him goods upon credit, applied to the defendant (being a partner in trade with one *Lichigaray*) to be by him truly informed of the credit, circumstances, and character of *Thompson*; all of which said premises, etc., the defendant had notice from the plaintiffs, and was requested by them to inform them truly of the credit, circumstances, and character of *Thompson*; and thereupon the defendant fraudulently, deceitfully, and wrongfully contriving and intending to deceive, injure, and prejudice the plaintiffs, and to induce and cause them to export, sell, and deliver the said goods to *Thompson* upon credit, afterwards, etc., did falsely, deceitfully and wrongfully affirm and represent to the plaintiffs that they, the defendant and his partner, were informed by a very respectable house at *Hamburg* that *Thompson* was of respectable connexions, and a person to whose character they (the said defendant and his partner) might speak with confidence; and that the defendant and his partner had a credit lodged with them by the same house for *12,000*l., which they held at *Thompson's* disposal. And on the defendant's being informed by the plaintiffs that the amount of the goods which *Thompson* had so applied to the plaintiffs to export, etc., to him, would be about *1,000*l., the defendant further intending as aforesaid, did falsely, etc., affirm and represent to the plaintiffs, that they (the defendant and his partner) thought the order might be executed with safety. That the plaintiffs, confiding in the said assertions and representations of the defendant, and believing the same to be true, and not knowing the contrary thereof, afterwards, to wit, on the *15th*

less the defendant, well knowing the premises, and that *Henry Brown* had not *300*l. capital, his own property, to commence business with at *Norwich*, but fraudulently intending craftily and subtly to deceive and injure the plaintiff in that behalf, to wit, on *June 15*, 1876, at *London*, falsely, fraudulently, and deceitfully informed the plaintiffs, in answer to their inquiry, that the statement so made to them by *Henry Brown* as to the *300*l. was perfectly correct, as the defendant had advanced him, *Henry Brown*, the money; by means and in consequence of which information so given by the defendant to the plaintiffs as aforesaid, they, not knowing to the contrary, but believing therefrom that *Henry Brown* had *300*l. capital, his own property, to commence business with, at *Norwich*, afterwards, to wit, on *June 15*, 1876, and on divers other days and times, to wit, at *London*, were induced to give credit to *Henry Brown*, and did then and there sell and deliver to him divers goods on credit, at or for divers prices, in the whole amounting to a certain large sum of money, to wit, the sum of *700*l; whereas in truth and in fact the said *Henry Brown*, at the time of the defendant so giving the information to the plaintiffs as aforesaid, had not *300*l. capital, his own property, to commence business with, at *Norwich*, and the defendant, at the time of his so giving the information to the plaintiffs, well knew the same; and whereas in truth and in fact the defendant, at the time of his so giving the information to the plaintiffs, had not advanced the said sum of *300*l., or any sum whatever, to *Henry Brown*. Averment, that *Henry Brown* now is in bad and insolvent circumstances, and that the sum of *700*l. is wholly due and unpaid to the plaintiffs, and that they are likely to lose the same." Plea of not guilty and issue thereon. The jury found for the defendant, whereupon rule nisi to set aside verdict was obtained and rule was made absolute, it being held that the misrepresentations of the defendant were such as to render him liable in damages to the plaintiff.

of *August* in the year aforesaid, etc., were thereby induced to and did export, sell and deliver to *Thompson* the goods to the amount of *710*l. *12*s. *9*d. upon credit for *six* months: whereas in truth at the time the defendant so made the said affirmations and representations, he and his partner were not nor had been informed by a very respectable house at *Hamburg* that *Thompson* was of respectable connexions, and a person to whose character the defendant and his partner might speak with confidence, and the defendant well knew the same; and in truth, the defendant and his partner at the time, etc., had not a credit lodged with them by the said house at *Hamburg*, etc., for *12,000*l., etc., and the defendant well knew the same; and in truth, at the time, etc., they, the defendant and his partner, did not think the said order of the said *Thompson* might be executed by the plaintiffs with safety. And the plaintiffs further say, that although the said *six* months for which they did so trust and give credit to *Thompson* for the goods are elapsed, yet *Thompson* hath not yet paid the plaintiffs, etc., for the said goods, etc., and ever since hath been and still is unable to pay, etc. By means, etc., whereof, [they the plaintiffs have suffered great cost, loss, damage and expense to their damage, as they say, *710*l. *12*s. *9*d. (*Concluding as in Form No. 6934.*)][1]

(*c*) *As to His Business or Trade.*

Form No. 6914.

(Anthon's Am. Prec., p. 244.)

(*Commencement as in Form No. 6942.*)[1] For that the said *Richard Roe* [defendant] on *September 1st*, 1875, in order greatly to deceive the plaintiff, came, together with one *Richard Fen*, to the plaintiff's house in *Salem* aforesaid; and then and there, well knowing that the plaintiff had a yoke of oxen for sale, declared to the plaintiff, that the said *Richard Fen* was a person of good substance, and a brazier in *Boston*, in the county of *Suffolk*, and of considerable trade and business, and was obliged to ship off a considerable quantity of beef; and assured the plaintiff, he might safely trust the said *Richard Fen*. And accordingly, the plaintiff, crediting the words and speeches of the said *Richard Roe*, was then and there prevailed upon to sell a pair of oxen to the said *Richard Fen* for the sum of *eighty* dollars, and to take the said *Richard Fen's* note for the payment thereof, on *October 7th* then next ensuing; whereas the said *Richard Roe* well knew at the time of sale of said oxen, and the taking of said note, that the said *Richard Fen* was not the person by him represented as aforesaid, and no brazier in said *Boston*, nor in such trade and business, nor in such credit as aforesaid; but was an impostor, by the said *Richard Roe* equipped to impose on people, and to deceitfully gain the property of others upon credit; by all which false and deceitful actions and

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

Consult also the notes to Form No. 6863, *supra*.

sayings of the said *Richard Roe*, the plaintiff was not only deceived in the sale of his oxen as aforesaid, but put to *sixty* dollars charges and costs in retaining his said oxen. (*Concluding as in Form No. 6942.*)[1]

(*d*) *As to His Fitness to be Trusted.*

Form No. 6915.

(*Title of court and cause, and commencement as in Form No. 5926.*)[1]

1. That the defendant on *December thirtieth*, eighteen hundred and *ninety-seven*, at *New York*, in the county of *New York*, intending to deceive and defraud the said plaintiff, made to him certain false representations.

2. That these false representations were that one *John Den* was a man of property and fit to be trusted to any amount.

3. That by these representations and in reliance upon them plaintiff was induced to trust and did trust said *Den* for *merchandise* to the value of *ten thousand* dollars.

4. That said *Den* was not a man of property and fit to be trusted, but was possessed of no property and was unfit to be trusted and was insolvent.

5. That this the defendant well knew when he made the representations aforesaid.

6. That plaintiff by his reliance on said representations suffered damage to the amount of *ten thousand* dollars.

Wherefore (*concluding as in Form No. 5926*).[1]

Form No. 6916.

(Conn. Prac. Act, p. 79, Form No. 119.)

[(*Commencement of writ as in Form No. 5912.*)][1]

1. On *March 22d*, 1879, the defendant represented to the plaintiff that *John Stiles* (who was then proposing to purchase goods of the plaintiff on credit, and had referred the plaintiff to the defendant for information respecting his character and circumstances), had done much business with him; that he had received a large amount of money from said *Stiles*; that he then did business with said *Stiles*, and that he, the defendant, believed him to be a man in good circumstances, and fit to be trusted with goods on credit.

2. The plaintiff believed said representations made by the defendant to be true, and was induced thereby to sell, and did, on said day, sell and deliver to said *Stiles* [*briefly designate the goods*], of the value of *$850*, upon a credit of *sixty* days.

3. On *March 30th*, 1879, the plaintiff, relying upon said representa-

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244. The matter to be supplied within [ ] is not found in the statutory form, but should be added to complete the form. Consult also the notes to Form No. 6863, *supra*.

tions, sold and delivered to said *Stiles* [*designate goods*], of the value of $*600*, upon a credit of *sixty* days.

4. In fact, said *John Stiles*, at the time the defendant made said representations to the plaintiff, was insolvent and not fit to be trusted with goods on credit, and the defendant did not at that time do business with said *Stiles*, and did not believe said *Stiles* to be a man in good circumstances, and fit to be trusted with goods on credit.

5. The defendant made said false representations well knowing them to be false, and with intent to induce the plaintiff thereby to sell goods to said *Stiles* on credit, and to defraud the plaintiff.

6. Said *Stiles* has not paid for said goods sold him by the plaintiff, although the time of credit has long since expired, and the plaintiff is likely to lose the value of said goods.

The plaintiff claims $*1,500* damages.

[(*Concluding as in Form No. 5912.*)][1]

Form No. 6917.

(Petersd. Prec., p. 158.)

(*Commencing as in Form No. 6935.*)[1] For that whereas the plaintiff, before and at the committing of the grievance by the defendant as hereinafter mentioned, was and from thence hitherto has been and

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

Consult also the notes to Form No. 6863, *supra*.

Other Precedents.— In 2 Chit. Pl. 326, a declaration for falsely representing the third person to be trustworthy is given in the following words and figures, omitting the formal parts:

"For that whereas the plaintiff, before and at the time of the committing of the grievance by the defendant as hereinafter next mentioned, was and from thence hitherto hath been and still is a printer, and the trade and business of a printer hath, for and during all that time, used, exercised and carried on, and still doth use, exercise and carry on. And whereas also the plaintiff, so being a printer, and so using, exercising and carrying on, the said trade and business as aforesaid, one *Edward Farmer* before the committing of the grievance by the defendant as hereinafter next mentioned, to wit, on *May 1st*, 1895, applied to the plaintiff, and then requested the plaintiff to sell goods on credit to the said *Edward Farmer* in the way of the plaintiff's said trade and business of a printer. And the plaintiff being then unacquainted with the character and circumstances of the said *Edward Farmer*, was then referred by him to the defendant for information respecting the same, whereof the defendant afterwards, and before the sale of any goods by the plaintiff to the said *Edward Farmer*, to wit, on *June 1st*, 1895, had notice, to wit, from one *George Howe*, the servant of the plaintiff, and the defendant was then interrogated by the said *Gearge Howe* on the part of the plaintiff, respecting the character and circumstances of the said *Edward Farmer*. Nevertheless the defendant well knowing the premises and that the said *Edward Farmer* was then in bad and insolvent circumstances, and unfit to be trusted with goods on credit, but contriving and fraudulently intending, craftily and subtly to deceive and injure the plaintiff in this behalf, on the day and year aforesaid, falsely, fraudulently and deceitfully, in writing, to wit, in the words and manner hereinafter stated, signed by the defendant, in answer to certain questions then put to the defendant by the said *George Howe* on the part of the plaintiff, respecting the character and circumstances of the said

still is a *dry goods merchant*, and the trade and business of a *dry goods merchant* has for and during all that time exercised and carried on, and still uses, exercises, and carries on. And whereas the plaintiff, so being a *dry goods merchant*, and so using, exercising, and carrying on such trade and business, one *John Den*, before the committing of

Edward Farmer, represented and affirmed that (*Here set forth the misrepresentations as they appear from the defendant's writing, as thus*, 'he, the defendant, then well knew the said *Edward Farmer*, and had done a deal of business with him, and taken a deal of his (the said *E. F.'s*) money, and that the defendant then did business with the said *E. F.*, and that upon the whole the defendant believed the said *E. F.* to be a good man (thereby then meaning that the defendant believed the said *E. F.* to be a man in good circumstances and fit to be trusted with goods on credit)." By means and in consequence of which representation and affirmation so made and given by the defendant to the said *George Howe* as aforesaid, the plaintiff not knowing to the contrary, but believing therefrom that the said *Edward Farmer* was a man in good circumstances, and fit to be trusted as aforesaid, afterwards, to wit, on the day and year aforesaid, and on divers other days and times between that day and the day of ——— then next following, was induced to give credit to the said *Edward Farmer*, and did then sell and deliver to him divers goods on credit to a large amount, to wit, to the amount of £*1,000*, whereas in truth and in fact (*Here negative the truth of defendant's representations, as thus*, 'that the said *Edward Farmer* at the time of the defendant so making and giving the said representation and affirmation to the said *George Howe* as aforesaid, was in bad and insolvent circumstances and not fit to be trusted with goods on credit; and whereas in truth and in fact the defendant did not at that time do business with the said *Edward Farmer*, and, whereas, in truth and in fact the defendant did not believe the said *Edward Farmer* to be a good man, but on the contrary thereof at that time well knew the said *Edward Farmer* then was in bad and insolvent circumstances, and not fit to be trusted with goods on credit.') And the plaintiff further says that the several sums of money are still wholly due and unpaid to the plaintiff, and by means of the defendant's said false and deceitful representation he the plaintiff is likely wholly to lose the same."

Similar precedents may be found in 2 Rev. Swift's Dig., p. 528; Tillingh. Forms, p. 419.

In Pasley *v.* Freeman, 3 T. R. 51, the declaration, omitting the formal parts, was substantially as follows: "And whereas also, said *Joseph Freeman*, afterwards, to wit, on the *twenty-first* day of *February* in the year of our Lord *1787*, at *London*, in the Parish of *St. Margaret's*, further intending to deceive and defraud said *John Pasley* and *Edward*, did wrongfully and deceitfully encourage and persuade said *John Pasley* and *Edward* to sell and deliver to said *John Christopher Falch* divers other goods, wares and merchandises, to wit, *16* other bags of cochineal of great value, to wit, of the value of £*2,634 16*s. *1*d., upon trust and credit; and did for that purpose then and there, falsely, deceitfully and fraudulently, assert and affirm to said *John Pasley* and *Edward*, that said *John Christopher Falch*, then and there, was a person safely to be trusted and given credit to in that respect; and did thereby falsely, fraudulently and deceitfully, cause and procure said *John Pasley* and *Edward* to sell and deliver said last mentioned goods, wares and merchandises upon trust and credit, to said *John Christopher*; and in fact they, said *John Pasley* and *Edward*, confiding in and giving credit to said last mentioned assertion and affirmation of said *Joseph Freeman*, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on the, etc., at, etc., sell and deliver said last mentioned goods, wares and merchandises, upon trust and credit, to said *John Christopher*, whereas in truth and in fact, at the time of said *Joseph Freeman's* making his last mentioned assertion and affirmation, said *John Christopher* was not then and there a person safely to be trusted and given credit to in that respect, and said *Joseph Freeman* well knew the same, to wit, at *London* aforesaid, in the parish and ward aforesaid. And said *John Pasley* and *Edward* fur-

the grievance by the defendant as hereinafter mentioned, to wit, on the *eighteenth* of *June*, 1874, applied to, and then requested the plaintiff to sell certain goods on credit to him the said *John Den*, in the way of his the plaintiff's trade and business of a *dry goods merchant*. And the plaintiff being then unacquainted with the character and circumstances of the said *John Den* was then referred by him to the defendant for information respecting the same, whereof the defendant afterwards, and before the sale of any goods by the plaintiff to the said *John Den*, to wit, on the *eighteenth* of *June*, 1874, had notice; nevertheless the defendant, well knowing the premises, and that the said *John Den* was then in bad and insolvent circumstances, and unfit to be trusted with goods on credit, but contriving and fraudulently intending, craftily, and subtly, to deceive and injure the plaintiff in this behalf, on the day and year aforesaid, falsely, fraudulently, and deceitfully, in a certain letter or writing signed by the defendant, informed the plaintiff, in answer to certain inquiries then made of the defendant respecting the character and circumstances of the said *John Den*, that he the defendant knew the said *John Den*, and had done a deal of business with him, and that he the defendant then did business with the said *John Den*, and that upon the whole he the defendant believed the said *John Den* to be a good man (thereby meaning that the defendant believes the said *John Den* to be a man in good circumstances, and fit to be trusted with goods on credit). By means and in consequence of which information so given by the

ther say, that *John Christopher* hath not, nor hath any other person on his behalf, paid to said *John Pasley* and *Edward*, or either of them, said sum of £2,634 16s. 1d., last mentioned, or any part thereof, for said last mentioned goods, wares and merchandises; but on the contrary said *John Christopher* then was, and still is, wholly unable to pay said sum of money last mentioned, or any part thereof, to said *John Pasley* and *Edward*, to wit, at *London* aforesaid, and in the parish and ward aforesaid; and said *John Pasley* and *Edward* aver that said *Joseph Freeman* falsely and fraudulently deceived them in this, that at the time of his making his last mentioned assertion and affirmation said *John Christopher* was not a person safely to be trusted or given credit to in that respect as aforesaid, and said *Joseph Freeman* then well knew the same, to wit, at *London* aforesaid, and in the parish and ward aforesaid, by reason of which said last mentioned false, fraudulent and deceitful assertion and affirmation of said *Joseph Freeman* said *John Pasley* and *Edward* have been deceived and imposed upon, and have wholly lost said last mentioned goods, wares and merchandises, and the value thereof, to wit, at *London* aforesaid and in the parish and ward aforesaid, to the damage, etc." Motion in arrest of judgment was overruled, the court holding that a false affirmation made by defendant with intent to defraud plaintiff, whereby the latter receives damage, is the ground of an action upon the case in the nature of deceit, and that it is not necessary that defendant should be benefited by the deceit or that he should collude with the person who is so benefited.

In Boyd *v.* Browne, 6 Pa. St. 311, the declaration, omitting the formal parts, was substantially as follows: "*John A. Boyd* falsely and fraudulently recommended one *John B. Miller* as a person worthy of being trusted for *merchandise*, and thereby induced the plaintiffs to sell him goods on credit to the amount of $389; when at the time of such representations the said *Miller* was not worthy of credit; that said *Boyd* knew his representations to be false, and that said *Miller* was at that time greatly indebted to him and various other persons, and in bad circumstances; that no part of the goods sold by said plaintiffs has been paid for, and that the said *John B. Miller* was and still is wholly unable to pay for the same."

defendant to the plaintiff, the plaintiff not knowing to the contrary, but believing therefrom that the said *John Den* was a man in good circumstances, and fit to be trusted as aforesaid, afterwards and on divers times between that day and the *fourteenth* day of *August* then next following, was induced to give credit to the said *John Den*, and did then sell and deliver to him divers goods on credit to a large amount, to wit, *ten thousand* pounds; whereas in truth and in fact the said *John Den*, at the time of the defendant so giving the information to the plaintiff, was in bad and insolvent circumstances, and not fit to be trusted with goods on credit. And whereas in truth and in fact the defendant did not at that time do business with the said *John Den*. And whereas in truth and in fact the defendant did not believe the said *John Den* to be a good man, but on the contrary thereof, at that time, well knew the said *John Den* then was in bad and insolvent circumstances, and not fit to be trusted with goods on credit. And the plaintiff further says, that the said several sums of money are still wholly due and unpaid to the plaintiff; and he is likely wholly to lose the same: To the damage of the plaintiff, as he says, *ten thousand* pounds. (*Concluding as in Form No. 6935.*)

(*e*) *As to His Solvency.*

Form No. 6918.

(Precedent in Patten *v.* Gurney, 17 Mass. 182.)[1]

[(*Title of court and cause as in Form No. 6942.*)][2]

For that the said *Gurney & Patten*, previous to the *11th* of *June*, 18*18*, had sold certain goods and merchandise to one *Abel Upton*, who, having afterwards become insolvent, applied to them to be credited with certain other goods and merchandise, which they, because of *Upton's* inability to pay his debts, refused to sell and deliver to him, at fair and usual prices, pretending that they did not wish to sell any more goods on credit, as they expected soon to dissolve the connection in trade existing between them, advised him to get the goods in their line, which he might want, elsewhere, saying they would recommend the plaintiffs to him as good and fair men to deal with, and would recommend him to plaintiffs as of good credit and responsibility to be trusted; that thereupon *Upton* applied to plaintiffs to purchase certain goods and merchandise, of the value of *189* dollars,

1. **There were two other counts** for the same cause of action. After verdict for the plaintiffs, defendants moved an arrest of judgment. It was held that the second and third counts were defective, but that the case was tried upon the first count, which was held to be good, and judgment thereon allowed to be taken on the theory that an action lies for copartners in trade against two or more also copartners for falsely and fraudulently recommending a solvent person as worthy of credit, whereby plaintiffs were induced to trust him with goods which the defendants immediately attached, in consequence of which plaintiffs lost their goods.

2. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not in the reported case, but should be added to complete the form.

Consult also the notes to Form No. 6863, *supra*.

Another precedent of this character is given in 2 Rev. Swift's Dig., p. 530.

on a credit of *sixty* days; but the plaintiffs refused to credit him therefor, until they could be well assured of his ability to pay them, and that his property and circumstances were such that he could safely be trusted for that amount and for the term proposed; that *Upton* thereupon referred the plaintiffs to defendants, to be informed of his circumstances, and his credit and ability to pay said sum; that the plaintiffs, on the *16th* of *June*, 18*18*, applied to the defendants for such information and the defendants, well knowing that *Upton* was insolvent and unable to pay that sum, with intent thereby to procure the plaintiffs to deliver and entrust their said goods and merchandise to him, and that they might then immediately attach the same by legal process, to satisfy their own demands against him, and with intent to injure and defraud the plaintiffs, falsely and fraudulently affirmed to the plaintiffs that *Upton* was a person of good credit and property, and of sufficient ability to pay said sum; that they, the defendants, would trust him to any amount he might want; that he might be safely trusted, and that the plaintiffs need not fear to give him the credit he had applied for; that plaintiffs, believing and confiding in the said false and fraudulent affirmation of the defendants, delivered to and credited *Upton* with goods to the amount and for the time aforesaid; that he was then insolvent, as the defendants well knew; that the defendants, in pursuance of the said fraudulent intent, on or about the *18th* of the same *June*, attached all the property of *Upton*, including the goods sold to him as aforesaid by the plaintiffs; and that the plaintiffs have expended much time and money in attempting to obtain payment from *Upton*, without being able to get any satisfaction or security, and have thus totally lost their money, time, [and so totally lost their time, money and labor, to their damage, as they say, *one hundred and eighty-nine* dollars. (*Concluding as in Form No. 6942.*)][1]

(5) Of Person Employed by Plaintiff.

Form No. 6919.

(Precedent in Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 113.)[2]

1. See note 2, p. 205, *supra*.

2. **The second and third counts** differed from the first count set out in the text, in stating more generally the representation made by the defendant to the plaintiffs. The gravamen of the fourth count was, that the defendant at the time he recommended Jacque as a desirable agent, knew that he had 800 pounds to pay without any means of doing so, and that Jacque being employed by the plaintiff, failed to account to them.

The fifth count stated that defendant requested plaintiffs to employ Jacque as an agent; it then set forth in detail certain embarrassments which Jacque was laboring under at the time, of which it was material they should have been informed, and which the defendant, although it was his duty to inform them, wrongfully, deceitfully, wilfully, and fraudulently failed and concealed from them, *pro quod.* They employed and were injured by Jacque (nearly as as in the first count).

There were four other counts alleging this concealment in various ways. General issue was pleaded. It was held, in the case, that where a party recommends an agent by making statements which he knows to be false he is responsible in damages for the misconduct of the agent, although it be not shown that the recommendation was given from malice or with the view to the pecuniary interest of the party recommending.

[(*Commencement as in Form No. 6934.*)][1] For that whereas the plaintiffs before and at the time of the committing of the grievances hereinafter mentioned, carried on, and from thenceforth hitherto had carried on, trade and business as dealers in tea and other goods, to wit, at *London*, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*; and whereupon the defendant, heretofore, to wit, on the *10th* of *December*, 1824, at *London*, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, contriving and fraudulently intending craftily and subtly to deceive and injure the plaintiffs, and to induce them to employ a certain person, to wit, one *James Jacque*, as their agent in the said business at *Manchester*, in the county of *Lancaster*, to obtain and receive orders for goods to be supplied by them, and to receive and collect money on their account, in the way of their said business, for commission and reward to him payable in that behalf, falsely, fraudulently and deceitfully represented and asserted to the plaintiffs, that the said *James Jacque* had then an excellent connection in that line at *Manchester* and the neighborhood, and that the house for which he had done business there was no longer able to execute his extensive orders. By means and in consequence of which representation, the said plaintiffs, and one *William Foster* and *John Halgate*, who, at the time next thereinafter mentioned, were partners of plaintiffs in the said business, not knowing to the contrary, but believing therefrom that the said *James Jacque* had, at the time of such representation, an excellent connection in the line of such agency as aforesaid, at *Manchester* aforesaid, and had obtained extensive orders there for some house, were induced to hire and engage, and did afterwards, to wit, on the *10th* day of *December*, in the year aforesaid, hire and engage the said *James Jacque* as such agent in their said business at *Manchester* aforesaid, for commission and reward to him payable in that behalf, and did instruct and authorize him in that capacity to obtain and take orders for the sale and supply of goods by the plaintiffs in the said business, and to collect and receive money for and on account of the plaintiffs and their partners in the way of the said business. And the said *James Jacque* under and by virtue of that employment, did afterwards, to wit, on the day and year aforesaid, at, etc., obtain and take orders for the sale and supply of goods by the plaintiffs and their partners in the said business, to divers persons, to a large amount and value, and to collect and receive for and on account of the plaintiffs and their partners, in the way of the said business, from divers persons, divers sums of money; whereas in truth and in fact, at the time the defendant so represented and asserted as aforesaid, the said *James Jacque* had not an excellent or any connection in the line of such agency at *Manchester* aforesaid, or its neighborhood, as the defendant then well knew. And whereas in truth and in fact, at the time last aforesaid, the said *James Jacque* had not obtained extensive

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not in the reported case, but should be added to complete the form.

Consult also the notes to Form No. 6863, *supra*.

orders, or any orders, at *Manchester* aforesaid, for any house whatsoever, as the defendant then well knew. And the plaintiffs in fact say, that the said *James Jacque*, for want of a good and sufficient connection in the line of such agency at *Manchester* aforesaid and its neighborhood, did, under and by virtue of his said employment, obtain orders for the sale and supply of goods or credit by the plaintiffs and their partners in the said business, to divers customers of worse and less respectable characters and circumstances than he otherwise would have done, and did thereby induce the plaintiffs and their said partners, who were ignorant of the character and circumstances of such customers, to sell to them on credit, and supply them with goods pursuant to such orders, such goods being in the whole of large value, to wit, of the value of *£2,000* of lawful money of Great Britain, and although the prices for which those goods were sold ought long since to have been paid and satisfied to the plaintiffs and their partners, yet those customers, by reason of such their characters and circumstances, have hitherto refused and neglected to pay for the same, and the said last mentioned goods were wholly lost to the plaintiffs and their said partners, to wit, at, etc., and the plaintiffs further say, that the said *James Jacque*, contrary to his duty as such agent, has made away with and converted to his own use, and has not paid or accounted for to the plaintiffs, their partners, divers large sums of money, collected and received by him as such agent as aforesaid, amounting in the whole to a large sum, to wit, *£2,000* of like lawful money which was thereby wholly lost to the plaintiffs and their said partners, to wit, at, etc. And the plaintiffs further say, that the said *James Jacque*, contrary to his duty as such agent, has neglected and refused to render due and sufficient accounts to the plaintiffs and their partners, of divers large quantities of their goods sold by him and of the prices of other of their goods which came to his possession as such agent as aforesaid, the value thereof amounting in the whole to a large sum, to wit, *£2,000*, of like lawful money, which goods were thereby wholly lost to the plaintiffs. [(*Concluding as in Form No. 6934.*)]

2. Misrepresentation Made to the Public.[1]

1. **Precedents.** — See Brackett *v.* Griswold, 112 N. Y. 457; Bartholomew *v.* Bentley, 15 Ohio 659.

For example of declaration held bad on demurrer, based on deceit consisting of defendant's false representations that plaintiff, a directory publisher, had gone out of business, see Dudley *v.* Briggs, 141 Mass. 582, on the ground that plaintiff did not allege that defendant's act had deprived him of the benefit of any contract he had made, or of any property in existence and in his possession, or that he, defendant, published his directory in 1885, as a directory proper, and published by plaintiff.

Declaration for falsely representing plaintiff's articles to be an infringement of defendant's letters patent, whereby plaintiffs were injured in the sale of their goods, is set out in Snow *v.* Judson, 38 Barb. (N. Y.) 210, substantially as follows:

"That on or about the *10th* day of *January*, 1854, letters patent were granted and issued out of the patent office of the United States of America, to *Junius Judson*, the defendant, bearing date on that day, whereby, after reciting that whereas *Junius Judson* and *Alfred Judson*, of *Rochester*, *New York*, have alleged that they have invented new and useful improved valves for governors, for which letters patent were issued to *Junius Judson*, dated *November 5*, 1850, as the assignee of

a. By Means of a Prospectus[1] or Advertisement.

(1) Generally.

Form No. 6920.

(Precedent in Gerhard *v.* Bates, 2 El. & Bl. 476, 75 E. C. L. 478.)[2]

[(*Commencement as in Form No. 6935.*)][3] That, whereas, before and at the time of the making the false representation by defendant after next mentioned, defendant and divers other persons whose the said *Junius* and *Alfred Judson*, which letters patent have been surrendered by them, the same having been canceled, and new letters patent ordered to issue to the said *Junius Judson* upon the amended specifications of the said *Junius* and *Alfred Judson*, etc., there purported to be granted to the said *Junius Judson*, his heirs, administrators or assigns, for the term of fourteen years from the said *5th* day of *November*, 1850, the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said valves. And the plaintiffs further stated, that after the making and issuing of the said letters patent the said *Junius Judson* entered upon the business of making and vending governors, with valves made and constructed according to the plan and specifications annexed to said letters patent, and has hitherto continued said business to a large extent at *Rochester*, in the county of *Monroe*. That the plaintiffs, at *Rochester*, have for about one year last past been, and still are, engaged in the business of manufacturing governors for steam engines, with valves not constructed and operating upon or according to the plan and specifications annexed to said letters patent, but upon a plan and principle entirely distinct and different from valves described in said specifications, and in no way infringing said patent, and have been at great expense in providing a shop and materials, tools and machinery for such manufacture and sale, and would have done a lawful and profitable business therein but for the wrongful acts of the defendant. That the defendant wrongfully and maliciously, and with the declared object of injuring the plaintiffs, and breaking up and destroying their said business, and well knowing that the said valves are not an infringement of the rights granted by his said letters patent, and that they are not and none of them are constructed according to the plan and specifications attached to said letters patent, have by advertisement and publication in newspapers, and otherwise advertised as extensively as he has been able, that the said valves are such infringement, and has thus in repeated instances defeated the sale by the said plaintiffs of governors with valves so manufactured by them, the said plaintiffs, as aforesaid; the com plaint specifying, particularly, several instances in which this had occurred. And that many other sales by the plaintiffs of such governors the defendant, by his said false claims, had prevented and continues to prevent, and thus had injured the plaintiffs to a large sum, and they had sustained damages thereby to *five thousand* dollars, which sum they claimed to recover." The demurrer to this complaint was held to have been properly overruled.

1. By Means of Prospectus. — For material part of declaration in an action for false representations in a prospectus issued by defendant, a director, president, and chairman of the executive committee of a steamship construction company, see Gilfillan *v.* Mawhinney, 149 Mass. 264.

2. Demurrer to both counts and joinder; judgment for defendant on demurrer to the first count; on the second count, however, plaintiff was given judgment. Gerhard *v.* Pettis, 2 Ellis & B. 476, the court holding that the damage to the plaintiff was sufficiently shown to be the direct result of defendant's fraud to entitle plaintiff to recover against defendant as for a tort.

3. For the formal parts of complaints or petitions, generally, see the title Complaints, vol. 4, p 1019. For the formal parts of declarations, generally, see the title Declarations, *post*, p. 244.

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Consult also the notes to Form No. 6863, *supra*.

names are to plaintiff unknown had agreed together to form, and had accordingly then formed, a certain company, upon a certain principle known as a *Société Anonyme*, called *The Iberian Silver Lead Ore Company*, for the purpose of smelting and refining the ores of certain mines in the kingdom of *Spain*; the capital of which said company was divided into *ninety-six thousand* shares of *1*l. each, out of which *twelve thousand* were to be appropriated to the public at *12*s. *6*d. per share, free from all further calls: the capital of which said Company was divided into the same *ninety-six thousand* shares of *1*l. each, out of which *twelve thousand* were to be appropriated to the public at *12*s. *6*d. per share as therein mentioned: and which said *twelve thousand* shares were then actually offered to the public: and whereas defendant then was such promoter and managing director, as in the first count mentioned; and being such promoter and managing director, defendant heretofore, to wit, *1st August*, 1847, intending to defraud, deceive and injure the public, and to cause it to be publickly represented and advertised that the said company was likely to be a safe and profitable undertaking, and also to deceive the public who might become purchasers of the said *twelve thousand* shares, and to induce them to become such purchasers, falsely, fraudulently and deceitfully caused and procured it to become publickly advertised and made known, in and by a certain prospectus issued by the defendant as such director as aforesaid, (amongst other things) that the said promoters of the said Company, in proposing to issue to the public the said *twelve thousand* shares at *12*s. *6*d. per share, free from all further calls, and participating conjointly with all the said other shares on the net annual profits of the said Company, did not hesitate to guaranty to the bearers of the said *twelve thousand* shares a minimum annual dividend of *33* per cent., payable in half yearly dividends of *16 1-2* per cent. each: and that the said guaranty should remain in force until the said *12*s. *6*d. should be thus repaid to the shareholders, the *first* half yearly dividend to be payable on the *24th December* then next: Averment that the defendant, by means of the said false, fraudulent and deceitful pretences and representations, after the making the same as aforesaid, and before the commencement of this suit, wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer, and plaintiff did then and by reason thereof actually become the purchaser and bearer, of *two thousand five hundred* of the said *twelve thousand* shares, at *12*s. *6*d. per share; and by means and in consequence of being so deceived as aforesaid, and by means of the several premises, plaintiff was then induced to pay, and did pay, for such *two thousand five hundred* shares, a large sum, to wit, *12*s. *6*d. for each of the said shares: Whereas in truth and in fact, at the time of the making the said statement, the same was false and fraudulent, to the knowledge of the defendant; and the defendant had no ground whatever for offering such guaranty to the public as aforesaid, as he, defendant, then well knew. By means whereof plaintiff has not only lost the use of the said moneys by him paid for the said *two thousand five hundred* shares as aforesaid, but is likely to lose the said moneys altogether and the future use thereof. [(*Concluding as in Form No. 6935.*)]

(2) Of Insurance Company.

INDUCING PLAINTIFF TO INSURE.

Form No. 6921.

(Precedent in Harper *v.* Chamberlain, 11 Abb. Pr. (N. Y. Super. Ct.) 235.)[1]

[(*Commencement as in Form No. 5926.*)][2]

I. That these plaintiffs are, and at all the various times hereinafter mentioned were, partners in business, as *publishers* in the city of *New York*, under the firm-name of *Harper and Brothers.*

1. Judgment was entered for plaintiffs on a demurrer to this complaint.

2. For the formal parts of complaints or petitions, generally, see the title Complaints, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title Declarations, *post*, p. 244.

The matter to be supplied within [ ] is not in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra.*

Another precedent of this character may be found in Pontifex *v.* Bignold, 9 Dowl. P. C. 860, which, omitting the formal parts, is as follows:

"For that whereas heretofore and before the committing of the grievances by the defendant hereinafter mentioned, to wit, on the *1st* of *July*, 1808, a certain publication had been printed and published, purporting to be a copy of a certain deed, bearing date the day and year aforesaid, and purporting to contain, amongst other things, a recital of the said deed, that the public having derived great benefit from the establishment of a society known by the name or style of the *Norwich Union Society*, formed for the purpose of the insurance of houses, buildings, goods, merchandizes and effects from loss or damage by fire; and that it appeared from mature consideration, that many advantages and great benefits might arise and be secured to great numbers of persons in particular situations in life and circumstances of fortune from the establishment of a society to be composed of such persons as should be qualified and willing to become mutual contributors for equitable insurances on lives and survivorships, upon premiums proportionable to the chance of death attending the age of the life to be insured, and to the time for which such insurance was to be continued: and for granting and selling annuities for life or lives to any person or persons for a gross sum in hand paid; that it was then further stated by the said indenture, that they, the said parties, whose names and seals were thereunto subscribed and affixed, being willing and desirous to procure every of them to themselves respectively, or to their several and respective executors, administrators or assigns, and to insure to others who should unite themselves with them, the advantages and benefits that might arise and be had from establishing themselves into a society for effecting equitable insurances on lives and survivorships, houses, goods and effects, did thereby consent, promise, agree, undertake and covenant, every of them for themselves respectively, to and with all and every the others of them, to become by mutual contributions insurers on lives and survivorships, and grantors of annuities, and to become members of, and to enter and erect themselves into a society by the name of the *Norwich Union Society* or *Union Office*, for insurances on lives, houses, goods and effects upon such terms, premiums and conditions, and with and under such constitutions, laws, rules and regulations as should be thereafter in the said indenture expressed, declared and provided for, and for such time and term to continue members thereof as should be signified in the policies of insurance to be made out and delivered to every of them respectively at the time, and in the manner thereinafter for that purpose mentioned; and that for the better forming, fixing and establishing the said society, and governing and regulating the same, and the proceedings thereof, and the more effectually to make provision for producing and securing to them the several good and beneficial ends and purposes thereby intended, that they, the

II. That sometime during the year 1852, not precisely known to these plaintiffs, a company named known as the *New York City Insurance Company*, was organized in this State for the purpose, among other things, of making insurance upon vessels, freights, goods, wares, merchandise, specie, jewels, profits, commissions, bank-notes,

subscribers to the said indenture consented, and severally covenanted, promised, agreed and undertook, every of them for themselves respectively, to and with all and every of the others of them, to observe, perform, abide by, conform to, fulfil and keep all and singular the articles, clauses, provisions, agreements, *etc.*, thereinafter mentioned and contained, and amongst others the following, that is to say, (*Here several provisions and rules were set out, the material parts of which may be sufficiently collected from the breaches*). And the plaintiff further saith that afterwards, to wit, on the day and year first aforesaid, a certain society was constituted for the purpose aforesaid, and falsely pretended and assumed to be constituted and conducted according to the deed so recited and set forth in said publication; and before the committing of the grievances hereinafter mentioned, to wit, on *July 1st*, 1808, he the said defendant, then being and acting as secretary of the said society, did issue, circulate and distribute for and in the name of the society so falsely pretending, *etc.*, and then called and known by the name of the *Norwich Union Life Insurance Society*, a certain prospectus or printed statement of the funds and regulations of the said society, and of the bonuses that had been declared, the amount of premium deposited by the members at various periods since the formation of the said society up to the year 1829, which said prospectus, *etc.*, contained, among other things the statements following; that is to say, that the first addition to the sums insured in the said society was made on the *28th June*, 1816, when a bonus of *twenty* per cent. was declared on the amount of premiums deposited by the members insured previous to *July*, 1815; that the second addition, assigned on the *28th July*, 1823, was *twenty-four* per cent. upon all premiums deposited prior to *July*, 1822; and that the third addition was declared on the *29th August last*, and was *twenty-five* per cent. on all premiums deposited prior to *July*, 1829, making a total addition of £69 per cent. on all insurances effected prior to 1815, and of £49 per cent. prior to 1822. And the plaintiff says that afterwards, and before the committing of the several grievances by the defendant hereinafter mentioned, to wit, on the *9th* of *July*, 1831, he the said plaintiff, then being desirous of effecting an insurance with the said company, *etc.*, did apply to the defendant so being secretary, etc., for information about the same, and did inquire of the defendant, and request him the defendant to inform him the plaintiff, whether the above recited articles, provisoes, powers, conditions, laws, constitutions, ordinances, regulations and agreements contained in the said deed of settlement, as set forth in the said publication, had been duly performed, complied with, observed, kept and fulfilled, and whether the above recited statements concerning the funds and pecuniary affairs and prosperity and bonuses of the said society, so contained in the said prospectus or printed statement of the funds and regulations of the said society as aforesaid, were true and correct; nevertheless the defendant well knowing the premises, and that the above recited articles and goods had not nor had any of them been duly complied with, *etc.*, and that the said recited statements, *etc.*, were not, nor were any or either of them,, strictly true and correct, but contriving, and fraudulently intending craftily and subtly to deceive and injure the plaintiff in this behalf, on the day and year last aforesaid, falsely, fraudulently and deceitfully, in answer to the said inquiries so put to him by the plaintiff as aforesaid, did represent and affirm that the above recited articles, goods and effects had and each and every of them had been duly performed, and that the above recited statements, *etc.*, were, and each and every of them was strictly true and correct; by means and in consequence of which representation, *etc.*, so made and given by the defendant to the said plaintiff as aforesaid, the plaintiff not knowing to the contrary, but believing thereupon that the said society was in the condition and in the circumstances and state so described, *etc.*, by the defendant,

bills of exchange, and other evidences of debt, bottomry and respondentia interests, and to make all and every insurance appertaining to or connected with marine risks, and risks of transportation and navigation; and to make insurance on dwelling-houses, stores, and all kinds of buildings, and upon household furniture, merchandise, and

and that its affairs were duly, lawfully and regularly administered and conducted, according to and in conformity with the several above recited articles, goods and effects, afterwards, to wit, on the *11th July*, 1831, made and entered into acertain policy of insurance with the said society, on his the plaintiff's life, upon the terms therein mentioned [profert], and paid thereon, according to the terms of the said policy, to the said society when the same became due, divers sums of money, to wit, £100; whereas in truth and in fact the said defendant well knew at the time of making the said representations and affirmations, that the said recited articles, goods and effects had not been nor were any of them performed, *etc.*, in this, to wit, that the said trustees had not nor did choose new trustees to supply such vacancies in their number as had from time to time occurred by death, resignation or otherwise, but on the contrary, therefore, *etc.*, (*Breaches of the other rules were then alleged, with regard to the holdings of meetings by the directors for the various purposes of the society*). And it was further stated, that the securities taken by the society were not taken in the names of the trustees or any four of them, but that securities to a large amount were taken in the name of the defendant as secretary; that the defendant so being secretary had omitted to see that the orders of the directors, with regard to the funds of the society, had been carried out, and that he did not once in *two* years, between the months of *June* and *September*, prepare an account of the state of the society's funds; that no general meeting of the members of the society was called, as by the deed was required; but on the contrary thereof, although no such meeting was called, and although the funds of the society were not more than sufficient to pay the claims made, or liable to be made, upon the society, yet afterwards, and before the committing of the grievances, *etc.*, to wit, on the *29th August*, 1830, a certain dividend of supposed surplus was declared, *etc.*, without reserving *one-fifth* part of such surplus to be funded for the purpose of accumulating, and forming a permanent capital to answer the demands that might be made upon the society, in case of any extraordinary mortality amongst the members, etc. And whereas in truth and in fact the said above recited statements concerning the funds and pecuniary affairs and prosperity of the said society, so contained in the said prospectus, *etc.*, were not each or any of them strictly true, and in this, to wit, that the third addition to the sums insured, which was declared on the *29th* of *August*, 1830, of £25 per cent. on all premiums, *etc.*, was in truth a false and fraudulent addition, *etc.*; by means whereof, and of the said false and fraudulent misrepresentation and deceit of the defendant, the plaintiff says that he has been defrauded and deceived in making and effecting the said policy, and in making the said payments of the said premiums from time to time, and the said policy of insurance is of much less value to the said plaintiff, than if the said representations of the defendant had been true in substance and in fact, to wit, £1,000 of less value, and by means whereof the said plaintiff is likely to lose the whole benefit of his said policy of insurance, and of the said sums of money so from time to time paid by him as aforesaid to the said society as premiums for the same, to the damage of the plaintiff of £3,000."

In Salmon *v.* Richardson, 30 Conn. 360, the action was one of case against certain persons for injury to plaintiff by the fraudulent representation of defendants as directors of the Bridgeport Insurance Company with regard to the assets and condition of the company, by which plaintiff was induced to insure his property in the company. The fourth count in the declaration was as follows: "And plaintiff further declares and says, that said *Bridgeport Insurance Company* was duly incorporated under and by virtue of the laws of this state, in the year 1850, for the purpose of carrying on the business of insurance against loss by fire; that by its charter

other property, against loss or damage by fire, and the risks of navigation and transportation.

III. That said company was pretended to be organized under the provisions of an act of the Legislature of this State, passed April 10, 1849, entitled "An Act to provide for the Incorporation of Insurance Companies."

said company was empowered and required to appoint a board of directors, consisting of nine persons, to be elected annually from among and by the stockholders of said company, whose duty it was to have the care, management and general supervision of the business of the company, and to see that its affairs were managed in a proper manner, and to see that all statements relative to its affairs, condition, business and property were properly and truly made; that on or about the *7th* day of *July*, 1857, a board of nine persons, among whom were the defendants, were duly elected directors of the company for the year ensuing, according to the provisions of the charter of said company; that they accepted said appointment, and subsequently, and before the commission of the acts and grievances hereinafter complained of, entered upon the discharge of the duties of said office, and continued in the discharge thereof till on or about tne *12th* day of *October*, 1858; that on or about the *1st* day of *February*, 1858, for the purpose of giving the company a false and fictitious credit, and to increase the business of said company, and to add to their own profits as stockholders of said company, the said directors, the defendants, did falsely and fraudulently represent and publish to the world, as and for the true condition of the affairs of said company, that said company was possessed of a very large amount of property of great value, to wit, *forty-five Harlem railroad first mortgage* bonds, *seventeen New Jersey Central railroad first mortgage* bonds, and *thirty-eight Bridgeport water* bonds, all of which said bonds were of the par value of $97,000, and various other stocks and properties of great value, to wit, $270,000, all which property was represented by and in the statement aforesaid to be of the value of $367,147.12; that said directors falsely and fraudulently represented said company to be the rightful owners of said property, and to be good and solvent to induce people to effect their insurance in and by said company, and to increase the business and profits of said company and their own profits as stockholders thereof; that the plaintiff, relying on said representations of the directors, the said defendants, and believing the same to be true, did on or about the *13th* day of *February*, 1858, at the special instance and request of said company, insure in said company a certain building to him belonging, situated in *Granby* in the state of *New York*, a patent tannery, so called, of the value of $1,200, on which the sum of $700 was insured by said company, and certain other stock and material of the plaintiff, situated in said tannery building, of the value of $1,000, on which the sum of $300 was insured by said company; and the plaintiff received from said company policies of insurance in accordance with the custom of said company; and the plaintiff paid to said company for insuring said property the sum of $100, according to the requirements of said company. And the plaintiff says that said policy of insurance has been destroyed by fire, and cannot be produced in court; that on the *8th* day of *October*, 1858, and while said policy was in full force, said building, and said stock and materials therein, so insured, without the fault of the plaintiff, were destroyed by fire; that the plaintiff gave notice and proof of said loss to the company, within the time and in the manner and form prescribed by said company and according to law; that he is and was the sole owner of said property so insured, and that said loss has never been paid; that at the time of said fire, for a long time previous thereto, and at the time of the publication caused and made by the directors as aforesaid, the said company was not the owner of the valuable assets hereinbefore specified and stated in said publication, nor of any valuable assets, but was wholly insolvent; all which the defendants well knew when they thus willfully, falsely and fraudulently uttered and caused to be published said false statement as aforesaid; that on or about the *4th* day of *May*, 1858, proceedings in insolvency were instituted against said company; that

IV. That, by the pretended charter of said company, it was provided that the business of said company should be conducted upon the plan of mutual insurance; and it was also provided that the capital of said company should be *three hundred thousand* dollars; and it was also provided that the directors of said company might unite a cash capital of not less than *fifty* nor more than *two hundred thousand* dollars, as an additional security to the insured, above the fund of *three hundred thousand* dollars, also mentioned in said charter; and it was also provided that the principal office of the company should be located in the city of *New York.*

V. That upon or after the organization of said company, and prior to the month of *March*, 1*853*, the defendants, and each of them, were chosen trustees or directors of said company, and accepted and entered upon office as such; and the defendants, and each of them, were, during said *March*, 1*853*, and before and afterwards, trustees or directors of said company.

VI. That the defendants, as such directors or trustees of said company, fraudulently, and with the intent to induce these plaintiffs and others to make insurances with the said company and pay them premiums for such insurances, did, at many times prior to, and during the first week of said *March*, 1*853*, falsely publish, advertise, aver, and represent to the public at large, and to these plaintiffs, and to the confidential advisers of these plaintiffs, that the capital of said company was *five hundred thousand* dollars; and that said company was possessed of a paid-up capital of said last-mentioned sum; and that said company was solvent and responsible, and able to pay any losses to the amount of said last-mentioned sum; and they did fraudulently, and with like intent, prepare, and publish, and exhibit to these plaintiffs, and the confidential advisers of these plaintiffs, a

on the *17th* day of *May*, 1*858*, *P. C. Calhoun* was appointed by the court of probate a trustee in insolvency, to take into his hands and possession, for the benefit of the creditors of said company, all the goods and estate belonging to said company; and that the total amount of all the assets of said company, so delivered into the hands of said trustee for the purposes aforesaid, according to the sworn inventory and appraisal thereof as returned into the court of probate, amounted to the sum of $*123.07*, and no more. And the plaintiff says that by means of the false and fraudulent statements so made and caused to be made by the defendants, regarding the assets, property and condition of said company, and his, the plaintiff's, belief in the same, and consequent insurance in said company as aforesaid, and by reason of the premises aforesaid, he has suffered great loss, to his damage the sum of *two thousand* dollars," etc. The jury returned a verdict for the plaintiff. Motions for new trial and in arrest of judgment were made, both of which were denied.

In Wakeman *v.* Dalley, 51 N. Y. 27, the complaint alleged, in substance, "that the defendants combined to procure by fraud, from the comptroller, a charter for the *Webster Fire Insurance Company*, and for that purpose procured worthless mortgages and made pretended deposits of money to the amount of $*150 000*, with the understanding that said money should be paid back to its real owners and fictitious mortgages substituted as assets. That by such fraudulent means a charter was obtained and the company was organized. That defendants, who were directors of the company, with intent to defraud plaintiff and others, falsely represented that a cash capital of $*150,000* was paid in, and that the stock was worth par. That plaintiff, relying upon such representations, purchased stock to the amount of $*30,000*. That the stock was, in fact, worthless, etc."

form of policy containing a statement that the capital of said company was said last-mentioned sum; whereas the fact was, and these defendants well knew, that said company had never raised, and never were possessed of a capital of said last-mentioned sum in any form; and that they had never raised, and never were possessed of any cash capital exceeding *thirty thousand* dollars; and that the said company never did raise a capital in any form of the value of even *one hundred and fifty thousand* dollars.

VII. That these plaintiffs, confiding in the representations aforesaid made to them by the defendants, and confiding in the general reputation of said company, produced by the representations aforesaid made by defendants to the public at large, and being further advised thereto by the confidential advisers of these plaintiffs, who were misled by the representations aforesaid made to them by the defendants, and believing, in consequence of the premises, that the said company was possessed of an actual capital of *five hundred thousand* dollars, paid in or secured in some of the ways prescribed by the provisions of the act of 1849, hereinbefore referred to, were induced to enter into a contract with said company for an insurance, as hereinafter stated, upon the material, stock, fixtures, and other property of these plaintiffs, used by them in their business, for one year from the *7th* day of *March*, 1*853*; and these plaintiffs, confiding and believing as aforesaid, were induced by the premises to pay, and on or about the *7th* or *8th* day of *March*, 1*853*, did pay to the said company, and to the defendants as directors or trustees thereof, the sum of *one hundred and fifty* dollars as premium upon such insurance; and were induced by the premises to make said insurance with said company, instead of making it with other companies, of which there then were a great number, solvent, responsible, and willing to make such insurance on the property described in said policy.

VIII. That the said company did, on the *7th* day of *March*, 1*853*, execute and deliver to these plaintiffs their policy of insurance, a true copy whereof is hereto annexed, marked Exhibit *A*, whereby the said company, in consideration of *one hundred and fifty* dollars, to them paid by these plaintiffs, the receipt whereof was thereby acknowledged, did insure these plaintiffs against loss or damage by fire, to the amount of *ten thousand* dollars, on their printing and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam-engine and machinery, contained in the premises in the city of *New York*, described in said policy.

IX. That on the *10th* day of *December*, 1*853*, the printing and book materials, stock, paper, stereotype plates, fixtures, printed books and steam-engine and machinery described in said policy of insurance, were by misfortune, and without fraud or evil practice, damaged, consumed, and lost by fire, not happening by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power; and that, by the said fire, the said insured sustained loss and damage, in and by the consuming, damage, loss, and destruction of said property, to the amount of *three hundred and twenty-one thousand nine hundred and ninety-five* dollars, estimating the said loss at the true and actual value of the property at the time of the happening of said fire.

X. That, at the time of said fire, there were other insurances effected by these plaintiffs, as permitted by said policy, on the same property, to the aggregate amount of *one hundred and eighty-two thousand* dollars only.

XI. That, at the time of making said insurance, and from then until the fire above mentioned, these plaintiffs had an interest in the said property insured as the owners thereof, and they were, and now are, the lawful owners and holders of the claim arising upon said policy and loss against the said company.

XII. That these plaintiffs duly fulfilled all the conditions of said policy of insurance upon their part, and did forthwith, after the said loss and damage by fire, give notice thereof to the said company, and did, as soon thereafter as possible, and on the *17th* day of *December*, 1*853*, deliver to said company a particular statement of said loss and damage, subscribed by *James Harper*, one of these plaintiffs, and duly verified by his oath; and these plaintiffs, on the *first* day of *June*, 1*854*, and at divers other times, duly demanded from said company payment of the sum of *ten thousand* dollars and interest, due to them upon said policy by reason of said loss.

XIII. That said company have hitherto always neglected and refused to pay said loss; and these plaintiffs brought an action in the *Superior* Court of the city of *New York* against said company, to recover upon said policy for their loss sustained as aforesaid, and were put to great expense therein, and on the *20th* day of *July*, 1*857*, recovered judgment therein for the full amount of their claim, and interest, and costs, to wit, *eleven thousand two hundred and seventy-eight* dollars and *seventy-six* cents, and caused execution to be issued thereon; which execution was, on the *24th* day of *September*, 1*857*, returned wholly unsatisfied.

XIV. That, by reason of the premises, these defendants have sustained great damage, to wit, *twenty thousand* dollars.

Wherefore these plaintiffs demand judgment for *twenty thousand* dollars damages.

[(*Signature of attorney as in Form No. 5926.*)][1]

b. By Means of a Report.

OF BANKING COMPANY.

Form No. 6922.

(Precedent in Taylor *v.* Ashton, 11 M. & W. 401.)[2]

[(*Commencement as in Form No. 6934.*)][1] That before and at the

1. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra*.

2. In this case it was held, that if a party makes an untrue representation to another for a fraudulent purpose, with the intent to induce the latter to do an act which he afterwards does to his prejudice, an action on the case for deceit lies, and it is not necessary to show also that defendant knew the representation to be untrue.

time of the making of the report thereinafter mentioned, and at each and every of the times therein respectively mentioned, a certain number of persons were carrying on the business of bankers in copartnership, under the name of the *Commercial Bank of England*; and that, before and at the said time of the making of the said report, and at each and every of the times in that count mentioned respectively, the capital of the said company or copartnership was divided into shares, divers of which shares were, at the said time of making the said report, appropriated to divers of the said persons so carrying on business as aforesaid, and called "appropriated shares;" that before and at the time of the making of the said report, certain officers of the said company, being directors thereof, and called *Manchester* directors, had the principal control, direction, and superintendence of the accounts and affairs of the said company, and had, as part of their duties as such *Manchester* directors as aforesaid, the office of exposing to sale and selling on behalf of the said company certain of the said shares, other than such appropriated shares as aforesaid; and that, before and at the said time of the making of the said report, there were, besides such *Manchester* directors, other officers of the said company called directors; and that, before and at the said time of the making of the said report, certain of the said directors, that is to say, all the said *Manchester* directors and certain of the said other directors, were called the *General Board of Directors*; and that the defendants, before and at the said time of the making of the said report, and at each and every of the times in this count mentioned respectively, were members of the said company, and were acting as *Manchester* directors of the said company, to wit, such *Manchester* directors as aforesaid, and directors of the said general board. And the plaintiff further says, that at the said time of making the said report, and at each and every of the times in this count mentioned respectively, the recommendation hereinafter mentioned to have been contained in the said report of a dividend of 8l. per cent. on the appropriated shares of the said company, being accompanied in the same report, as it is hereinafter mentioned to have been accompanied in the same report, with a representation of the said company being eminently prosperous, was at the said time of the making the said report, and at each and every of the said times in this count mentioned respectively, naturally calculated to deceive persons, to whom the contents of the said report should be made known, into believing that the said company had, at the said time of making the said report, made profits sufficient to pay such dividend as aforesaid, and was, at the said time of making the said report, a profitable undertaking and good investment for money; and the plaintiff further says, that if at the said time of making the said report, the said company had made profits sufficient to pay the said dividend, the said company would, at the said time of making the said report, have been a profitable undertaking and a good investment for money. And the plaintiff further says, that the representation hereinafter mentioned to have been contained in the said report, to the effect that the number of current accounts of the said company, as well as the amounts of its

promiscuous discounts, deposits, and London agency, had been so advanced, as speedily to mature a safe and profitable, and indicate a steady progressive business, was, at the time of making the said report, and at each and every of the times in this count mentioned respectively, naturally calculated to deceive persons, to whom the contents of the said report should be made known, into believing that the said company was, at the said time of making the said report, a good investment for money: and the plaintiff further says, that if the last-mentioned representation had, at the said time of making the said report, been true, the said company would, at the said time of making the said report, have been a good investment for money. And the plaintiff further says, that the representation hereinafter mentioned to have been contained in the said report, to the effect that in reference to capital, the position of the establishment (meaning the said company) had been ever creditable, and was at the said time of making the said report perfectly satisfactory, being accompanied in the same report, as it is hereinafter mentioned to have been accompanied, with a representation of the said company being eminently prosperous, was, at the said time of the making of the said report, and at each and every of the times in this count mentioned respectively, naturally calculated to deceive persons to whom the contents of the said report should be made known, into believing that the said company was, at the said time of making the said report, a profitable undertaking and a good investment for money; and the plaintiff further says, that if the last-mentioned two representations had, at the same time of making the said report, been true, the said company would at the said time of making the said report have been a profitable undertaking, and a good investment for money. And the plaintiff further says, that the representation hereinafter mentioned to have been contained in the said report, of the said company being an eminently prosperous establishment, was, at the said time of the making of the said report, and at each and every of the times in this count mentioned respectively, naturally calculated to deceive persons, to whom the contents of the said report should be made known, into believing that the said company was, at the said time of making the said report, a profitable undertaking, and a good investment for money; and the plaintiff further says, that if the last-mentioned representation had, at the said time of making the said report, been true, the said company would at the said time of making the said report have been a profitable undertaking, and a good investment for money. And the plaintiff further says, that at the said time of making the said report, and at each and every of the times hereinafter mentioned, the representation hereinafter mentioned to have been contained in the said report, of the total rejection of nominal capital as a characteristic of the said society, being accompanied in the same report, as hereinafter mentioned to have been accompanied in the same report, with the other statements and matters hereinafter mentioned to have been contained in the said report, and to have been false, was naturally calculated to deceive persons, to whom the contents of the said report should be made known, into believing that the said company was at the said time of making the

said report a profitable undertaking and a good investment for money; and the plaintiff further says, that if the last-mentioned representation, as to the total rejection of nominal capital being a characteristic of the said company, had at the said time of making the said report been true, and if the said other statements and matters hereinafter mentioned to have been contained in the said report had at the said time of making the said report been true, the said company would, at the said time of making the said report, have been a profitable undertaking and a good investment for money: all which said several premises respectively they, the defendants, at the said time of making the said report, well knew:—Yet the defendants, heretofore, to wit, on the *3d* day of *February*, 1836, then being and acting as such *Manchester* directors as aforesaid, wrongfully and injuriously contriving and intending to cause the contents of the said report to be publicly made known, and to cause it to be publicly represented and advertised that the said company was at the said time of making the said report a profitable undertaking, and thereby to deceive persons to whom such contents, and such last-mentioned representation, should be made known into believing that the said company had at the time of making the said report made profits sufficient to pay a dividend of 8*l*. per cent. on the said appropriated shares of the said company, and that the said company was at the said time of making the said report a profitable undertaking, and a good investment for money, and by means of such deceit to induce such persons as last aforesaid to purchase of the said *Manchester* directors shares in the said capital of the said company; at a certain meeting of divers members of the said company, at which meeting divers members of the said company, besides the defendants, but whose names are to the plaintiff unknown, were present, falsely, fraudulently, and deceitfully made and published a certain false, fraudulent, and deceitful report of and concerning the said company, and of and concerning the said general board of directors, and of and concerning the said meeting, and of and concerning the said accounts of the said company, and of and concerning the said appropriated shares, to wit, the report hereinafter set forth, and so then as aforesaid made and published the same, meaning to insinuate thereby the several matters hereinafter stated to have been meant; and then, and on divers other days and times between the day and year last aforesaid, and the making of the contents of the said report known to the plaintiff as hereafter mentioned, further contriving, intending and meaning as aforesaid, distributed divers, to wit, a number unknown to the plaintiff, copies of the said report to one *Thomas Langton* hereinafter mentioned, and to and amongst divers other persons whose names are to the plaintiff unknown; which said report was and is in the words following: (*setting out the report*).

And the plaintiff in fact says, that at the said time of making the said report, the said company had not made profits sufficient to pay such dividend as aforesaid, as the defendants, at the said time of making and publishing the said report and distributing the said copies, well knew. And the plaintiff further says, that at the said time of making the said report, the said company was neither a

profitable undertaking nor a good investment for money, as they the said defendants, at the said time of making and publishing the said report and distributing the said copies, well knew. And the plaintiff further says, that at the said time of making the said report, the number of current accounts of the said company, as well as the amount of its promiscuous discounts, deposits, and *London* agency, had not been so advanced as speedily to mature a safe or profitable, or indicate a steadily progressive, business, as the defendants, at the said times of making and publishing the said report and distributing the said copies, well knew. And the plaintiff further says, that in reference to capital, the position of the said company, at the said time of making the said report, had neither been ever creditable, nor was it at the said time of making the said report perfectly satisfactory, as the defendants, at the times of making and publishing the said report and distributing the said copies, well knew. And the plaintiff further says, that at the said time of making the said report, the said company was not eminently prosperous, or even prosperous, as the defendants, at the said times of making and publishing the said report and distributing the said copies, well knew. And the plaintiff further says, that the total rejection of nominal capital, was not, at the said time of making the said report, a characteristic of the said company, as the defendants, at the said times of making and publishing the said report and distributing the said copies, well knew. By means and in consequence of the making and publishing of which said report as aforesaid, and of the distributing the said copies as aforesaid, it was afterwards, to wit, on the *14th* of *February*, 18*36*, represented to the plaintiff, by the said *Thomas Langton*, that the said company, at the said time of making the said report, was a profitable undertaking; and by means and in consequence of the same making, publishing, and distributing, as aforesaid, the said contents of the said report, were also afterwards, to wit, on the *3d* day of *February*, 18*36*, then being and acting as such *Manchester* directors as aforesaid, made known to the plaintiff to the said *Thomas Langton*, whereby the plaintiff was then deceived into believing that the said company had, at the said time of making the said report, sufficient to pay such dividend as aforesaid, and was, at the said time of making the said report a profitable undertaking and a good investment for money; and by means and in consequence of being so deceived, and of the said several premises, was then, to wit, on the *3d* day of *February*, 18*36*, induced to purchase, and actually did purchase, of and from the said *Manchester* directors of the said company, divers, to wit, *200* shares in the capital of the said company, at and for certain prices for the said shares, amounting to a large sum, to wit, *200* shares in the capital of the said company, at and for certain prices for the said shares, amounting to a large sum, to wit, the sum of *£1,054* 7s. *8*d.; and by means and in consequence of being so deceived, and of the said several premises, was then induced to pay and paid to the said *Manchester* directors the said prices, to wit, the said sums of *£1,400* and *£1,054* 7s. *8*d. By means whereof the plaintiff has not only lost the use of the said monies so by him paid, being of great value, to wit, of the value of *£2* per cent. per annum, for a long time, to wit, from

thence until the commencement of this suit, but is likely to lose the said monies altogether, and the future use thereof, being of great value, to wit, of the value aforesaid. [(*Concluding as in Form No. 6934.*)]

3. Misrepresentation Made to Third Party.[1]

1. Deceiving Plaintiff's Special Agent.— In Pattison *v.* Barnes, 26 Ind. 209, the second paragraph of the complaint alleged in substance:

"That on the *13th* day of *October*, 1864, one *Isaac Pattison* was the agent of said plaintiff, and as such was authorized to pay and compromise debts due from said plaintiff, and debts due and owing by the firm of *Shoup, Cullum & Co.*, created by said firm while said plaintiff was a member of said firm, and any and all debts justly due and owing from said plaintiff individually, or as a member of any firm, which authority and agency were well known to said defendant; that to deceive and defraud the plaintiff he, the said defendant, falsely represented to said agent that the plaintiff was liable to him, said defendant, on a certain note executed by the firm of *Shoup, Van Bergen & Co.*, of which said plaintiff was a member, and also that the plaintiff was liable to him on a note executed by *George Shoup, Richard Cullum* and said plaintiff; and further falsely represented to said agent that said plaintiff was liable to him on a judgment in the *Franklin Common Pleas* Court; and, further to deceive said agent, and defraud said plaintiff, the defendant represented that said notes were at *Brookville*, when asked to produce them, and by the use of said false statements made said agent believe that said plaintiff was indebted and liable to him in a great sum of money; and by the use of the aforesaid false and deceitful statements, and other devices, induced and procured said agent to pay him the sum of $*250*, and gave him therefor a receipt, of which the following is a copy: 'Received, *October 13th*, 1864, of *E. W. Pattison, two hundred and fifty* dollars, in full of all demands as an individual, or as a partner in any company, including all judgments up to the present date. *Aaron Barnes*.' That the said defendant then well knew that said plaintiff did not owe him in any way, either by note or judgment, as an individual or as a member of any firm, one farthing." Wherefore he demands judgment for $*500*.

The third paragraph is as follows, viz.: "The plaintiff, for a further and third paragraph of his complaint, says that he was, from the spring of 1852 to *July*, 1853, a member of the firm of *Shoup, Cullum & Co.*; that about the *1st* of *October*, 1864, he authorized one *Isaac Pattison*, as his agent, to compound, settle and pay any and all debts of said firm, either by note, judgment or otherwise, created by said firm during the time he was a member thereof as aforesaid, and furnished said agent the money with which to compound, settle and pay said debts; that about the *13th* of *October*, 1864, the defendant, well knowing the premises, and designing to defraud and cheat the plaintiff, falsely represented to said agent that he had a claim against said *Shoup, Cullum & Co.*, created during the time said plaintiff was a member of said firm, in the sum of $*795*, and that he had a note of said firm for that amount, which note was then in the hands of his attorney at *Brookville*, and he could not produce the same for the inspection of said agent, but that said plaintiff was liable to him, the defendant, on said note; that the defendant, further to defraud and cheat the plaintiff, falsely represented to said agent that he had obtained a judgment against said firm of *Shoup, Cullum & Co.*, on the note aforesaid, and that said plaintiff was liable to him on said judgment; that further to defraud and cheat the plaintiff said defendant represented to said agent that he loaned the said firm, during the time the plaintiff was a member thereof, the sum of $*795*, for which said firm was liable to him; that said agent, relying upon the statements and representations aforesaid as true, and having no means then and there to ascertain the truth of said statements, for the reason that when he called upon the said defendant to produce the evidence of said indebtedness he, the defendant, stated that said note, judgment, etc., were at *Brookville*, some

a. As to Defendant's Authority to Receive Goods.

Form No. 6923.[1]

(*Commencement as in Form No. 6934.*)[2] For that whereas the plaintiff, before and at the time of the committing of the grievance by the defendant hereinafter next mentioned, was and from thence hitherto hath been and still is a wharfinger, and the business and employment of a wharfinger exercised and carried on, and still doth exercise and carry on, at and upon a certain wharf called "*Three Cranes Wharf*," situate and being at *Southampton*; and, whereas, also, before and at the said several and respective times hereinafter mentioned, the defendant also was a wharfinger, and the business and employment of a wharfinger exercised and carried on, and still exercises and carries on, at and upon a certain other wharf called the *Long* wharf, situate and being at *Southampton* aforesaid; and, whereas, also, just before and at the time of the committing of the grievance hereinafter next mentioned, one *Edward Frost*, master of a certain ship or vessel, had been and was directed and authorized by *George Hunt* and *Isaac King* to deliver to the plaintiff, as such wharfinger as aforesaid, at his said wharf, divers, to wit, *forty-seven* packages of goods and merchandizes for the said *George Hunt*, and divers, to wit, *nineteen* packages of goods and merchandizes for the said *Isaac King*, to be by the plaintiff, as such wharfinger as aforesaid, taken care of in and upon the said wharf, and from thence forwarded for the said *George Hunt* and *Isaac King*, respectively, for wharfage and reward to the plaintiff in that behalf, and which said packages the plaintiff was then ready and willing to accept and receive and take care of at and upon his said wharf, and forward as aforesaid. And thereupon, just before the committing of the grievance in this count hereinafter mentioned, the said *Edward Frost* was about to cause to be delivered the said packages to the plaintiff; yet the defendant, well knowing the premises, but contriving and intending wrongfully

25 miles distant; that said agent was induced by the statements and representations made by the defendant as aforesaid, to believe that the plaintiff was liable to said defendant in a large sum of money, and was thereby induced to pay to said defendant, out of the money of said plaintiff, the sum of $*250*, as a compromise or settlement of all claim or liability from the plaintiff to the defendant, as set forth in the statement of the defendant. Whereas in truth and in fact, said defendant had not a note of *Shoup, Cullum & Co.*, nor had he ever obtained a judgment against said firm, nor had he ever loaned said firm the money spoken of, nor had he any valid existing claim, either in law or equity, against said firm, or against said plaintiff; all of which was well known to said defendant, and that said statements and representations were false, and made by said defendant to deceive and defraud said plaintiff out of the said sum of $*250*, to the plaintiff's damage," etc., with prayer for judgment, etc. In this case, demurrers to the second and third counts were sustained. On appeal, by the plaintiff, the judgment was reversed with instructions overruling the demurrer.

1. **Three other counts** are given in the declaration set out in 3 Chit. Pl., p. 398, upon which declaration the form in the text is based.

2. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

Consult also notes to Form No. 6863, *supra*.

and unjustly to injure and damnify the plaintiff, so being such wharfinger as aforesaid, in the said business and employment, and to deprive him of the reward he would otherwise have received and derived from the wharfage and care of the said packages, did heretofore, to wit, on *March 1st*, 1*803*, falsely, fraudulently, deceitfully and maliciously represent and pretend to a certain person, then being the mate of the said ship or vessel, that the defendant was authorized by the said *George Hunt* and *Isaac King* to receive the said packages; and the said mate being then deceived by the said false representation of the defendant, did then suffer and permit the defendant to take and receive the said parcels and packages, and the defendant did then take away the said packages, and the said packages were never delivered by the said *Edward Frost* at the said wharf of the plaintiff; by means of which said several premises the plaintiff then was put to great trouble and expense in sending a lighter to the said ship or vessel for the said packages, and lost and was deprived of the hire and reward, profits, benefit and advantage which he otherwise would have derived and acquired from the wharfage, stowage and keeping and forwarding such packages as aforesaid. (*Concluding as in Form No. 6934.*)

b. Defendant Misrepresenting His Credit to Mercantile Agency.[1]

DECLARATION FOR DECEIT BASED UPON MISREPRESENTATIONS MADE TO DUN'S COMMERCIAL AGENCY BY DEFENDANT AS TO DEFENDANT'S STANDING, WHEREBY PLAINTIFFS WERE DEFRAUDED.

Form No. 6924.

(Precedent in Hinchman *v.* Weeks, 85 Mich. 537.)

[(*Commencement as in Form No. 6943.*)][2]

That the firm of *T. H. Hinchman & Sons* (composed of the above named plaintiffs) are wholesale dealers in groceries, drugs, etc., in the city of *Detroit*, county of *Wayne*, and state of *Michigan*, and that they were thus engaged and have been since the *1st* day of *July*, 1*887*, and that since said last-mentioned date, in the course of trade, the said defendant, *Ambrose A. Weeks*, became indebted to the firm of *T. H. Hinchman & Sons*, composed of the parties above named, in the sum of $*1,202.61* for goods, wares, and merchandise sold and delivered by plaintiffs to the said *Ambrose A. Weeks*, defendant herein; and that said indebtedness was created and credit given by plaintiffs to defendant upon the basis that the statements and representations of defendant as to his financial responsibility, more particularly hereinafter referred to, were true in substance and in fact.

1. That an action for deceit may be maintained against a defendant for false and fraudulent representations made by him to a commercial agency, through means of which plaintiff is deceived, is supported by Eaton, etc., Co. *v.* Avery, 18 Hun (N. Y.) 44.

2. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *subra*.

That the said firm of *T. H. Hinchman & Sons* is a member of *Dun's Commercial Agency*, a company organized and existing for the purpose of collecting information as to the circumstances, standing, and pecuniary reliability of merchants and dealers throughout the country, and keeping accounts thereof, so that the subscribers of the agency, when applied to by customers to sell goods to them on credit, may, by resorting to the agency, or to the lists which it publishes, ascertain the standing and responsibility of the customers to whom its purpose is to extend credit.

That on or about the *19th* day of *December*, A. D. 1*887*, the said *Ambrose A. Weeks*, with intent to obtain a standing and credit, and to extend information therefor, stated and represented to said *Dun's Commercial Agency*, its agents and servants, in substance, among other things, that he then had and owned a stock of goods, wares, and merchandise, and that he had made an inventory of such stock, which showed an amount of goods on hand amounting to $*4,000* or thereabouts; that he then owned a house and lot, store and barn, at *Grattan*, in said county, for which he paid the sum of $*3,550* or thereabouts; that he had that fall built an addition to his store building, and that it was filled with goods; that he then owed $*1,500* on his residence, which was secured by a mortgage, which would mature a year from that fall, and that he had offered to pay up the mortgage, but the mortgagee would not take the money until it became due; that he also then owned *20* acres of land, worth $*800* or thereabouts, which was free and clear from all incumbrances; that he had good accounts amounting to $*400*, and personal property worth $*1,000*, besides household goods, furniture, etc., which were valued at $*2,500*; that he then had notes and cash worth about $*300*; and that in *July* or *August*, 1*886*, his (the said *Ambrose A. Weeks*') wife gave him as a present a sum of $*2,000*, which she received from the estate of *Thomas Byrne*, with which he (the said *Weeks*) purchased a team of horses, which he used in his business, — making his gross assets, in round numbers, upwards of $*10,000*; and that his total sales during the *two* years he had been in the trade amounted to $*21,000*; that his liabilities consisted of a mortgage on his said residence of $*1,500*, and about $*1,000* for merchandise.

Plaintiffs further aver that the substance of such information was reported by said *Dun's Commercial Agency* to the said plaintiffs; and that the said plaintiffs, in making and continuing the sale of goods to the said *Ambrose A. Weeks* after the making of such report, and especially during the time the goods for which the indebtedness in this action arose, relied upon the said statements so made to the said commercial agency, and believed the same to be true, and that such sales were made, and such credit granted and extended, upon the basis of such representations.

Plaintiffs further aver that such representations were untrue in substance and in fact, and were known to be so by said defendant; and that afterwards, and on or about the *29th* day of *December*, 1*888*, the said *Ambrose A. Weeks* made a general assignment for the benefit of his creditors. And they, the said plaintiffs, allege that in the fall of 1*887*, and at the time of making such reports and permitting them to

be spread abroad for the purposes aforesaid, the said *Ambrose A. Weeks* was owing to merchandise creditors between $*1,200* and $*1,500*, and was owing to his wife the sum of $*2,700*, and was largely indebted otherwise; and that he then had on hand a stock of only about $*2,600*; and that the said *Ambrose A. Weeks* was at such time insolvent, and unable to pay his debts in full; and that, by means of such false and fraudulent representations upon the part of the said defendant, they, the said plaintiffs, lost and were wholly deprived of their said goods, wares, and merchandise, and became and were, and ever since have been, unable to secure, collect, or enforce payment for the same, or any part thereof, and lost and became deprived of the value thereof; to the great damage of them, the said plaintiffs, to wit, in the sum of $*10,000*. Therefore they bring suit.[1] [(*Concluding as in Form No. 6943.*)]

c. Defending Suit in Plaintiff's Name Without His Authority.

Form No. 6925.[2]

(*Commencement as in Form No. 6934.*)[3] For that whereas, before and at the time of committing the grievance by the now defendant as hereafter mentioned, the plaintiff was occupier of a certain [*mes-*

1. There was also added a count in trover. To the first count, the one given in the text, defendant demurred, for the following reasons:

"1. That it does not appear by the declaration that the defendant knew that the plaintiffs were members of *Dun's Commercial Agency* at the time the representations to the said agent were claimed to have been made.

2. That it does not appear by the declaration that the defendant knew that the person to whom the representations were made was in any way connected with *Dun's Commercial Agency*.

3. That it does not appear by the declaration that the representations made by the defendant were untrue in fact.

4. Because it does not appear by the declaration that the only ground for the general allegation therein that said representations were untrue in fact is that defendant on *December 29*, 1888, made a general assignment for the benefit of his creditors.

5. Because it does not appear by the declaration that, by virtue of said assignment, said plaintiffs have been unable to collect the amount due them, nor that the assigned property is not sufficient to pay off and discharge all the debts owing by the defendant.

6. Because it does not appear by the declaration that the plaintiffs did not have ample and ready means of ascertaining the truth or falsity of the representations when the merchandise was sold, or that they have made inquiry of the defendant regarding his financial condition."

Issue was joined upon the demurrer, and it was overruled, which ruling was assigned as error. Judgment was affirmed with costs, on the theory that a declaration was sufficiently specific to apprise the defendant of the plaintiff's claim that he falsely and fraudulently represented his financial condition in making a report to the agency; that plaintiffs sold in reliance upon this report, which was false and untrue, and by means of which they were cheated and defrauded out of the value of the property sold to defendant after such false and fraudulent representations were made.

2. Another count is given in the declaration as set out in 3 Chit. Pl., p. 406, upon which declaration the form in the text is founded.

3. For the formal parts of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

Consult also notes to Form No. 6863, *supra*.

suage, etc.], and a certain action of ejectment had been commenced against the now plaintiff, and then was depending, for the recovery of the said tenements with the appurtenances in the Court *of Common Pleas* wherein *John Den*, on the demise of *Frank Stow*, was the then plaintiff. And whereas the now plaintiff had been served with a copy of the declaration in the said action of ejectment; yet the defendant contriving, and wrongfully and unjustly intending to injure the plaintiff, and to subject him to the payment of the costs of the said action, heretofore, to wit, in *Trinity* term, in the *third* year of her Majesty *Queen Victoria*, that is to say, on *March tenth*, 1840, wrongfully and injuriously, and without the leave or license and against the will of the plaintiff, caused and procured an appearance to be entered in the same court in the said action for and on behalf of the now plaintiff, and then also, without the leave or license and against the will of the now plaintiff, caused and procured a certain plea to be pleaded therein, to wit, that he the now plaintiff was not guilty of the trespass and ejectment complained of in the said action; and such proceedings were thereupon had, without the license or consent or knowledge of the now plaintiff, that afterwards, to wit, in *Hilary* term, in and concerning the said action, it was considered and adjudged in and by the said court that the said *John Den* should recover against the plaintiff his term then to come of and in the said tenements, with the appurtenances, and his damages of *£10,000* by the jury in the said action assessed, and also *£500* for his costs and charges, by the said court of our said lady the queen adjudged to the said *John Den* of increase, and with his assent, as by the record and proceedings thereof in the said court of our said lady the queen, before the queen herself, more fully appears. And now the plaintiff further saith, that afterwards, to wit, on the *first* of *June*, 1842, a certain writ of our said lady the queen was duly issued upon the said judgment out of the said court of our said lady the queen, before the queen herself, directed to the sheriff of *Lancashire*, whereby our said lady the queen commanded the said sheriff that he should take the now plaintiff, if he should be found in his bailiwick, and him safely keep, so that he the said sheriff should have the body of the now plaintiff before our said lady the queen, on the *first* day of *the term following* wheresoever our said lady the queen should then be in *England*, to satisfy the said *John Den* the said sum of *£10,000* which by the said court of our said lady the queen, before the queen herself, at *Westminster* aforesaid, were adjudged to the said *John Den* for his damages which he had sustained as well on occasion of the trespass and ejectment aforesaid, as for his costs and charges by him about his suit in that behalf expended, whereof the now plaintiff was also convicted as aforesaid, as appeared to our said lady the queen of record, and that the said sheriff should then have there that writ; which said writ afterwards, and before the delivery thereof to the said sheriff of *Lancashire* to be executed as hereinafter mentioned, was duly indorsed with a direction to the said sheriff, requiring him to levy *£10,000* besides poundage, officers' fees, and all other incidental expenses: which said writ, so indorsed as aforesaid, afterwards, and before the said return thereof, to wit, on *the second* day of *June*, 1842, was deliv-

ered to *Edward Fowler* and *George Howe*, then being sheriffs of the said county of *Lancashire*, to be executed in due form of law, by virtue of which said writ the said *Edward Fowler* and *George Howe* so being sheriffs as aforesaid, afterwards, and before the said return of the said writ, to wit, on *June fourth*, 1842, and within the bailiwick of the said sheriff, took and arrested the now plaintiff by his body, and then, by virtue of the said writ, had and detained him in his custody in execution for the said sum of *£10,000*, and the plaintiff was kept and detained in execution upon the said judgment for a long space of time, to wit, for the space of *sixty* days. By means of which said several premises the plaintiff, whilst he was so imprisoned as aforesaid, not only suffered great pain of body and mind, and was greatly exposed in his credit and circumstances, and was hindered and prevented from performing and transacting his necessary affairs and business, but was forced to, and obliged to and did necessarily pay, lay out and expend a large sum of money, to wit, the sum of *£20* in and about supporting himself whilst he was so imprisoned as aforesaid, and also in and about the obtaining his release from the said arrest and imprisonment, and in and about other the premises, and hath been and is by means of the premises otherwise greatly injured (*Concluding as in Form No. 6934.*)

d. Inducing Plaintiff's Partner to Sign Partnership Name.

Form No. 6926.

(Precedent in Christian *v.* Penn. 5 Ga. 482.)[1]

[(*Commencement as in Form No. 5913.*)][2] For that, whereas, the said defendant heretofore, to wit: On the *1st* day of *January*, 1839, having, or pretending to have a demand or debt owing to him, the said defendant, for the sum of *four hundred* dollars, by one *William P. Christian*, of *Elbert* county, in the State of *Georgia*, and which the said *William Penn*, the defendant, stated was to be paid by the said *William P. Christian*, when the estate of one *Maxwell*, the father-in-law of the said *William P.* was distributed. And the said defendant, intending to deceive and defraud your petitioner, wrongfully and deceitfully persuaded one *Nathaniel Duncan*, the then co-partner of your petitioner, to sign the partnership name of your petitioner, for the said *William P. Christian's* benefit, paying to him, the said defendant, for the sum of *four hundred* dollars; and by falsely, deceitfully and fraudulently representing to the said *Nathaniel*, the co-partner of your petitioner, that the said *William P. Christian* was abundantly able to pay the said note, and that your petitioner should never be

1. This petition was drawn prior to the adoption of the present code. Under the practice now existing in *Georgia* the petition should set forth the cause of action in numbered paragraphs. 2 Ga. Code (1895), § 4961.

2. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not found in the reported case, but should be added to complete the form.

Consult also notes to Form No. 6863, *supra*.

called on for the payment thereof, but should be saved harmless from all liability on account of said note, and that the said defendant would never look to your petitioner for payment of the same, caused and procured the said *Nathaniel* to sign the partnership name of your petitioner to the said note of hand without the knowledge of your petitioner, and fraudulently accepted the same, whereby your petitioner became bound to pay the said note, when in truth and in fact, the said defendant, at the time of making such representations, well knew the said *William P. Christian* was not safely to be trusted, but was insolvent and unable to pay said note, and so your petitioner says the defendant fraudulently deceived your petitioner, by representations made by him, and that by means thereof, he hath been compelled to pay the said note, and the interest and costs, amounting in the whole to the sum of money aforesaid.

(*Here was set out several other counts alleging substantially the same facts contained in the first count.*)

(*Here was set out amendment to the petition.*)[1]

[(*Concluding as in Form No. 5913.*)]

1. The amendment to the petition referred to in the text was as follows:

"And for that, whereas, also your petitioner, and one *Nathaniel Duncan*, being partners in trade, and carrying on business in co-partnership as merchants, and dealers in goods, and were as a firm in the business aforesaid, to-wit: on and before the *11th* day of *March*, 18*38*, and being such merchants and co-partners in the business of goods, wares and merchandise only, the said *Nathaniel*, fraudulently and without the knowledge or consent of your petitioner, executed and issued a certain promissory note, for the sum of *four hundred* dollars, payable to the said defendant, as and in consideration of a tract or tracts of land of little value, sold and conveyed to the said *Nathaniel Duncan* by the said defendant, and the said defendant, fraudulently, and without the knowledge or consent of your petitioner, accepted the said promissory note so issued and executed, in the name of the said mercantile firm of your petitioner, and the said *Nathaniel Duncan*, by the style of *Duncan and Christian*, and received the said note so executed as aforesaid, in payment of and for the said tract of land so sold and conveyed to the said *Nathaniel Duncan* as aforesaid, of and from the said *Nathaniel*, fraudulently and without the knowledge or consent of your petitioner, and the said defendant fraudulently and injuriously combining with the said *Nathaniel*, kept your petitioner in ignorance that your petitioner's name had been thus unauthorizedly used by the said *Nathaniel*, or that the said partnership name had been so used as aforesaid, and after the said note having been so executed as aforesaid, your petitioner hath been compelled to pay the said note to the said defendant, amounting to the sum of *six hundred* dollars and *forty* cents, which he, your petitioner, hath paid, and been compelled and held liable to pay, upon the said note so executed and accepted as aforesaid, the said *Nathaniel Duncan* being and having become insolvent and unable to pay the said sum of money in said note specified, which said note was executed in the said partnership name by the said *Nathaniel*, and received by the said defendant fraudulently and without the knowledge or consent of your petitioner." The amendment contained two other counts setting forth substantially the same cause of action with the first count of the amendment.

The defendant pleaded the general issue, the statute of limitations, and a former adjudication and recovery on the same note. On the trial, counsel for the defendant moved to reject the amendments on the ground that they contained a new cause of action, which motion was granted by the court. On appeal, however, the judgment of the court below was reversed, and the cause reinstated, and the amendments allowed.

e. Personating Plaintiff.

Form No. 6927.

(2 Rev. Swift's Dig., p. 525.)[1]

(*Commencement as in Form No. 6934.*)[2]

That, for more than *two* years last past, he, the plaintiff, has been and still is a *fishmonger*, and during all that time has used, exercised, and carried on the trade and business of a *fishmonger*, at *Blank*, and has been of great repute in the way of his said trade and business, and divers persons, during all said time, have been accustomed to buy fish of him, by which he was daily acquiring great gain and profits, and the defendant has during all said time there used, exercised, and carried on, and still does use, exercise, and carry on the trade and business of a *fishmonger*, and while the plaintiff and defendant so respectively followed and carried on the trade and business of a *fishmonger*, at *Blank*, one *Samuel Short*, being the customer of the plaintiff in his said trade and business, did then and there want to buy certain fish, and was then and there desirous of buying the same of the plaintiff, whereof the defendant then and there had notice; nevertheless the defendant, well knowing the premises, but contriving and intending to injure the plaintiff in his said trade and business, then and there, on the *first* day of *June*, 1898, at *Blank* aforesaid, wrongfully and unjustly offered and exposed to sale to one *John Smith*, then and there being the servant of said *Samuel Short*, certain fish, to wit, *twenty shad*, belonging to the defendant, as and for the fish of the plaintiff, who then had a large quantity of fish for sale, whereby the said *Samuel Short*, who would otherwise have then bought fish of him, the plaintiff, bought said fish of the defendant, and was then wholly prevented from buying the same of the plaintiff, and the plaintiff thereby wholly lost the sale of the said fish, which he would otherwise have sold to the said *Samuel Short*, and the profit and benefit of such sale, to his damage (*concluding as in Form No. 6934*).

f. Representing Goods Sold as Those Prepared by Plaintiff.

Form No. 6928.

(3 Chit. Pl., p. 405.)[3]

(*Commencement as in Form No. 6934.*)[2]

For that whereas he the said *John Doe* for divers years before, and at the time of the committing of the grievances hereafter next mentioned, did prepare, vend, and sell, and did continue to prepare, vend, and sell, and still does continue to prepare, vend and sell, for profit, divers large quantities of a certain snuff called *cordial cephalic snuff*, which said snuff the said *John Doe*, was then, and still is, used and

1. **Another precedent** of a similar character is given in 3 Chit. Pl., p. 404.

2. **For formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

Consult also notes to Form No. 6863, *supra*.

3. **Another precedent** of this character is given in 2 Rev. Swift's Dig., p. 525.

accustomed to sell in bottles, respectively wrapped up in paper, having the following, amongst other words, printed thereon, that is to say, "Sold by *Fran. Newberry*, joint proprietor, having purchased of *Mr. Collins* half the right and benefit of the patent, at his new medicinal warehouse, No. *45*, in *St. Paul's Church-yard*, on the coach-way, five doors from *Cheapside* towards *Watling-street*, *London*, used by *B. C. Collins*, at the printing office, *New Canal*, *Salisbury*," to wit, at, etc.; and whereas the said *John Doe* before, and at the time of committing the grievances hereinafter next mentioned, had gained and acquired great fame and reputation with the public, on account of the excellent quality of the said *cordial cephalic snuff*, so by him prepared, vended, and sold, and continued to be prepared, vended, and sold as aforesaid, whereby the said *John Doe* daily acquired and obtained great gain and profit, to the comfortable support of himself and family, to wit, at, etc., aforesaid; yet the said *Richard Roe* well knowing the premises, but wickedly and wrongfully, subtly and unjustly, intending to injure the said *John Doe* in his said sale of the said *cordial cephalic snuff*, and to deprive him of the great gain and profits which he the said *John Doe* would otherwise have gained by preparing, vending and selling, the said *cordial cephalic snuff* as aforesaid, to wit, on, etc., and on divers other days and times gained by preparing, vending and selling, the said *cordial cephalic snuff* as aforesaid, to wit, on, etc., and on divers other days and times between that day and the day of the commencement of this suit, to wit, at, etc., aforesaid, did wrongfully, knowingly, injuriously, deceitfully and fraudulently, against the will, and without the licence or consent of the said *John Doe*, prepare and make, and cause to be prepared and made, divers, to wit, *15,000* bottles of snuff, in imitation of the said *cordial cephalic snuff*, so prepared, vended, and sold by the said *John Doe* as aforesaid, and did wrap, and caused to be wrapped up, the said last-mentioned bottles of snuff, in paper, having the following, amongst other words, printed thereon, that is to say, "Sold by *Fran. Newberry*, etc." (*as in the original label*), in order to denote that such snuff was the genuine *cordial cephalic snuff*, prepared, vended, and sold by the said *John Doe*; and did knowingly, wrongfully, injuriously, deceitfully, and fraudulently vend and sell, for his own lucre and gain, the said last-mentioned bottles of snuff, by the name and description of a *cordial cephalic snuff*, which had been prepared, vended, and sold by the said *John Doe*; whereas, in truth, and in fact, the said *John Doe* had never been the preparer, vender, or seller thereof, or any part thereof; by reason of which said premises the said *John Doe* has been fraudulently, deceitfully, wrongfully, and injuriously hindered and prevented by the said *Richard Roe* from selling, vending, and disposing of divers large quantities, to wit, *15,000* bottles of the said *cordial cephalic snuff*, which the said *John Doe* would otherwise have sold, vended, and disposed of, and the said *John Doe* has also been deprived of divers great gains and profits, which would otherwise have accrued to him the said *John Doe* from the sale thereof, and has been otherwise greatly injured in the selling and vending of the said *cordial cephalic snuff*, to wit, at, etc., aforesaid. (*Concluding as in Form No. 6934.*)

4. Accomplished by Means of a Conspiracy.

Form No. 6929.

(Precedent in Dean *v.* Yates, 22 Ohio St. 389.)[1]

[(*Commencement as in Form No. 5929.*)][2] on the *19th* day of *December*, 1*867*, the said defendants fraudulently combined and confederated together to cheat and defraud the plaintiffs, and thereby, then and there, did, in pursuance of said combination and confederation between them, fraudulently obtain from the plaintiffs the goods and chattels enumerated in the exhibit hereto annexed, marked "*A*," and which is made a part of this petition. That at the time said goods and chattels were so fraudulently obtained, plaintiffs were merchants at *Cleveland*, *Ohio*, and on or about said *19th* day of *December*, 1*867*, said defendant *Kent*, with full knowledge on the part of said *Dean*, and acting at his suggestion and instigation, came to plaintiff's store in *Cleveland*, and then and there, in order to obtain said goods and chattels, fraudulently and falsely represented to plaintiffs that he, said *Kent*, the defendant, was a son of *Charles H. Kent*, of *Kent*, *Portage* county, *Ohio*, and was a partner with said *Charles H. Kent*, as merchants at said *Kent*, in the firm name of *Charles H. Kent & Son*, said *Charles H. Kent* then being known to plaintiffs to be responsible — all of which representations were wholly false, and were known by the said defendants, at the time they were so made, to be false. That it was not true that said defendant *Kent* was a son of *Charles H. Kent*, of *Kent*, *Portage* county, *Ohio*. Nor was it true that said defendant was then, or ever had been, a partner of said *Charles H. Kent*. By means of which false and fraudulent representations the said defendants obtained from plaintiff the goods and merchandise specified in said exhibit "*A*," which were of the value of $*529.40*, and have, by reason of their said frauds subjected the said plaintiffs to damages, expenses, costs, and charges in the sum of $*150*, in addition thereto.

That said goods and merchandise were, after being so fraudulently obtained by plaintiffs, shipped to *Kent*, *Portage* county, *Ohio*; were there received by the said *Dean*, and by him as well as by the said *Kent*, immediately thereafter exposed to sale at public auction, and some portions thereof, as well as other goods obtained in the same manner, sold at public auction as rapidly as possible, but before all were sold, both defendants left *Kent*, and neither one has returned.

The plaintiffs aver that the obtaining of said goods, in the manner and upon the representations aforesaid, was a scheme to defraud plaintiffs and others, concocted and carried out by the defendants jointly, and for the pecuniary benefit of both, and that both participated in the proceeds of the fraud, whereby and by reason of the

1. Defendant Dean filed his separate answer specifically denying the allegations of the petition.

2. **For the formal parts** of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1919. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

The matter to be supplied within [ ] is not in the reported case, but should be added to complete the form.

Consult notes to Form No. 6863, *supra*.

premises, the plaintiffs aver that they have sustained damages, and that the defendants have damaged them in the sum of $*669.40*, and that, by reason of the premises aforesaid, an action hath accrued to them therefor, against the said defendants. Wherefore they pray for a judgment against said defendants for the said sum of $*669.40*, and interest thereon from *December 19*, 1867.

[(*Signature of attorney as in Form No. 5929.*)][1]

Form No. 6930.

(Precedent in Johnston Fife Hat Co. *v.* National Bank, 4 Okla. 19.)[2]

In the *District* Court of the *First* Judicial District, holding terms at *Guthrie*, in and for *Logan* County, *Territory* of *Oklahoma*.

Johnston Fife Hat Company, a corporation under the laws of *Missouri*, Plaintiff,
v.
Drury L. Melone and *Baker H. Melone*, partners composing the firm of *Melone Brothers*, and *L. DeSteiguer*, and the *National Bank of Guthrie*, Defendants. } [1]

Come now the *Johnston Fife Hat Company*, a corporation doing business under the laws of *Missouri*, and for their complaint against the defendants say:

That at all times hereinafter mentioned the said *Drury L. Melone* and *Baker H. Melone* were partners, composing the firm of *Melone*

1. For the formal parts of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019. For the formal parts of declarations, generally, see the title DECLARATIONS, *post*, p. 244.

Consult also notes to Form No. 6863, *supra*.

2. The judgment of the district court in sustaining defendant's demurrer to this complaint was reversed on the theory that a bank is liable for the torts of a managing officer, he being the head of the corporation, not a servant of the same, when these torts are committed in the carrying on of its business while he is acting within the scope of his powers, even though the tortious acts are not within the corporate power of the bank.

Other Precedents. — For substance of complaint in an action against defendants, for conniving, conspiring, combining, cheating and defrauding plaintiffs out of certain chattels, held to be bad, see Cohn *v.* Golman, 76 N. Y. 284.

For substance of complaint in an action by one who purchased notes issued by a corporation against the directors of the corporation, for alleged fraud and conspiracy to induce the public, by means of false representations as to its financial condition, to purchase, etc., see Brackett *v.* Griswold, 112 N. Y. 455.

For precedent of a declaration in an action for conspiracy to defraud see the title CONSPIRACY, vol. 5, p. 219, Form No. 6171.

In Breedlove *v.* Bundy, 96 Ind. 319, it was held that where several conspired to defraud another for the benefit of one, all are liable in damages for the deceit. The complaint in this case was upheld, and reads substantially as follows, omitting the formal parts:

"The appellants, *Breedlove* and *McClellan*, together with their co-defendants, *Gosset* and *Gause*, on the *first* day of *May*, 1879, conspired and confederated together to cheat, swindle, and defraud the plaintiff of a certain stock of goods, owned and kept by him in a grocery store in the city of *Indianapolis* in said county, of the value of $*1,000*; that in pursuance of said conspiracy and confederation, said *Breedlove* and *McClellan* came together on or about said day, to this plaintiff and proposed selling the said stock and good-will for the said plaintiff and informed him that the said defendant *Gossett* was de-

Brothers, and engaged in the retail clothing and gents' furnishing goods business in the city of *Guthrie*, *Logan* County, *Oklahoma* Territory.

That the said defendant, the *National Bank* of *Guthrie*, was at such times, and now is, a national banking corporation, organized and

sirous of purchasing the same, and had certain notes and mortgage, executed by the defendant *Gause*, which said *Gossett* would trade and exchange for the said stock and good-will; and said *Breedlove* then and there said and represented to the plaintiff that said notes, aggregating in amount the sum of $675. were part of the consideration for certain real estate in the town of *Plainfield*, in *Hendricks* county, and State of *Indiana*, and were secured by mortgage on such real estate, and that said real estate was very valuable and was worth $4,000; that said *McClellan* corroborated and assented to all the foregoing representations; that the same were made for the purpose and with the intent of inducing the plaintiff to make and enter into the bargain and trade hereinafter set forth; that the said *Breedlove* and this plaintiff were members of the Masonic order, and said plaintiff, on account of such membership, imposed trust and confidence in the said *Breedlove*, which fact the said *Breedlove* well knew; that this plaintiff then said that if a satisfactory arrangement could be made, he, the said plaintiff, would be willing to sell out said store and business for $700 cash, as he was desirous of quitting said business and was in need of the money; that afterwards, to wit, on the —— day of *May*, 1879. said *Gossett* came to the said place of business of this plaintiff and represented himself as ready and willing to carry out and make the said trade proposed by said *Breedlove* and *McClellan* as aforesaid, and, in pursuance of the aforesaid conspiracy and confederation, said and represented to the said plaintiff that the defendant *Gause* had purchased the interest of his wife, *Phœbe A. Gossett*, in certain real estate (*describing it*), and that said *Gause* owned all but *one-seventh* of said real estate. and that said *Gause* had paid for said interest of said *Phœbe A. Gossett*, $975, $300 in cash and the remainder in *five* notes, all dated *March 27th*, 1879 (*describing the notes*), and which notes were secured by a first mortgage upon all the real estate aforesaid, and that *Gause* had money in *Harrisons' Bank* in the city of *Indianapolis*, and had proposed to discount said notes for $600, and that said real estate was worth more than $2,000; that afterwards, to wit, on the *8th* day of *May*, 1879, said defendants *Gossett* and *Gause* came together to the plaintiff, and, in pursuance of the conspiracy and confederation aforesaid, the said *Gause* confirmed the said representations and statements of said *Gossett*, and said that said notes were well secured and worth their face; that all the foregoing representations and statements were and are false and fraudulent, and were made in pursuance to the conspiracy aforesaid, and for the purpose of fraudulently inducing this plaintiff to bargain and sell said stock of goods for said notes; and that the said defendants did each and all impose upon the trust and confidence of this plaintiff in the said *Breedlove* for the reasons aforesaid, to prevent this plaintiff from investigating the said property; and that said *Gause* did acknowledge said indebtedness, and express a willingness to pay the same in pursuance to said conspiracy, and for the purpose of deceiving this plaintiff and prevent him from investigating said real estate; that on account of the said representations, and induced thereto by them, this plaintiff did bargain and sell the said stock of goods and the said good-will of said establishment to said *Gossett*, and did pay to him, the said *Gossett*, the sum of $25 in cash, and the said notes and mortgage, and did deliver possession to said *Gossett*; * * * that said plaintiff relied entirely upon said representations; that said mortgage was not a first lien upon the real estate aforesaid and said real estate is worthless, and enough to pay the costs of foreclosing said mortgage cannot be realized therefrom; and that said *Gause* never had any title whatever to said real estate, and now refuses to pay the notes aforesaid; wherefore," etc. It was held that this complaint stated a good cause of action against all of the defendants, and that separate demurrers of defendants Breedlove and McClellan to the complaint were properly overruled.

doing business under the national banking laws of the *United States.* That *L. DeSteiguer* was and is the president and business manager and active officer of said *National Bank* of *Guthrie.*

That the plaintiffs, *Johnston Fife Hat Company*, above mentioned, are a corporation, engaged in the wholesale clothing and gents' furnishing goods, etc., business in the city of *St. Joseph, Mo.*

In Haines *v.* Herrick, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 380, the material portions of the complaint were as follows:

"I. (*Setting out the partnership of the plaintiffs.*)

II. (*Setting out the partnership of the defendants.*)

III. That on or about the *first* day of *November*, 1877, the defendants, *William C. Herrick*, *Pierre Van Alstyne* and *Bernard N. Smith* entered into an unlawful confederation and conspiracy with intent and design to cheat and defraud the plaintiffs and such other persons as the said *Van Alstyne* and *Smith* might induce to give them credit, and the said defendant did, on or about said *1st* day of *November*, 1877, and at the time hereafter mentioned, corruptly and unlawfully conspire and confederate together to cheat and defraud the plaintiffs.

That at the time said defendants entered into such conspiracy and confederation the said *Van Alstyne* and *Smith* were carrying on an extensive business and had in their possession a large amount of property, and possessed and enjoyed an extended business credit. That said *Van Alstyne* and *Smith* were at that time indebted to the defendant, *William C. Herrick*, in the sum of about $*21,000*, and the said *Herrick* then neld as security for the payment of said indebtedness the bond of said *Van Alstyne* and *Smith* and a mortgage on the said premises, Nos. *547* to *555 West 21st* street, in the city of *New York*, which said mortgage was ample security for the payment of said indebtedness.

IV. That in pursuance of the said unlawful conspiracy and confederation aforesaid the said *Van Alstyne* and *Smith* on or about the said *1st* day of *November*, 1877, executed and delivered to the defendant, *William C. Herrick*, their certain promissory note, whereby they promised to pay *three* months after the date thereof to the order of said *Herrick* the sum of $*10,000*; that said note, as the plaintiffs are informed and believe, was wholly without consideration, and was given for the sole purpose of creating a fictitious indebtedness in favor of the said *Herrick*, with the fraudulent intent and design aforesaid; that subsequently, and in pursuance of said unlawful conspiracy and confederation, and as a cover to conceal the same, the said *Herrick*, as the plaintiffs are informed and believe, indorsed and gave credit for the amount of said note on said bond and mortgage.

That in pursuance of said corrupt and unlawful conspiracy and confederation the said *William C. Herrick* on or about the *5th* day of *March*, 1878, commenced an action in this court, in the county of *Columbia*, against the said *Pierre Van Alstyne* and *Bernard N. Smith* upon the said promissory note and two other notes, one for $*716.84* and the other for $*1,508.80*. That the summons and complaint in said action were served by said *William C. Herrick* personally upon said *Pierre Van Alstyne* and *Bernard N. Smith*. That neither said *Van Alstyne* or said *Smith* ever appeared in said action, and no further steps were taken by the plaintiffs in the prosecution thereof until the *30th* day of *December*, 1879, when judgment was entered therein against the said *Van Alstyne* and *Smith* by default for the sum of $*13,885.26*.

That on the *31st* day of *December*, 1879, an execution upon said judgment was issued and delivered to the sheriff of the city and county of *New York*, who immediately levied thereunder upon all the property of the said *Van Alstyne* and *Smith* and said *B. N. Smith & Co.* and proceeded to sell and did sell the same to the said *William C. Herrick* for the sum of $*6,625*.

V. That in pursuance of the said unlawful conspiracy and confederation said *Van Alstyne* and *Smith* did, on or about the *31st* day of *December*, 1879, assign, transfer and set over unto the said *William C. Herrick* all the property which they then had, and the said *B. N. Smith & Co.* did likewise at or about the same time assign, transfer and set over unto the said *William C.*

That on or about the *30th* day of *October*, 1891, the said defendants, *Melone Brothers*, and the said *National Bank* of *Guthrie*, through its agent and business manager, *L. DeSteiguer*, for the use and benefit of said bank, while acting in the due course of his business and scope of his authority as such agent and officer of said bank in loaning money and taking mortgages for said bank, which was to take chattel mortgages on personal property to secure loans by said bank to others, and *L. DeSteiguer*, all entered into a fraudulent and corrupt conspiracy and agreement, whereby it was understood and agreed between said defendants that the *Melone Brothers* should procure by and with the advice and assistance and aid and help of said other defendants, and purchase from various wholesale houses in *St. Joseph*, *Kansas City*, *Chicago*, and elsewhere, and of these plaintiffs, all of the goods and merchandise that the said *Melone Brothers* could purchase and in the sum of many thousand dollars' worth on credit and with the intention and purpose of never paying for the same.

That they should procure these plaintiffs and other wholesale houses to ship these goods to the said *Melone Brothers* at *Guthrie*. That thereafter the said *Melone Brothers* should give to the said *National Bank* of *Guthrie*, in the name of *L. DeSteiguer*, president, a chattel mortgage on said goods for a large sum of money, to wit, the sum of $*10,000*, or thereabouts, without the said *National Bank* of *Guthrie* paying to the said *Melone Brothers* any sum whatever therefor, excepting the sum of about $*1,000* or $*1,500* loaned by the bank to said *Melone Brothers*, and without the said *National Bank* of *Guthrie* actually being a creditor of said *Melone Brothers* in any sum whatever, except as above stated, and that said defendants should then pretend to foreclose said mortgage and take all the goods purchased from said creditors, and divide the proceeds thereof, the said *Melone Brothers* giving the said *National Bank* of *Guthrie* and *L. DeSteiguer* the one-third of the amount which said stock of goods of said *Melone Brothers* should be worth or bring.

The plaintiffs allege that in pursuance to said fraudulent and cor-

Herrick all the property belonging to said *B. N. Smith & Co.*

That the value of the property thus assigned by said *Van Alstyne & Smith* and said *B. N. Smith & Co.* to said *Herrick*, and sold to him under execution, amounted to the sum of about $*96,779.00*; and the said *Herrick*, as the plaintiffs are informed and believe, realized therefrom, in cash or its equivalent, within a few weeks after such transfers and sale were made, the sum of about $*51,461.00*, and thereafter had and still retains, except so far as the same have been paid, uncollected accounts due said firms from various persons amounting to the sum of about $*45,318.00*."

The complaint then alleged that the amount of *Van Alstyne* and *Smith's* indebtedness to defendant *Herrick* did not exceed $*28,000*, and that before plaintiff's proceedings they had enjoyed good credit and become indebted to plaintiff in various sums, which were specified, and that plaintiff had recovered judgments against them, and issued executions which were returned unsatisfied. It also alleged that $*250* was expended in actions and in supplementary proceedings. The complaint then proceeded as follows: "That by means of the said corrupt and unlawful conspiracy and confederation the defendants have cheated and defrauded the plaintiffs out of the said several sums of money above mentioned, and by reason thereof the plaintiffs have sustained damages in the sum of *one thousand and twenty 16-100* dollars besides interest," etc.

rupt conspiracy and agreement the said defendants by and through one of the said defendants, *Baker H. Melone*, did come to the city of *St. Joseph, Mo.*, and purchase of these plaintiffs goods, wares and merchandise in the sum and value of *three hundred and fifty-four* dollars and *fifty* cents, a true and verified account of which is hereto attached and marked exhibit "*A*" and made a part of this complaint.

The plaintiffs allege that the said *National Bank* of *Guthrie*, through its agent and president, *L. DeSteiguer*, in the due course of his employment, and as recognized by the directors of said bank in his general authority as given by said directors of said bank to do any and all acts for said bank, and *L. DeSteiguer*, furnished to the said *Baker H. Melone* on said trip $*100* to pay expenses of said trip, and that said purchases were made in pursuance to said agreement, and by the request, aid and assistance of all of the said defendants.

The plaintiffs further allege that after the receipt of said goods of the plaintiffs by said defendants, the said *National Bank* of *Guthrie*, in the name of *L. DeSteiguer*, president, did, in pursuance to said agreement and conspiracy, take a chattel mortgage on said goods and the said other goods of the said *Melone Brothers* in the sum of $*9,960*, which said mortgage was without any consideration whatever, excepting the sum of about $*1,000* or $*1,500*, the money of said bank loaned to *Melone Brothers*, and was fraudulent and corrupt and a part of the carrying out of the said agreement and corrupt conspiracy and was made in pursuance thereof.

That the said *L. DeSteiguer* and the *National Bank* of *Guthrie*, through and by its said officer and agent, *L. DeSteiguer*, who was authorized to take and foreclose chattel mortgages for said bank, did proceed to foreclose said chattel mortgage and did take and close up the business of the said *Melone Brothers*, and did convert the said goods and merchandise and property of the said *Melone Brothers* to the use and benefit of said bank and *L. DeSteiguer*.

That the said bank, by its said president, foreclosed said mortgage and sold said stock of goods, and received a check for the sum of $*5,300* therefor, and afterwards took a note for $*5,300*, concerning the same transaction, which note said bank, by its directors, officers and agents, have affirmed with full knowledge of all facts herein.

Plaintiffs further allege that the said goods of the said plaintiffs in the sum of $*354.50* were purchased of these plaintiffs by the said *Melone Brothers*, with the aid, consent, and assistance of all of the said other defendants and in pursuance of the said fraudulent and corrupt conspiracy, to cheat and defraud these plaintiffs, and with the intention of never paying for these goods, and with the intention and purpose and agreement that all of said defendants should divide the proceeds among themselves.

Plaintiffs allege that these goods have never been paid for, and that these defendants are now indebted to these plaintiffs for the same, and the said amount is now due.

Plaintiffs allege that they had never received any knowledge or notice of the said agreement and conspiracy of the said defendants, but sold the said goods to the said *Melone Brothers* in the usual course of business, believing the said *Melone Brothers* to be solvent and that

they intended to pay therefor, and that the said *Melone Brothers* intended to continue in business.

The plaintiffs further allege that the said bill of goods and merchandise stated in exhibit "*A*" hereto attached was sold to said defendants, *Melone Brothers*, upon credit, and that it is the custom among wholesale merchants generally, and the custom in the business of the plaintiffs that all accounts for goods sold and delivered on credit to become due and payable whether the term of credit had expired or not, when any suit or action at law is brought against, or any lien is given by the purchaser, or when the purchaser suspends payment or is closing out. That the said defendants, *Melone Brothers*, knew of said custom and regulation in the business of the plaintiffs at the time they purchased said goods, and the credit to said *Melone Brothers* on said account was given in accordance with said custom and conditions and said *Melone Brothers* at the time agreed thereto and that the said conditions were a part of the credit given said *Melone Brothers*.

Plaintiffs allege that said *Melone Brothers* assigned and sold out and went out of business and ceased to carry on said business on the *23d* day of *November*, 18*91*, and that they suspended payment on their bills and accounts at the time and prior thereto, and that suits and actions at law were brought against said *Melone Brothers* on the *28th* day of *November*, 18*91*.

Wherefore, plaintiffs pray judgment against all of said defendants in the sum of $*354.50*, together with the legal rate of interest thereon, and with the costs of said suit, and for all other proper relief.

Bierer & Cotteral,
Attorneys for *Johnston Fife Hat Co.*

II. ANSWER OR PLEA.[1]

1. A general denial of fraud is not enough, where facts are alleged in the complaint from which the court may infer fraud. Litchfield *v.* Pelton, 6 Barb. (N. Y.) 187; Dykers *v.* Woodward, 7 How. Pr. (N. Y. Supreme Ct.) 313; Churchill *v.* Bennett, 8 How. Pr. (N. Y. Supreme Ct.) 309.

Fraud results from the law and the facts, and the court must be made acquainted with all the facts to be enabled to determine whether fraud does or does not really exist. The defendant may, in many cases, very honestly deny fraud in a transaction which is actually tainted by it; for what constitutes fraud, particularly fraud in law, is often a matter of much diversity of opinion; he therefore must answer to every material allegation. Pettit *v.* Candler, 3 Wend. (N. Y.) 618, 1 Paige (N. Y.) 427.

Precedents. — In Callis *v.* Waddy, 2 Munf. (Va.) 511, to an action on the case for deceit, the defendant pleaded not guilty, and for further plea, that the cause of action, if any, "did not accrue within five years next before suing out the capias ad respondendum in this cause."

Deceit in the Sale of a Horse. — In Schwartz *v.* Osthimer, 4 Ind. 110, the defendant pleaded two pleas:

"1st. Not guilty. 2d. That the defendant on the —— day of ——, 1850, impleaded the said plaintiff before one *Joseph Carlin*, a justice of the peace, in an action of debt for the purchase money agreed to be given by the plaintiff for the identical horse mentioned in the declaration; and that the plaintiff appeared to said action and filed his general and special pleas, wherein he set up as a defense the very identical matters, and each and every of them, now set forth in the declaration in this present suit; and that said matters were considered and admitted by said justice

as proper and legal matters of defense in that suit, and the justice, upon the merits, gave judgment in favor of the defendant for *30* dollars and costs, etc., which judgment is in full force, etc."

Deceit in Sale of Business. — In Herbst *v.* Lowe, 65 Wis. 317, the answer, in effect, denied all false representations and pretenses, and alleged "that the defendant did not have the agency for five years, nor any right to sell the same; that, in the negotiations preceding the completion of the sale, the defendant, disclaiming all right to sell the agency, agreed to do what he could to procure the plaintiffs' appointment for a year, and if he failed he would go in partnership with them in the business; and that the plaintiffs were to pay $*2,900* for the house, lots, and warehouse, payable in instalments, and that the defendant did go into partnership with them."

Deceit in the Sale of Realty. — In West Florida Land Co. *v.* Studebaker, 37 Fla. 32, the defendant pleaded to the declaration as follows, omitting the formal parts:

"1st. That they did sell the land as stated in plaintiff's declaration, and that said land was worth the amount the plaintiff agreed to pay. 2nd. That the defendant did not make the representations mentioned in plaintiff's declaration as to the land having timber growing upon it, except pine timber; that no representations were made by this defendant as to a growth of black walnut, red cedar, white holly, cypress and oak, mentioned in plaintiff's declaration. 3d. That no representations were made that the town of *Bonifay* was the county seat of *Holmes* county at the time of making the sale of land mentioned in plaintiff's declaration as alleged in plaintiff's declaration. 4th. That the plaintiff long after he had executed the notes and mortgage to secure the payment of the purchase money of the land, expressed himself as well pleased, and wrote to certain papers encouraging others to come to this country; that he was highly pleased; that this was after he had taken possession of said land mentioned in plaintiff's declaration. 5th. The defendant for further plea says the plaintiff was not induced to buy said land by reason of representations as alleged in plaintiff's declaration, and plaintiff was not damaged as alleged." Upon these pleas issue was joined. The court in this case said: "Issue having been joined and trial had upon the set of pleas last filed, there having been no demurrer to the same or any ruling thereon to which our attention has been directed, we are not called upon to pass upon the sufficiency of these pleas. To save future litigation and trouble for the parties as well as the courts, we think it not improper to suggest to the parties that they again examine their pleas and see whether they have not gone to trial upon pleas that present immaterial issues in the case."

In Schoellhamer *v.* Rometsch, 26 Oregon 394, the defendant answered plaintiff's complaint, denying all the allegations thereof, and affirmatively alleging "that he was the owner in fee of the land described in the complaint, and that it was of the value of over *sixteen hundred* dollars; that the husband of plaintiff was her agent and as such purchased the land of his for *fifteen hundred* dollars, after he had examined the same and fully informed himself as to its location, condition, and value; that by the terms of the contract *five hundred and fifty* dollars of the purchase price was to be paid in cash, and the balance on or before *two* years from date; that the land is situated about *nine and one half* miles from *Portland*, on what is known as the '*Cornell Road*,' and is well improved, cleared, and ready for use; that the certificate of deposit referred to in the complaint, was delivered to him as part payment on the purchase price of said land, and the plaintiff purchased the land well knowing all the facts and circumstances concerning it, and it was sold to her at her earnest solicitation and request." The allegations of the answer were denied by the reply, and upon the issues thus made the cause was tried by a jury.

Deceit Inducing Exchange of Realty for Worthless Promissory Notes. — In Crane *v.* Elder, 48 Kan. 260, the answer of defendant to plaintiff's petition was substantially this:

"(1) A general denial, except as admitted. (2) Alleges that he did exchange the notes for the realty, but that at the time of the dealing it was 'well understood and agreed' by *Fuller* and himself that it was not worth in cash over $*1,000*; that some of the notes might not be collectible; that the 'residence property' was valued at $*2,200*, so as to equalize and compensate for any loss which *Fuller*

might sustain by reason of his inability to collect some of the notes, but that he has collected on the notes more than the cash value of the house and lot." The reply was a general denial.

Deceit Inducing the Settlement of Judgment. — In Manchester *v.* Dodge, 57 Ind. 586, the answer to a complaint for damages for false and fraudulent representations inducing the settlement of a judgment was in substance that defendant "admitted the execution of the notes, dated *April 8*, 1867, as alleged in the complaint, but he averred that the same had been, and were, long prior to the alleged compromise and composition, fully paid, satisfied and discharged; and in the second paragraph of his answer the appellee alleged, in substance, that he admitted the execution of said notes dated *April 8th*, 1867, but he averred, that the appellant ought not to recover in this action, because he said that said notes were secured by a mortgage executed by him, at the same date, upon his interest in certain real estate, a copy of which was filed with said paragraph, the appellee at the time being the owner of an interest in said real estate, as the heir at law of —— *Dodge*, deceased; that afterward, on the *28th* day of *April*, 1867, the appellee by deed, without warranty, a copy of which was therewith filed, conveyed his interest in, and delivered, said real estate so mortgaged to the appellant, who had knowledge of said mortgage which was then upon record, and who, with her husband, said *William J. Manchester*, thereafter executed a warranty mortgage upon all said lands to the appellee and others to secure the payment of a debt of *three thousand five hundred* dollars, as therein stated, a copy of which mortgage was therewith filed; that thereafter, the payees of said debt and mortgage sold and assigned the same to *Alexander Pope*, who thereafter, at the *March* term, 1870, of the court below, sued the appellant and her husband upon said debt, and foreclosed the said mortgage against them, and such proceedings were therein had as that a decree of foreclosure was duly entered in said court upon said mortgage, and the said real estate was by the court decreed to be sold to pay said debt, a copy of which decree and judgment were therewith filed; that afterward, the appellant failing to pay said mortgage debt, such proceedings were therein had as that an order of sale was duly issued by virtue of said decree, and all said land was, by the sheriff of said county, duly sold by virtue thereof to said *Pope*, and, the appellant failing to redeem said land from said sale, the said sheriff duly executed to said *Pope* a deed conveying said lands to him by virtue of such decree and sale, whereby the said lands became and were chargeable in said *Pope's* hands as a fund for the payment of said debt and mortgage, evidenced by said notes dated *April 8th*, 1867, so due to said *E. F. Dodge*; that thereafter, on the *31st* day of *August*, 1871, the said *Pope*, so being the owner of said lands, paid off the said notes and debt to said *E. F. Dodge*, whereupon said *Dodge*, without any consideration therefor, endorsed said notes to said *Pope* without recourse on himself, and executed a release of said mortgage, which was duly recorded; that thereafter the said *Pope*, still being the owner of said lands, without any consideration, transferred said notes to *William J. Manchester*, the appellant's husband, without recourse on himself, and said *William J.* transferred the same, without any consideration paid to the appellant; and that such payment by *Pope* operated as a release and discharge of the debt, and the appellant was estopped, by her mortgage and the deed to her, from enforcing payment from the appellee; wherefore, etc."

Deceit Preventing Collection of Claims. — In Haines *v.* Herrick, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 383, the material portion of the defendant's answer was as follows:

"Admits the allegations contained in paragraphs *I.* and *II.* of said complaint; admits that on *1st November*, 1877, the defendants *Van Alstyne & Smith*, were carrying on an extensive business and had in their possession a large amount of property; admits and alleges that the said *Van Alstyne & Smith* were at that time indebted to *William C. Herrick* to the extent of as much as $*22,500*, and that for $*21,000* thereof the said *Herrick* then held the bond of said *Van Alstyne & Smith* and their mortgage on a lease of the premises mentioned in the complaint; admits that said *Van Alstyne & Smith* on *November 1st*, 1877, executed and delivered to said *Herrick* their promissory note whereby they promised to pay *three* months after date of same to said *Herrick's* order $*10,000*; admits the allegation of folio 8 commencing with the words 'the said *William C.*,' and

ANSWER TO COMPLAINT FOR DECEIT IN SALE OF CATTLE AND LANDS.

Form No. 6931.

(Precedent in Warren *v.* Hall, 20 Colo. 509.)[1]

[State of *Colorado*, } ss. In the *District* Court within and for said
El Paso County, } county.][2]

First — Come now the defendants in the above entitled action and in answer to the complaint filed herein deny each and every allegation and averment therein contained.

Second — The defendants further answering the complaint and as a counterclaim against plaintiff herein allege:

1st. That on or about *September 15*, 1884, for a good and valuable consideration, the defendants, *Nathan Hall* and *William Hall*, under their copartnership name of *Hall Bros.*, bargained, sold and delivered to the plaintiff, *M. V. Warren*, and one *Robt. T. Howard*, an undivided one fourth interest in a certain herd of horses and cattle, in *Las Animas* county, *Colorado*, generally known as the "*J–X*" or *Trinidad Cattle Company* herd, and also an undivided one fourth interest in certain lands in said county, used in connection with the grazing of said herd.

2d. That the said sale was the same transaction set forth in plaintiff's complaint.

3d. That as a part consideration for the sale of said interest in said horses and cattle and lands to the said *M. V. Warren* and *Robt. T. Howard* as aforesaid, they, the said *M. V. Warren* and *Robt. T. Howard*, did jointly and severally undertake and promise and agree with the defendants herein to assume the payment of and to pay according to their tenor and effect *four* promissory notes made, executed and delivered by defendants herein under their firm name of *Hall Bros.* to one *James Wilcox*, each of said notes bearing date *October 30*, 1893, each payable on or before *three* years from date, with interest on each from date at the rate of *ten* per cent. per annum, interest payable annually.

One of said notes was in the sum of $*5,000*, one $*12,000*, and two in the sum of $*11,000* each. That said *Warren* and *Howard*, in accordance with their said agreements, paid all the interest on said notes up to *October 30*, 1885, amounting $*7,800*, and one half of the

ending with the words 'levied thereunder,' in folio 10; admits and alleges that by virtue of the executions mentioned in said folio 10, the Sheriff of *New York* city and county levied upon nearly all of the personal property of the said *Van Alstyne & Smith* and sold the same under said execution and the prior executions, and at such sale the said *Herrick* purchased nearly if not quite all the property so sold; * * * Denies each and every allegation contained in the complaint in this action not hereinbefore specifically denied or expressly admitted." This answer was upheld against a motion to make it more definite and certain.

1. Plaintiff, by replication, denied each and every of the allegations of the counterclaim. Upon these issues the action was tried by the court without a jury, resulting in a judgment in favor of the defendants upon the cause of action set out in the complaint, and also in their favor upon the issues joined upon the counterclaim, which judgment was affirmed on error.

2. **For the formal parts** of answers or pleas in general consult the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; PLEAS.

principal of each of said notes, the aggregate amount of the principal paid being $*19,500*.

4th. That the balance due on said notes, to wit, the sum of $*19,500* and interest thereon, at *ten* per cent. per annum, from *October 30*, 1*885*, to *October 30*, 1*886*, amounting to $*1,950*, the said *Warren* and *Howard* failed and refused to pay.

5th. That said *Hall Bros.*, defendants herein, were compelled to pay and did pay to the said *Wilcox* said balance of the principal of said notes and said interest of $*1,950*, and neither said *Warren* nor *Howard* have repaid the same.

Wherefore, defendants ask judgment against said *Warren* for $*21,450*, with interest thereon from *October 30*, 1*886*, at *ten* per cent. per annum, and for costs of suit.

[(*Signature of attorney.*)]

AVERMENT OF GOOD FAITH ON PART OF DEFENDANT.

Form No. 6932.

(Sand. & H. Ark. Dig. (1894), p. 1641.)

Pulaski Circuit Court.

John Doe, plaintiff,
against
Richard Roe, defendant. } Answer.[1]

The defendant, *Richard Roe*, admits that he represented the horse sold to the plaintiff to be sound, and he says he did believe said horse was sound at the time of the sale.

Joseph Story, attorney for defendant.

(*Verification.*)[2]

III. REPLY.

REPLY TO ANSWER TO COMPLAINT FOR DECEIT INDUCING THE SETTLEMENT OF A JUDGMENT.

Form No. 6933.[3]

State of *Indiana*, } ss. *Elkhart Circuit* Court.
Elkhart County. } *October* Term, 1*876*.

——— *Manchester*, plaintiff,
against
Peleg S. Dodge, defendant. } [4]

First paragraph: For a reply herein to the defendant's answer, the plaintiff says, she denies each and every allegation therein contained.

1. **For formal parts** of answers or pleas, generally, see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; PLEAS.

2. Consult the title VERIFICATIONS.

3. **Based on the reply,** set out in substance, in Manchester *v.* Dodge, 57 Ind. 587, in which case, the action being at issue after the filing of the reply, the case was submitted for trial upon an agreed statement of facts, and the court below found for the defendant, which judgment was affirmed on appeal.

4. **For the formal parts** of replications or replies, generally, consult the titles REPLICATIONS; REPLIES.

Precedents.— In Callis *v.* Waddy, 2 Munf. (Va.) 511, plaintiff joined issue to the first plea, and to the second replied that plaintiff ought not to be precluded from his said action "by anything by the defendant above in

Second paragraph: For another paragraph of reply herein to the defendant's answer, plaintiff says that she admits that the defendant executed the notes and mortgage mentioned in said answer, and that the defendant was the owner of the real estate mentioned in said mortgage, and that defendant, on the *28th* day of *April*, 1*867*, sold and conveyed said land to the plaintiff by deed, a true copy of which was set forth in said answer; but the plaintiff says, that said deed appeared on its face, to be a warranty deed with general covenants and bound to the defendant to pay off said first mentioned encumbrance; and the plaintiff also admits that she and her husband gave back a mortgage on said land to secure the purchase money; and that said mortgage and debt were assigned to *Pope* and foreclosed, and the title to said land divested, as set forth in said answer; and she, the said plaintiff, says, that, after said *Pope* became invested with said title by foreclosure, he purchased and took an assignment of said notes of *April 8th*, 1*867*, and thereupon, to clear up the title to said lands, released said mortgage, holding the notes against the defendant personally; and that, in consideration that the plaintiff would and did make to him, said *Pope*, a deed for said land, he assigned said notes by endorsement without recourse to the plaintiff; (*and the reply continued by denying every allegation in the answer not otherwise admitted or controverted in the reply.*)

Oliver Ellsworth, Attorney for the Plaintiff.

pleading alleged; because the plaintiff sued out his writ in the said court, against the said defendant for the same cause of action, within the time prescribed by the act of limitations, which was executed and returned by the sheriff of said county, and which went off the docket for want of formality; also because his cause of action, as alleged in his declaration aforesaid, is founded on a fraud, and the plaintiff avers that the same came to his knowledge within the time prescribed by law for the bringing of this kind of actions (to wit,) within five years previous to his suing out his writ in this cause, and this he is ready to verify," etc. It was held that it is no answer to the bar set up by the plea of the act of limitations that the plaintiff sued out a writ for the same cause of action within the time prescribed by the act, which writ was executed and returned and went off the docket for want of formality; and that in an action on the case for a deceit, "if the defendant plead that the cause of action did not accrue within five years next before suing out the writ, a replication that the fraud came to the plaintiff's knowledge within that time is not good, and issue joined upon it should be set aside by the court as immaterial."

Deceit Inducing Assignment of Partnership Interest. — The reply to a plea of the statute of limitations, filed in an action for deceit, brought to recover damages for an alleged fraud, by which the plaintiff was induced to assign to the defendant his interest in a certain farm, set out in Wear *v.* Skinner, 46 Md. 263, omitting the formal parts, was as follows: "that he was kept in ignorance by the fraud of the defendant for a long time of the cause of action which he had against the defendant, and that he brought his action within three years from the time at which he could, with usual and ordinary diligence, have discovered the fraud."

Rejoinder. — In Callis *v.* Waddy, 2 Munf. (Va.) 511, the defendant filed a rejoinder to plaintiff's replication "that the plaintiff his action ought not to have, etc., for anything by him in his replication aforesaid alleged, because the defendant says there is no such record in said court, of a suit by the same plaintiff against the defendant for the same cause of action; and this he prays may be inquired of by the court, etc., also because the fraud in this cause, if any there was, did not first come to the knowledge of the plaintiff within five years prior to the suing out the writ in this cause," etc.

DECLARATIONS.

I. IN ENGLAND, 244.
1. *At Common Law*, 244.
2. *Under Hilary Rules*, 248.
II. IN THE UNITED STATES, 249.

CROSS-REFERENCES.

For Forms of Corresponding Pleading under the Codes, see the title COMPLAINTS, vol. 4, p. 1019.
For Forms of Corresponding Pleading in Equity, see the title BILLS IN EQUITY, vol. 3, p. 417.
For Forms of Declarations in Specific Cases, see the various special titles throughout this work.
For Forms connected with Bills of Particulars, consult the title BILLS OF PARTICULARS, vol. 3, p. 473.
See also the GENERAL INDEX to this work.

I. IN ENGLAND.

1. At Common Law.

Form No. 6934.

Markham and Le Blanc.
Wednesday next after fifteen days of the Holy Trinity, in Trinity Term, *51 Geo. III.*[1]

1. **Caption** — *Generally.* — A declaration was entitled of the term when the writ was returnable, though in certain cases, according to the practice of the court, it need not actually be filed until the next term. Smith *v.* Muller, 3 T. R. 624.

When the cause of action arose after the first day of the term in which the writ was returnable, the declaration should be entitled specially of a subsequent day in that term, and it was in general advisable in an action of assumpsit, case, or trespass, to entitle the declaration specially on the day it was delivered or filed. 2 Chit. Pl. 13, note *a*.

In Craig *v.* Murdock, 12 Wend. (N. Y.) 293, it was held that a declaration in suit commenced by capias must be entitled of the term in which the writ is returnable. And it has been held that it is not necessary that a declaration should have any caption. If it discloses a good cause of action, it serves its appropriate office. Evans *v.* Bridges, 4 Port. (Ala.) 348; Hubbert *v.* Collier, 6 Ala. 269; Judson *v.* Eslava, Minor (Ala.) 2; Chandler *v.* Holloway, 4 Port. (Ala.) 17; Jackson *v.* Stiles, 6 Cow. (N. Y.) 597. In this last case a declaration in ejectment was held good without any title at all.

King's Bench by Bill. — The caption given in the text was that used when the action was commenced in the King's Bench by bill. 2 Chit. Pl. 12.

Common Pleas. — When the action was in the Common Pleas, the caption was the same, save that the words "In the

Middlesex, to wit,[1] *John Doe* complains of *Richard Roe*,[2] being in the custody of the marshal of the Marshalsea of our lord the now king,[3] before the king himself, of a plea *of trespass on the case*[4] *on prom-*

Common Pleas" were substituted for the words "*Markham and Le Blanc.*" 2 Chit. Pl. 17.

King's Bench by Original.— When the action was commenced in the King's Bench by original, the caption as given in 2 Chit. Pl. 28, was as follows:
"In the King's Bench.
Trinity Term, *51 Geo. III.*
Middlesex, to wit."

Exchequer.—The caption in the Exchequer was the same, substituting the words "In the Exchequer of Pleas" for the words "In the King's Bench." 2 Chit. Pl. 20.

Inferior Courts.—For the caption in the various inferior courts and courts of special jurisdiction see 2 Chit. Pl. 21, 22, 23, 31.

1. Venue.— Where no venue is laid in the body of the declaration, that in the margin is sufficient. Mellor *v.* Barber, 3 T. R. 387; Slate *v.* Post, 9 Johns. (N. Y.) 81; Swinney *v.* Burnside, 17 Ark. 38; Pullen *v.* Chase, 4 Ark. 210. But a declaration without any venue is bad in form. Briggs *v.* Nantucket Bank, 5 Mass. 94.

For a general discussion of the venue in actions at common law see 1 Chit. Pl. 267–285.

2. Parties — *Generally.* — The declaration and process must agree in names of parties. Willard *v.* Missani, 1 Cow. (N. Y.) 37.

Addition.—The defendant's addition, *i. e.*"late of the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, in *London* aforesaid, *clerk*," was not necessary. Gray *v.* Sidneff, 3 B. & P. 395.

Contract Executed in Wrong Name.— Where a person executes a contract by a wrong name, or by an abbreviation, he should be declared against in his right name and the other name given under an *alias dictus*. Wilson *v.* Shannon, 6 Ark. 196. But where the surname in an obligation varies in the spelling, but not much in the sound, from that in the subscription, the obligor may be sued in the name he has signed, without an *alias dictus* as to the name in the deed. Meredith *v.* Hinsdale, 2 Cai. (N. Y.) 362.

Initials. — That christian names of parties are represented in declaration by initial letters only is no ground for special demurrer. Wilthaus *v.* Ludecus, 5 Rich. L. (S. Car.) 326.

Residence. — No averment in the declaration as to the residence of either party is necessary for any purpose whatever. Jones *v.* Buzzard, 2 Ark. 415; Troy *v.* Bower, 3 Ark. 352; Fort *v.* Hundley, 5 Ark. 179. And in *Georgia* an omission to allege in the declaration that the defendant resides in the county where the suit is brought was held amendable. Raney *v.* McRae, 14 Ga. 589; Hall *v.* Mobley, 13 Ga. 318.

3. Being in Custody. — This form was adopted whether the defendant was in the actual or in the supposed custody of the marshal. 2 Chit. Pl. 12, note *c.* And omission to aver that defendant was in custody was matter of special demurrer at common law. Sossamon *v.* Gamble, Minor (Ala.) 4.

4. Style of Action — *Generally.* — It is no cause of demurrer that a count in debt is styled by the pleader a count in case. New London City Nat. Bank *v.* Ware River R. Co., 41 Conn. 546. And a declaration on a bond commencing in debt and ending in covenant has been held good on demurrer. Gale *v.* O'Brian, 13 Johns. (N. Y.) 189. But a variance between the writ and declaration, the former being in debt and the latter in assumpsit, has been held fatal, even after verdict. Stamps *v.* Graves, 4 Hawks (11 N. Car.) 102.

In the King's Bench. — The style of the action varied with the different forms of action. The form given in the text was used in a declaration in assumpsit. Other forms were as follows:

(1) In Account. "That he render to the said *John Doe* a reasonable account for the time he was bailiff for the said *John Doe* in *Lancaster*, in the county of *Lancashire*, (or *receiver of the moneys of the said John Doe*)."

(2) In Annuity. "That he render unto the said *John Doe* the sum of £*50*, of lawful money of Great Britain, which is in arrear to the said *John Doe* of a certain annuity or yearly rent of £*100*, and which the said *Richard Roe* owes to the said *John Doe*."

(3) In Case. "Of trespass on the case."

(4) In Covenant "Of breach of covenant."

(5) In Debt. "That he render to the

ises.[1] For that whereas[2] (*Here set forth the cause of action in the words and figures to be found in the appropriate form under the particular title*).[3]

said *John Doe* the sum of £50, of lawful money of Great Britain, which he owes to and unjustly detains from him."

In actions by and against executors and administrators, in general, the words "owes to and" were omitted.

(6) In Detinue. "That he render to the said *John Doe* certain goods and chattels (or *deeds and writings*) of the value of £50, of lawful money of Great Britain, which he unjustly detains from him."

(7) In Trespass. "Of trespass."

(8) In Trover. "Of trespass on the case."

In the Common Pleas. — In account, annuity, assumpsit, case, debt, detinue, and trover, the style of the action was the same as in the King's Bench. In other actions, however, the words varied somewhat. They were as follows:

(1) In Covenant. "That he keep with him the covenant made by the said *Richard Roe* with the said *John Doe*, according to the force, form and effect of a certain indenture (or *articles of agreement* or *deed poll*) made between them," etc.

(2) In Replevin. "Wherefore he took the cattle (or *goods and chattels*) of the said *John Doe* and unjustly detained the same against sureties and pledges until," etc.

(3) In Trespass. "Wherefore, the said *Richard Roe* with force and arms (*Here recite the trespass at length, but without particularizing the time, number, quantity, or value, etc.*), and other wrongs to the said *John Doe* there did to the great damage of the said *John Doe*, and against the peace of our said lord the now king."

1. Commencement — *In the King's Bench.* — From the venue to this point is the commencement of the declaration, and the form given in the text is that used in a suit commenced by bill in the King's Bench. 2 Chit Pl. 12.

In the Common Pleas. — The commencement in the Common Pleas or when the action was in the King's Bench by original is given in 2 Chit. Pl. 17, as follows:

"*Richard Roe* was attached (or *summoned*) to answer *John Doe* of a plea of *trespass on the case* [and thereupon the said *John Doe* by *Jeremiah Mason*, his attorney, complains.]"

The omission of the words enclosed by [ ], while technically incorrect, was not demurrable. Dobson *v.* Herne, 1 B. & P. 366. The omission of the attorney's christian name was held to be an error in Hewson's Case, 1 Rolle 336.

In account, annuity, covenant, debt, and detinue, the defendant was stated to have been "summoned" to answer. But the fact that a declaration founded on an attachment averred that the defendant was in custody instead of stating that his goods were attached has been held immaterial. Miller *v.* McMillan, 4 Ala. 527.

In the Exchequer. — The commencement in the Exchequer is given in 2 Chit. Pl. 20, as follows:

"*John Doe*, a debtor to our sovereign lord the now king, cometh before the Barons of his Majesty's Exchequer, on the *tenth* day of *October*, in this same term, by *Jeremiah Mason*, his attorney, and complains by bill against *Richard Roe*, present here in court the same day, of a plea of *trespass on the case on promises.*"

Inferior Courts. — In declaring in a court of limited and special jurisdiction, it must be averred, generally, that the matters in question were within the jurisdiction of the court, or the declaration will be bad on demurrer. Horton *v.* Beckman, 6 T. R. 764; Grover *v.* Gould, 20 Wend. (N. Y.) 227. But this is not always necessary. 2 Chit. Pl. 21; Pegge *v.* Gardner, 1 Lev. 208; 1 Saund. Rep. 74.

For forms of commencements in such courts see 2 Chit. Pl. 21–24.

2. For that Whereas.— In trespass, the injury should be stated directly and positively, and not by way of recital, and therefore a declaration "For that whereas (or *wherefore*)" was bad on special demurrer. Hore *v.* Chapman, 2 Salk. 636; Amyon *v.* Shore, 1 Stra. 621; Com. Dig., tit. Pleader, c. 36.

3. Cause of Action — *Generally.* — In declaring either for a right detained or wrong committed, the plaintiff must state every material fact with certainty and precision. Kingsley *v.* Bill, 9 Mass. 198. But the direct averment of a fact is not necessary, if it is a necessary inference or a legal presumption from such facts as are averred. Lee *v.* Stiles, 21 Conn. 504; Tileston *v.* Newell, 13 Mass. 406; Dunning *v.* Owen, 14 Mass.

To the damage of the said *John Doe* of *£50*,[1] and therefore

157; M'Gee *v.* Barber, 14 Pick. (Mass.) 212.

Conditions Precedent. — The performance of conditions precedent must be averred. McLaughlin *v.* Hutchins, 3 Ark. 207; Childress *v.* Foster, 3 Ark. 252; Speer *v.* McLaughlin, 11 Ark. 732; Armor *v.* Fisk, 1 Colo. 148; Watson *v.* Hahn, 1 Colo. 385; Glover *v.* Tuck, 24 Wend. (N. Y.) 153. But it is not necessary to allege or excuse performance of a condition which is impossible. Armor *v.* Fisk, 1 Colo. 148.

Matters of Defense. — Matters of defense need not be pleaded. Booth *v.* Comegys, Minor (Ala.) 201; Newton *v.* Paddock, 2 Root (Conn.) 89

Time. — Time, when material, must be averred. Hogan *v.* Alston, 9 Ala. 627; Little *v.* Blunt, 16 Pick. (Mass.) 359; Anonymous, 1 Hayw. (1 N. Car.) 488. And a declaration which states the cause of action as having arisen subsequent to the date of the writ is bad on demurrer. Hotchkiss *v.* Judd, 12 Allen (Mass.) 447; Redick *v.* Orr, Tappan (Ohio) 158. But where, through an obvious clerical error, the promise was laid at a time subsequent to the commencement of the action, the error was held to be cured by verdict. Hawse *v.* Burgmire, 4 Colo. 313.

A failure to fill up a blank in the declaration with the day of the month and year, when the precise date is immaterial, cannot be taken advantage of by general demurrer. Nesbit *v.* Bradford, 6 Ala. 746. And when time is laid under a *videlicet*, the pleader is not required to prove time as alleged. Hogan *v.* Alston, 9 Ala. 627.

Special contracts must be truly described, and a material variance is fatal. Weir *v.* Pennington, 11 Ark. 745. And the consideration is an essential part of a contract, and must be truly and fully set forth, except it may be on notes and instruments which import a consideration. Hemmenway *v.* Hickes, 4 Pick. (Mass.) 497; Harris *v.* Rayner, 8 Pick. (Mass.) 541.

In declaring on a contract, a breach is sufficiently averred by alleging a request of performance in the terms of the contract. McGregory *v.* Prescott, 5 Cush. (Mass.) 67.

A declaration on an agreement within the statute of frauds need not allege that it is in writing. Price *v.* Weaver, 13 Gray (Mass.) 272; Elliott *v.* Jenness, 111 Mass. 29; Mullaly *v.* Holden, 123 Mass. 583.

Written instruments may be declared on by setting them out *in hæc verba* or by stating them according to their legal effect. Humphries *v.* Goulding, 3 Ark. 581; Lent *v.* Padelford, 10 Mass. 230. In the first case an omission or substitution of a word will be fatal, although not affecting the substance of the contract; in the second case it is sufficient to describe the contract substantially. M'Rae *v.* Raser, 9 Port. (Ala.) 122; Davis *v.* Campbell, 3 Stew. (Ala.) 319; Pharr *v.* Bachelor, 3 Ala. 237; Dickerson *v.* Morrison, 5 Ark. 316; Roysdon *v.* Sumner, 2 Ark. 465.

Notice. — When a matter lies equally in the knowledge of the plaintiff and defendant, an averment of notice is not necessary; as if it be an act to be done by a stranger. Lent *v.* Padelford, 10 Mass. 230.

Profert. — A profert is required only where oyer may be demanded. It is necessary in pleading instruments under seal, and want thereof is fatal on special demurrer. Commercial Bank *v.* Sparrow, 2 Den. (N. Y.) 97.

Separate Counts. — It is allowable in pleading to refer in a subsequent to a preceding count. Robinson *v.* Drummond, 24 Ala. 174; Morrison *v.* Spears, 8 Ala. 93; Mardis *v.* Shackleford, 6 Ala. 433; Rathbun *v.* Emigh, 6 Wend. (N. Y.) 407; Griswold *v.* National Ins. Co., 3 Cow. (N. Y.) 96; Freeland *v.* McCullough, 1 Den. (N. Y.) 414.

And Thereupon. — In pleading, the words "and thereupon," in their ordinary meaning, mark the succession of events in time, and do not necessarily exclude the existence of other material facts than those previously recited. Dennehey *v.* Woodsum, 100 Mass. 195.

Etc. — The "etc." is sufficient after the exceptions or the words which might properly be substituted have been once fully stated or set out in the pleading. 2 Chit. Pl. 480, note *f*.

1. Damages — *Generally.* — Where the writ and declaration are in proper form, except that there is no *ad damnum* clause, held, that the declaration should be erased from the docket. Deveau *v.* Skidmore, 47 Conn. 20. But an omission to lay damages in the declaration was not material where the writ claimed damages. Boddie *v.* Ely, 3 Stew. (Ala.) 182; Elliott *v.* Smith, 1 Ala.

he brings his suit, etc.[1]

Pledges[2] to prosecute { *William West* and *John Jones.*

2. Under Hilary Rules.

Form No. 6935.

In the *King's Bench* (or *Common Pleas* or *Exchequer of Pleas*).[3]
Tenth day of *February*, 1834.[4]
Middlesex.[5] *John Doe*, by *Jeremiah Mason*, his attorney (or *in his*

74. And it is not necessary that each count should close with an averment of damages. The general averment at the conclusion of the declaration will be referred to each count. Adams *v.* McMillan, 7 Port. (Ala.) 73. See, however, People v. Van Eps, 4 Wend. (N. Y.) 387.

A declaration commencing and concluding in case, but in the body setting forth a debt under a penal statute, seems to be sufficient without a demand for damages. Brooks *v.* King, 1 Jones L. (46 N. Car.) 45.

Abbreviation. — It is no error to abbreviate thus in a declaration: "Damages, one thous. dollars." Rice *v.* Buchanan, 1 W. L. J. (Ohio) 395.

Pounds.—The court will take notice of the value of pounds; accordingly, a declaration stating the amount of demand in pounds is good. Johnston *v.* Hedden, 2 Johns. Cas. (N. Y.) 274.

1. Conclusion — *In the King's Bench.* — This form was proper in every action by bill, except debt *qui tam* and trespass. 2 Chit. Pl. 16. In trespass, the conclusion is given in 2 Chit. Pl. 16, as follows:

"And other wrongs to the said *John Doe* then and there did, against the peace of our said lord the king, and to the damage of the said *John Doe* of £50, and therefore he brings his suit, etc."

In the Common Pleas. — The following form is given in 2 Chit. Pl. 19, as proper in all proceedings in the King's Bench, by original, or in the Common Pleas, except in debt *qui tam* and trespass.

"Wherefore the said *John Doe* saith, that he is injured, and hath sustained damage to the amount of £50, and therefore he brings his suit, etc."

In Trespass, the following form is given in 2 Chit. Pl. 19, as proper, to wit:

"And other wrongs to the said *John Doe* then and there did, to the great damage of the said *John Doe*, and against the peace of our lord the king; wherefore the said *John Doe* saith that he is injured, and hath sustained damage to the amount of £50, and therefore he brings his suit, etc."

In the Exchequer. — The following form is given in 2 Chit. Pl. 20, as proper, to wit:

"To the damage of the said *John Doe* of £50, whereby he is the less able to satisfy our said lord the king the debts which he owes his majesty at his said Exchequer; and therefore he brings his suit, etc."

Signature. — The omission of the plaintiff or his attorney to sign the declaration, if a defect, was cured by reference to the body of the declaration or any other part of the record. Phillips *v.* Malone, Minor (Ala.) 110.

2. Pledges to Prosecute. — The omission of pledges is not material. Read *v.* Brookman, 3 T. R. 157.

3. Name of Court. — By the Michaelmas Rules, 3 Wm. IV, every declaration was to be entitled in the proper court. Formerly the name of the chief clerk for enrolling pleas was prefixed to the declaration in actions by bill in the King's Bench. See Form No. 6934, *supra.*

4. Date of Filing. — By Hilary Rules, 4 Wm. IV, every pleading, as well as the declaration, was entitled of the day of the month and year when the same shall be pleaded, and bear no other time or date.

5. Venue. — By Hilary Rules, 4 Wm. IV, the name of the county was in all cases stated in the margin of the declaration, and was taken to be the venue intended by the plaintiff, and no venue was to be stated in the body of the declaration, or in any subsequent pleadings, provided that, in cases where local description was, at that time, required, such local description

own proper person) complains of *Richard Roe*[1] who has been summoned to answer (or *arrested at the suit of*) the plaintiff[2] (or *being detained at the suit of the plaintiff in the custody of the sheriff*) in an action *upon promises.*[3] For that whereas[4] (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title*).[5] To the damage of the plaintiff of £50; And therefore he brings suit, etc.[6]

II. IN THE UNITED STATES.

DELAWARE.

Form No. 6936.

In the *Superior* Court of the State of *Delaware*, in and for *New Castle* County.

John Doe
against
Richard Roe.

New Castle County, ss. *Richard Roe*[7] was summoned (or *attached*)

was to be given. The venue in the margin has hitherto been followed by a scilicet to denote the commencement of the first paragraph, but this is unnecessary.

1. Parties. — When the action was brought by or against particular persons, as assignees, or executors, the special character in which they sued or were sued was set forth. And in all cases the christian and surnames should be given. Petersd. Prec. in Pl. 3, note 4.

2. Parties Once Named. — The parties having once been named it is preferable to refer to them by the term "the plaintiffs," or "the defendants." Petersd. Prec. in Pl. 3, note 6.

3. Style of Action. — These words were, of course, varied according to the form of action; thus in *case* the commencement concluded "in an action upon the case," or in *debt*, "action of debt," etc.

This statement of the form of action was almost invariably introduced in the commencement of a declaration, but it appears to have been unnecessary, as nothing in the Hilary Rules required such a description. See also Petersd. Prec. in Pl. 3, note 7.

4. For that Whereas. — A declaration in trespass would have been demurrable unless the word "whereas" was omitted. Petersd. Prec. in Pl. 4, note 1. And see *supra*, note 2, p. 246.

5. Cause of Action. — See *supra*, note 3, p. 246.

6. Conclusion. — The general conclusion given in the text is found in Petersd. Prec. in Pl. 16.

The proper conclusion in trespass is given in Petersd. Prec. in Pl. 8, as follows:

"And other wrongs to the said plaintiff then did; against the peace of our said Lord the King, and to the damage of said plaintiff of £50; And therefore he brings suit, etc."

Pledges to Prosecute. — By Hilary Rules, 3 Wm. IV, it was ordered that the entry of pledges to prosecute, at the conclusion of the declaration, be in future discontinued.

7. Parties — *Generally.* — It seems that where a note is signed by a wrong name a declaration against defendant in his right name, counting the name by which he signed the note, is good. Prettyman *v.* Waples, 4 Harr. (Del.) 299. But an averment of a bond to "Eliza R." is not supported by evidence of one to "Sarah Eliza R." State *v.* Reading, 1 Harr. (Del.) 23.

Infants. — Where an infant sues by next friend, the admission to sue must be stated in the declaration. Wilson *v.* Vandyke, 2 Harr. (Del.) 29.

Lunatics. — A lunatic may sue by next friend without a commission of lunacy having been previously taken out. Allen *v.* Babcock, 1 Harr. (Del.) 348.

Partners. — A firm cannot sue in the firm name, but must set out its members. Roberts *v.* Rowan, 2 Harr. (Del.) 314.

to answer *John Doe* of a plea of *trespass on the case upon promises*;[1] and thereupon the said *John Doe*, by *Jeremiah Mason*, his attorney, complains for that whereas (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title*),[2] to the damage of the said *John Doe* of *one hundred* dollars, and therefore he brings his suit.

Pledges to Prosecute { *John Den.* *Richard Fenn.*

Jeremiah Mason, Attorney for Plaintiff.

1. Recital of Writ. — The declaration need not recite the writ in the caption. The recital is supposed, and may be supplied at any time. Burton *v.* Waples, 3 Harr. (Del.) 75.

2. Cause of Action — *Immaterial Allegations.* — All allegations heretofore usually inserted in declarations and other pleadings, which are not material or traversable, and which the party could not be required to prove, may be omitted, unless when they are required for the right understanding of allegations that are material. Del. Rev. Stat. (1893), p. 792, § 14.

Venue. — It shall not be deemed necessary in any declaration to lay the venue in the county in which the action is brought, nor to set forth in any manner the place in which an act is alleged to have been done, unless when, from the nature of the case, the place may be material or traversable. Del. Rev. Stat. (1893), p. 792, § 12. But where the *locus in quo* is material and traversable the venue must be alleged and proven. Parvis *v.* Truax, 7 Houst. (Del.) 574.

Conditions Precedent. — The performance of conditions precedent must be averred. Pierson *v.* Springfield F. & M. Ins. Co., 7 Houst. (Del.) 507; Easton *v.* Jones, 1 Harr. (Del.) 433, note *a*.

Record. — Where matter of record is the foundation of the action, the declaration must refer to it with a *prout patet per recordum*; but this is not necessary if the matter of record be merely inducement. Jarman *v.* Windsor, 2 Harr. (Del.) 162.

Statutes. — In pleading on a statute, a proviso or exception which is a part of the enacting clause must be negatived; a subsequent exception need not be pleaded, but is matter of defense. The distinction is between a proviso in the description of the offense and a subsequent exemption from the penalty. Silver *v.* Rhodes, 2 Harr. (Del.) 369; Socum *v.* State, 1 Houst. (Del.) 204; New Castle Common *v.* Stevenson, 1 Houst. (Del.) 451; Brinkley *v.* Jackson, 2 Houst. (Del.) 71.

Written Instruments. — An instrument must be declared on according to its legal effect, whatever its form. Higgins *v.* Bogan, 4 Harr. (Del.) 330. And when any deed, note or other instrument bears date of any place, it may be alleged to have been made at that place without any averment or suggestion that it was within the county in which the action is brought. Del. Rev. Stat. (1893), p. 792, § 13.

Where an instrument is set out in the pleadings, it must be accurately described, and the proof must support it accurately. State *v.* Reading, 1 Harr. (Del.) 23. See Reading *v.* State, 1 Harr. (Del.) 190. For where a party undertakes to set out an instrument by its tenor, *in hæc verba*, it becomes descriptive of the instrument itself, and any omission, or slight discrepancy, destroys the identity of the instrument pleaded and proved. State *v.* Houston, 1 Harr. (Del.) 230. Thus a variance in the date of an instrument declared on is fatal, the date being matter of description. Wilmington Bank *v.* Simmons, 1 Harr. (Del.) 331. And where a promissory note was declared on as being payable generally, but was in fact payable at a particular place, it was held that this was a fatal variance. Thornton *v.* Herring, 5 Houst. (Del.) 154.

While it is enough to set out as inducement to the action so much of the contract as will enable the plaintiff to sustain his case, yet he must set out truly what he undertakes to allege. Randal *v.* Wright, 1 Harr. (Del.) 34; State *v.* Houston, 1 Harr. (Del.) 230.

Profert. — If the loss of an instrument is stated in the declaration, this dispenses with the necessity of profert. Shrowders *v.* Harper, 1 Harr. (Del.) 444.

Separate Counts. — Two breaches of the same specific stipulation cannot be assigned in the same count. Jarman *v.* Windsor, 2 Harr. (Del.) 162.

DISTRICT OF COLUMBIA.[1]

Form No. 6937.

In the *Supreme* Court of the *District of Columbia*, the *sixteenth* day of *July*, 1898.

John Doe
against } At Law, No. *42130*.
Richard Roe.[2]

Plaintiff sues the defendant for (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title*).[3]

And the plaintiff claims $*10,000*, with interest thereon from the *fourth* day of *July*, 1897, (or *a return of said goods, or their value, and $10,000 for their detention*,) besides costs.

Caton & Milburn, Attorneys for Plaintiff.[4]

The defendant is to plead hereto on or before the *twentieth* day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

Caton & Milburn, Attorneys for Plaintiff.[5]

1. This form is set out in Dist. of Col. Supreme Ct. Rules (1898), No. 112.

2. **Parties.** — If the cause of action accrue to or against parties in some special character, for example, as executor, administrator, trustee, etc., it will promote brevity and clearness to state such character in the title of the cause, thus: "*John Doe, Executor of Samuel Short, Deceased*, plaintiff." The special character in which plaintiff sues shall not be considered to be in issue or necessary to be proved, unless by specific plea under oath as to the truth thereof the same be denied. Dist. of Col. Supreme Ct. Rules (1898), No. 112.

It was formerly held that in a suit by an administrator or executor, in his representative capacity, he must describe himself and make his claim "as" administrator or executor, describing himself "administrator" or "executor" being mere *descriptio personæ*. Fugate *v.* Bronaugh, 3 Cranch (C. C.) 65. But the form given in Dist. of Col. Supreme Ct. Rules (1898), No. 112, was held sufficient in Jordan *v.* Hamlink, 21 D. C. 189.

In a declaration against partners, it has been held that all the persons composing the firm must be named with an averment that they were joint partners, or joint traders, under the name or firm of (*naming it*). Lapeyre *v.* Gales, 2 Cranch (C. C.) 291.

3. **Cause of Action** — *Generally.* — Dist. Col. Supreme Ct. Rules (1889), No. 23, provides as follows: "The declaration shall state only the substantive facts necessary to constitute the cause of action without unnecessary verbiage and with substantial certainty."

Certainty.— Whatever is alleged must be set forth with certainty, and not in doubtful or ambiguous terms. Murphy *v.* Preston, 5 Mackey (D. C.) 514.

Time, when immaterial, need not be proved as stated in the declaration. McLaughlin *v.* Turner, 1 Cranch (C. C.) 476.

Profert. — In a suit upon a bond, where the bond is filed as a public record, it is not necessary to make profert of it in the declaration. U. S. *v.* Ritchie, 3 Mackey (D. C.) 162. But a plaintiff suing in the character of administrator or executor is bound to make profert of his letters. Fugate *v.* Bronaugh, 3 Cranch (C. C.) 65. Although the declaration need not set out where or by what authority the administration was granted. Jordan *v.* Hamlick, 21 D. C. 189; Cawood *v.* Nichols, 1 Cranch (C. C.) 180.

4. **Signature.** — Dist. of Col. Supreme Ct. Rules (1898), No. 20, provides as follows: "Every pleading shall be signed by the party or by counsel, showing in this way whether the party appear in person or by attorney, and not alone by stating the fact in the body of pleading."

5. **Notice to Plead.** — Dist. of Col. Supreme Ct. Rules (1898), No. 10, provides that a notice to plead shall be subscribed to every declaration in the form set forth in the text; and that "except this

FLORIDA.[1]

Form No. 6938.

Leon County, to wit.[2] *John Doe*, by *Jeremiah Mason*, his attorney, (or *in person*,) sues *Richard Roe*[3] for (*Here set forth the cause of action in the words and figures to be found in the appropriate form under the particular title*).[4] And the plaintiff claims *one hundred*

notice to plead, subscribed to the declaration, no rule to plead or demand of plea shall be necessary."

1. This form is given in Fla. Rev. Stat. (1892), § 1056.

2. Venue — *Where to be Laid.* —Where, in a local action, causes of action arising in different counties are joined, it is sufficient under our statute to lay the venue in the county in which the action is brought. Temple *v.* Florida Land, etc., Co., 23 Fla. 400.

When Sufficient. — Venue laid in the margin and not repeated in the body of the declaration is sufficient, though the action be local. Temple *v.* Florida Land, etc., Co., 23 Fla. 400. And when the venue is correctly laid in the margin it is sufficient, although a wrong venue is inserted in the body of the declaration. McKay *v.* Lane, 5 Fla. 268.

3. Parties — *Generally.* — As to parties to suits at law, see Fla. Rev. Stat. (1892), §§ 981–997.

Executors and Administrators. — In a suit by an administrator or executor in his representative capacity, he must describe himself and make his claim "as" administrator or executor, describing himself "administrator" or "executor" being mere *descriptio personæ*. Branch *v.* Branch, 6 Fla 314.

Infants. —A suit by "*John W. Paul*, next friend of *Esther J. Paul*, a minor," is not a suit in the name of the minor; it should be "*Esther J. Paul*, by her next friend *John W. Paul*." Paul *v.* Frierson, 21 Fla. 529. See Fla. Rev. Stat. (1892), § 982.

4. Cause of Action — *Generally.* — The declaration must allege every fact that is essential to plaintiff's right of action. South Florida Tel. Co. *v.* Maloney, 34 Fla. 338.

Knowledge by Defendant of Material Facts. — It is an admitted rule of pleading that where the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than in that of the defendant, the declaration ought to state that the defendant had notice of the same. And where a special averment of notice is necessary, it must be proved. Alabama, etc., R. Co. *v.* Rowley, 9 Fla. 508.

Statements which Need Not be Proved. — All statements which need not be proved, such as statements of time, quantity, quality and value, when these are immaterial; the statement of losing and finding and bailment; the statement of acts of trespass having been committed with force and arms; the statement of promises in *indebitatus* counts, and all statements of a like kind, shall be omitted. Fla. Rev. Stat. (1892), § 1038. And such averments which need not be made, or proved when made, may be stricken out or disregarded in the proof, except when they touch the identity of that which is necessary to be proved, in which event they become matter of description and must be proved as laid. Burrett *v.* Doggett, 6 Fla. 332.

Duplicity. — Surplusage of allegation not amounting to a statement of a distinct cause of action does not constitute duplicity. Liddon *v.* Hodnett, 22 Fla. 271.

Conditions Precedent. — Either party in an action may aver performance of conditions precedent generally, and the opposite party shall not deny such averments generally, but shall specify in his pleading the condition precedent the performance of which he intends to contest. Fla. Rev. Stat. (1892), § 1045. Thus an averment "that plaintiff performed each and every requirement by him contracted, as set forth in the contract," is not subject to demurrer because it fails to allege specially the performance of some particular condition precedent arising out of such contract. Wilcox *v.* Stephenson, 30 Fla. 377.

Private Statutes. — Private acts of the legislature shall not be pleaded specially, but printed copies thereof may be given in evidence without being specially pleaded. Fla. Rev. Stat. (1892), § 1041.

dollars[1] (or *a return of said goods or their value, and fifty dollars for their detention*).[2]

Jeremiah Mason, Attorney for Plaintiff.[3]

ILLINOIS.

Form No. 6939.

State of *Illinois*, } ss. *Circuit* Court of *Cook* County.
Cook County. } *October* Term, A. D. 1897.

John Doe, plaintiff in this suit, by *Jeremiah Mason*, his attorney, complains of *Richard Roe*, defendant[4] in this suit, in a plea of *trespass on the case on promises*: For that, whereas, the said defendant[5] heretofore, to wit, on the *first* day of *May*,[6] in the year of our Lord one thousand eight hundred and *ninety-seven*, at the county of *Cook*,[7] to wit, at the city of *Chicago* in the county of *Cook* aforesaid, (*Here set out the cause of action in the words and figures to be found in the appro-*

Profert. — It shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading; and if profert shall be made, it shall not entitle the opposite party to crave oyer or a set-out upon oyer of such deed or other document. Fla. Rev. Stat. (1892), § 1039. But it was formerly held that a plaintiff suing in the character of administrator or executor is bound to make profert of his letters. Sullivan *v.* Honacker, 6 Fla. 372.

1. Damages. — In an action of assumpsit, where no damages are stated in the declaration the defect is cured by verdict and judgment, especially when sufficient damages are stated in the writ. Broward *v.* Doggett, 2 Fla. 49. When the damages laid in the declaration are greater than are claimed in the præcipe and writ, the remedy of the defendant is to move to set aside the declaration for irregularity before pleading in bar. The plea is a waiver. Cooper *v.* Livingston, 19 Fla. 684.

2. The words enclosed by ( ) should be used where the action is brought to recover specific goods.

3. Signature. — While the declaration should in general be signed, the omission of the signature of plaintiff's attorney to an amended declaration, his name already being on the record, and the defendant having pleaded, is no ground for arresting or reversing the judgment. Huling *v.* Florida Sav. Bank, 19 Fla. 695.

4. Parties — *Generally.* — The declaration must state with certainty who are the parties to the suit, and they must prosecute and be prosecuted by their proper christian and surnames. Schmidt *v.* Thomas, 33 Ill. App. 109.

Executors and Administrators. — In a suit by an administrator or executor in his representative capacity, he must describe himself and make his claim "as" administrator or executor, describing himself "administrator" or "executor" being mere *descriptio personæ*. Brent *v.* Shook, 36 Ill. 125.

Unincorporated Society. — Where a number of persons associated in business are publicly known by a particular name in which they transact business, when sued they may be described as members of an association of that name. And they cannot defeat a recovery by showing that by their articles of association they adopted a different name. Boggs *v.* Olcott, 40 Ill. 303.

5. Defendant for Defendants. — The use of the word defendant, in the singular, for defendants in some parts of the declaration is not a material defect, where the meaning is obvious. Cutting *v.* Conklin, 28 Ill. 506.

6. Date. — The use of an abbreviation for the name of a month, as, for instance, Feb'y for February, is unimportant. Cutting *v.* Conklin, 28 Ill. 506.

7. Locus. — In transitory actions no locus need be averred beyond what is necessary to the venue, namely, the county. Read *v.* Walker, 52 Ill. 333.

priate form under the particular title,)[1] to the damage of the said

1. Cause of Action — *Generally.* — The declaration should pursue the writ as to both the character of the action and the extent of the demand. Weld *v.* Hubbard, 11 Ill. 573. And every fact the want of which of itself would defeat the action must be specially pleaded. Cox *v.* Reed, 27 Ill. 434 Unnecessary allegations, foreign and irrelevant to the cause, may be rejected as surplusage. Burnap *v.* Wight, 14 Ill. 301.

A declaration is, in law, sufficient if it properly avers facts which, with the legal presumptions therefrom, make a *prima facie* case. People *v.* Lane, 36 Ill. App. 649. And where the sense is obvious an error does not vitiate, as in the case of the omission of the word "not" in the averment of nonpayment, the sense being obvious from the context. Baldwin *v.* Banks, 20 Ill. 48.

Characters, Special Meaning of. — Where, in any trade or business, characters or letters are used which have not acquired a legal signification, their special meaning must be averred in a suit upon a contract embodied in such letters or characters in order to introduce parol proof in what sense they are used. American Express Co. *v.* Lesem, 39 Ill. 312.

Consideration. — In declaring on a contract not under seal and not implying a consideration, it is necessary expressly to state the particular consideration upon which it is founded. Indianapolis, etc., R. Co. *v.* Rhodes, 76 Ill. 285; Hulme *v.* Renwick, 16 Ill. 371. But a declaration on a sealed instrument need aver no consideration. Evans *v.* Edwards, 26 Ill. 279.

Conditions Precedent. — Where performance by the defendant depends on some act to be done or forborne by the plaintiff, or some other event, the plaintiff must aver the fulfilment of the condition or show some excuse. Continental L. Ins. Co. *v.* Rogers, 119 Ill. 474; Independent Order, etc., *v.* Paine, 17 Ill. App. 572, *following* People *v.* Glann, 70 Ill. 232; Williams *v.* Smith, 4 Ill. 524. And this, whether the condition is in the affirmative or in the negative, and whether it is to be performed by either of the parties or by a stranger. Independent Order, etc., *v.* Paine, 17 Ill. App. 572. It is not enough, moreover, to aver performance generally. The declaration should allege specially the fact and manner of the performance of each condition. People *v.* Glann, 70 Ill. 232. But where performance has been waived no proof thereof is necessary, for where it has been waived the condition is forever gone. Continental L. Ins. Co. *v.* Rogers, 119 Ill. 474.

Conditions Subsequent. — The declaration need not aver the performance of conditions subsequent: they are matter of defense. Rockford Ins. Co. *v.* Nelson, 65 Ill. 415.

Written Instruments. — In declaring on a written instrument, it may be described according to its legal effect. Curry *v.* People, 54 Ill. 263; Crittenden *v.* French, 21 Ill. 598. Or set out *in hæc verba.* And when set out *in hæc verba*, the legal effect is the same as if each fact therein was specifically averred. Continental L. Ins. Co. *v.* Rogers, 119 Ill. 474. And the pleader need not declare further its legal effect; the court will construe it for him. North *v.* Kizer, 72 Ill. 172. And where he avers its effect, the averment will be disregarded as mere conclusions of the pleader. Binz *v.* Tyler, 79 Ill. 248. Where a deed is so set out and its execution averred, there is in effect an averment of any covenant that may be implied therefrom, as of any such covenant the court will take notice. Sterling Hydraulic Co. *v.* Williams, 66 Ill. 393.

But in declaring on a written instrument which is ambiguous or refers to some matter not thereby fully identified, and so must be amplified by extrinsic matter, such matter should be introduced, if necessary to the cause of action, by an averment, and not as matter of description. Childs *v.* Laflin, 55 Ill. 156.

The misnaming, in the declaration, of the instrument declared on, as, for instance, calling an agreement a promissory note, does not vitiate. Smith *v.* Webb, 16 Ill. 105.

In an action on a written contract, the date, being matter of essential description, must be precisely averred. Germania F. Ins. Co. *v.* Lieberman, 58 Ill. 117. An averment that a writing was made on a particular day is equivalent to an averment that it bore date of that day. Walker *v.* Welch, 13 Ill. 674. And an averment "for that heretofore, to wit, on the *30th* day" of a certain month, the defendant made a

plaintiff of *one thousand* dollars,[1] and therefore he brings suit, etc.
Jeremiah Mason, Plaintiff's Attorney.[2]

MAINE.[3]

certain writing, etc., is thus an averment of a writing bearing that date. Germania F. Ins. Co. *v.* Lieberman, 58 Ill. 117.

Damages. — Where the damages are not the necessary result of the act complained of, and are thus not implied in law, they must be specially alleged. Olmstead *v.* Burke, 25 Ill. 86; Miles *v.* Weston, 60 Ill. 361; Adams *v.* Gardner, 78 Ill. 568; Horne *v.* Sullivan, 83 Ill. 30; Illinois Cent. R. Co. *v.* Phelps, 4 Ill. App. 238; Moline Water Power Co. *v.* Waters, 10 Ill. App. 159; Wabash, etc., R. Co. *v.* Lynch, 12 Ill. App. 365; Beidler *v.* Fish, 14 Ill. App. 623; Buckley *v.* Holmes, 19 Ill. App. 530.

Separate Counts. — The declaration may state the same cause of action in different counts, in order, by different forms of allegation, to meet the various possible phases of the proof. Lake Shore, etc., R. Co. *v.* Hessions, 150 Ill. 546. And separate and distinct causes of action cannot be set up in a single count. Louisville, etc., R. Co. *v.* Hill, 29 Ill. App. 582.

The statement of venue, title, parties, form of action, time and place in a declaration of several counts need not be repeated at large in each count, but may be made in counts after the first by reference merely. And these statements by reference will remain sufficient, though the first count is withdrawn. While the withdrawal of the count operates as a disclaimer of all right to recover on the ground therein alleged, it does not take it out of being as a subject of reference. Cleveland, etc., R. Co. *v.* Rice, 48 Ill. App. 51.

1. Ad Damnum. — Where the *ad damnum* is of a sum greater than the verdict, the declaration is in that respect sufficient, though the damages are alleged in the body of the declaration at a sum less than the verdict, the averment being under a *videlicet*. Chicago, etc., R. Co. *v.* O'Brien, 34 Ill. App. 155.

Profert by Executor or Administrator. — A plaintiff suing in the character of administrator or executor is bound to make profert of his letters. Collins *v.* Ayers, 13 Ill. 358.

Profert in the following form, "and the said plaintiffs bring into court here the letters showing their qualification as executors," was held to be sufficient profert in accordance with the most approved precedents and in the usual form. Linder *v.* Monroe, 33 Ill. 388.

2. Signature. — A declaration may be signed by attorneys in their partnership name. Zimmerman *v.* Wead, 18 Ill. 304.

3. Municipal Court. — Where the proceedings are in the municipal court, the declaration is as follows:

"State of *Maine*.

Kennebec, ss.

To the Sheriff of our said County of
(SEAL) *Kennebec*, or either of his Deputies, or either of the Constables of the City of *Augusta*, or either of the Towns in said County, Greeting.

We command you to attach the goods or estate of *Richard Roe*, of said *Augusta*, to the value of *twenty* dollars, and to summon the said *Richard Roe* (if he may be found in your precinct) to appear before our judge of our *Municipal* Court for the city of *Augusta*, in the county of *Kennebec*. to be holden at the *Municipal Court room*, in said *Augusta*, on *Monday*, the *twenty-third* day of *May*, A. D. 18*98*, at *nine* o'clock in the *fore*noon, then and there to answer unto *John Doe*, of said *Augusta*, in a plea of the *case* that (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title*); to the damage of said plaintiff (as he says) the sum of *twenty* dollars, as shall then and there be made to appear, with other due damages —

[And whereas the said plaintiff says that the defendant has not in his own hands and possession goods and estate to the value of —— dollars, which can be come at to be attached; but has entrusted to and deposited in the hands and possession of *Samuel Short* of *Augusta* in said county, trustee of the said defendant, goods, effects and credits, to the said value. You are commanded, therefore, to summon the said trustee (if he may be found in your precinct) to appear before said court, at the time and place aforesaid, to show cause, if any he has, why execution, to be issued upon such judgment as the plaintiff

Form No. 6940.

State of *Maine.*

Kennebec, ss. — To the Sheriffs of our respective Counties, or either of their Deputies, Greeting:

We command you to attach the goods and estate of *Richard Roe*, of *Augusta*, in the county of *Kennebec*, to the value of *six hundred* dollars, (and to summon the said defendant, if he may be found within your precinct, to appear)[1] before our justices of the *Supreme Judicial* Court, next to be holden at *Augusta*, within and for our said county of *Kennebec*, on the *first Tuesday* of *March*, 1*898*; then and there in our said court to answer unto *John Doe*[2] of *Augusta* aforesaid in a plea of the *case*, for that (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title*).[3] To the damage of the said plaintiff (as he says) the sum of *five hundred and fifty* dollars, which shall then and there be made to appear, with other due damages.[4] And have you there this writ, with your doings therein.

may recover against the said defendant in this action (if any), should not issue against his goods effects or credits, in the hands and possession of the said trustee.] And have you there this writ with your doings therein.

Witness, *A. G. Andrews*, our said judge, at *Augusta*, aforesaid, this *second* day of *May* in the year of our Lord one thousand eight hundred and *ninety-eight.*

A. G. Andrews, Judge."

The words enclosed by [ ] may be omitted where trustee power is not desired.

1. Capias and Attachment. — If it is desired to frame the writ as a capias and attachment, in lieu of the words enclosed by ( ) substitute the following, to wit: "And for want thereof to take the body of the said *Richard Roe* so that you have him."

2. Executors and Administrators. — In a suit by an administrator or executor in his representative capacity, he must describe himself and make his claim "as" administrator or executor, describing himself "administrator" or "executor" being mere *descriptio personæ*. Bragdon *v.* Harmon, 69 Me. 29. In such case the declaration need not set out where or by what authority the administration was granted. Brown *v.* Nourse, 55 Me. 230.

3. Venue. — A venue is sufficiently alleged in a declaration, where the agreement in suit with the prefix, "Penobscot, ss.," is declared *in hæc verba*, the count upon it alleging that the property sued for was situated (when attached and delivered to the defendants, as keepers for the plaintiff, as an officer) in Penobscot river, "in Penobscot county." Bean *v.* Ayers, 67 Me. 482. And a venue is sufficiently alleged in a declaration in a writ of entry if the land is described as being in a town which is within the county in which the action is brought, although it is not alleged to be in the county. Martin *v.* Martin, 51 Me. 366.

Venues are not required in transitory actions. Blackstone Nat. Bank *v.* Lane, 80 Me. 165.

Statutes. — Where a statute gives a special remedy upon particular facts, those facts must be specially alleged. Cape Elizabeth *v.* Lombard, 70 Me. 396.

Written Instruments. — A declaration reciting an instrument *in hæc verba* will not be rejected, provided that upon all the averments and recitals, taken together, a good cause of action is sufficiently stated. Bean *v.* Ayers, 67 Me. 482.

Separate Counts. — The second count in a writ need not allege that it is for a cause of action "other" than that of the first count. Ware *v.* Webb, 32 Me. 41. And an omnibus count of general assumpsit is not vitiated by referring to an invalid count in the same writ for a bill of particulars or specification. Cape Elizabeth *v.* Lombard, 70 Me. 396; Plummer *v.* Bowie, 76 Me. 496.

4. Trustee Process. — Where the writ is framed as a writ of attachment with trustee process, the following should be inserted at this point, to wit: "And

Witness, *John A. Peters*, chief justice of our said court, at *Augusta*, this *first* day of *February*, in the year of our Lord one thousand eight hundred and *ninety-eight.*

(SEAL) *John Hancock*, Clerk.

MARYLAND.[1]

Form No. 6941.

In the *Superior* Court of *Baltimore City*,

Baltimore City, to wit:[2]

John Doe, plaintiff,[3] by *Jeremiah Mason*, his attorney, sues *Richard Roe*[4] for (*Here state the cause of action in the words and figures to be found in the appropriate form under the particular title*).[5] And the plaintiff claims therefor $*500.00.*

Jeremiah Mason, Attorney for Plaintiff.

whereas the said plaintiff says that the said defendant has not in his own hands and possession goods and estate to the value of *six hundred* dollars aforesaid, which can be come at to be attached; but has entrusted to and deposited in the hands and possession of *Samuel Short*, of said *Augusta*, trustee of the said defendant, goods, effects and credits, to the said value, *three hundred* dollars: We command you, therefore, that you summon the said trustee (if he may be found in your precinct) to appear before our justices of our said court, to be holden as aforesaid, to show cause, if any he has, why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against his goods, effects or credits, in the hands and possession of said trustee."

1. This form of declaration is given in Md. Pub. Gen. Laws (1888), art. 75, § 23, p. 1099.

2. **Venue.** — Where the proper venue is laid in the body of the declaration, the county named in the margin may be rejected as surplusage. Hartford County *v.* Wise, 71 Md. 43. And the removal of a case does not necessitate a change of venue in the declaration. Calvert County *v.* Gibson, 36 Md. 229.

3. **Parties.** — The special character in which a party sues or is sued should be set out; and when suit is brought by a partnership, the names of the parties composing it must be stated in the declaration. Hirsh *v.* Thurber, 54 Md. 210. But where the persons are properly described as to their representative capacity in the writ, reference to them in the declaration as "the said plaintiffs" is sufficient. Sasscer *v.* Walker, 5 Gill & J. (Md.) 102. And no form of words is necessary to be used in an averment that the defendant is administrator; if enough is said to amount to an allegation that the defendant administered on the estate of the deceased, it will suffice. Giles *v.* Perryman, 1 Har. & G. (Md.) 164.

For forms of commencements and conclusions by and against particular parties see Md. Pub. Gen. Laws (1888), p. 1110 *et seq.*

Where an adult *feme sole* sues by her next friend and by attorney, the words "by her next friend" are obviously a misrecital, and surplusage. *Utile per inutile non vitiatur*, and it is not demurrable. Wilms *v.* White, 26 Md. 380.

4. **Formal Commencement.** — It shall not be necessary to state any formal commencement or conclusion to any declaration or other plea. Md. Pub. Gen. Laws (1888), p. 1093, § 4; Wilms *v.* White, 26 Md. 380.

5. **Cause of Action** — *Generally.* — Whatever facts are necessary to constitute the ground of action, defense, or reply, as the case may be, shall be stated in the pleading, and nothing more; and facts only shall be stated, and not arguments, or inferences, or matter of law or of evidence, or of what the court takes notice ex-officio. Md. Pub. Gen. Laws (1888), p. 1092, § 2; Pearce *v.* Watkins, 68 Md. 534; Cox *v.* Jones, 5 Gill & J. (Md.) 65. But any declaration which contains a plain statement of the facts necessary to constitute a ground of action shall be sufficient, and any plea necessary to form a legal defense shall be sufficient, with-

MASSACHUSETTS.

Form No. 6942.[1]

(Mass. Pub. Stat. (1882), c. 167, § 94.)

John Doe against *Richard Roe.* } *Middlesex, Sup.* Ct. Plaintiff's Declaration.

And the plaintiff says (*Here set forth the cause of action in the words*

out reference to mere form; this to apply to replications, rejoinders and all subsequent pleadings. Md. Pub. Gen. Laws (1888), p. 1092, § 3; Gott *v.* State, 44 Md. 319; Barton Coal Co. *v.* Cox, 39 Md. 1; Crichton *v.* Smith, 34 Md. 42.

Consideration. — A declaration which does not allege any consideration for the defendant's promise is defective upon motion in arrest. Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248. But see Md. Pub. Gen. Laws (1888), p. 1094, § 9.

Time and Place. — It shall not be necessary to state time or place in any declaration or plea, except in cases where time or place forms a part of the cause of action or ground of defense. Md. Pub. Gen. Laws (1888), p. 1093, § 5; Baltimore, etc., Turnpike Road *v.* Crowther, 63 Md. 558.

Written Instruments. — In declaring upon a written instrument, it is not necessary to set out its very words, but it may be pleaded according to its legal effect, and only its obligatory parts need be stated. Rich *v.* Boyce, 39 Md. 314. Hence in a suit on a promissory note reciting that it was secured by certain collateral, it is not necessary to set forth that fact. Rich *v.* Boyce, 39 Md. 314. But it must be set out in the exact words or according to the legal effect. Walsh *v.* Gilmor, 3 Har. & J. (Md.) 383. And the declaration must set out the contract substantially as made, or it will be bad for variance; although this rule does not generally apply to allegations of number, etc., except in those cases where they operate by way of limitation or description of other matters in themselves essential to the offense or claim. Hoke *v.* Wood, 26 Md. 453.

Damages. — In order to prevent a surprise upon the defendant, the plaintiff must specify particularly, in his declaration, all damages which are not the necessary consequences of the act complained of, and which are not therefore implied by law. Damages that do not necessarily result from the main fact alleged, though they might be the natural and even probable effect of it, are regarded as special damages, and as such must be set out in the declaration. Ellicott *v.* Lamborne, 2 Md. 131. But in an action for a breach of contract from which damages must necessarily arise, the general conclusion that the plaintiff has sustained damages is sufficient without charging damages in each of the counts. Howard *v.* Wilmington, etc., R. Co., 1 Gill (Md.) 311.

Clerical misprisions are construed to be not only mistakes of the clerk in court, but such slips in writing as a clerk of the party might make. Where a declaration concludes to the damage of the plaintiff instead of to the plaintiffs, the mistake is immaterial. Newcomer *v.* Kean, 57 Md. 121.

Surplusage. — When a count is substantially *ex contractu*, the words "contriving to injure and inflict a loss upon the plaintiff" do not make it a count in tort when the same may be wholly disregarded as surplusage. Soper *v.* Jones, 56 Md. 503.

Separate Counts.— The same cause of action may be declared on in different ways. Little *v.* Edwards, 69 Md. 499.

1. When Filed. — The declaration may be filed in the clerk's office on or before the day on which the writ is returnable, unless an arrest of the person is made. If there is an attachment of property, and the declaration and bill of particulars, when necessary, are not inserted in the writ, a copy thereof shall be furnished to the defendant or his attorney within three days after he has demanded the same in writing of the plaintiff or his attorney. Mass. Pub. Stat. (1882), c. 167, § 8.

When Inserted in Writ. — In actions of contract and actions of tort, unless an arrest of the person is made, the writ need not contain a declaration,

and figures to be found in the appropriate form under the particular title).[1]
Jeremiah Mason, Attorney for Plaintiff.

MICHIGAN.[2]

Form No. 6943.

State of *Michigan*,
In the *Circuit* Court,
For the County of *Montcalm*. } On the *first* day of *October*, A. D. 1896.[3]
County of *Montcalm*, ss.[4]

John Doe, plaintiff herein, by *Jeremiah Mason*, his attorney, com-

nor any description of the cause of action in which it is intended to declare, other than the name of the form thereof; but when in such actions in police, district and municipal courts, and before trial justices, the declaration is not inserted before the service of the writ, the defendant shall, upon motion, be entitled as of right to a continuance for at least seven days from the return day. Mass. Pub. Stat. (1882), c. 167, § 7.

Following Writ. — If an action is entitled in the writ one of tort, and the declaration contains only counts in tort, an amendment of the writ, whereby the words "or contract" are inserted after the word "tort," may be disregarded on demurrer to the writ and declaration. Bishop *v.* Weber, 139 Mass. 411.

1. Cause of Action — *Generally.* — The substantive facts necessary to constitute the cause of action may be stated with substantial certainty, and without unnecessary verbiage. Mass. Pub. Stat. (1882), c. 167, § 2, subs. 3. And no averment need be made which the law does not require to be proved. Mass. Pub. Stat. (1882), c. 167, § 2, subs. 2.

Written Instrument. — The declaration on a written memorandum given for money lent need not set forth a receipt for collateral, written on the back of the memorandum, in order that the memorandum may be put in evidence. Burr *v.* Joy, 151 Mass. 295.

Conclusions of Law. — An allegation in a declaration of a conclusion of law from the facts averred is not traversable, and is not admitted by a demurrer, and may be rejected as surplusage. Jones *v.* Dow, 137 Mass. 119.

Statute of Limitations. — A declaration need not show that the debt declared on is not barred by the statute of limitations. Blackler *v.* Boott, 114 Mass. 24.

Bill of Particulars. — In actions of contract, when either of the common counts is used, the plaintiff shall file a bill of particulars with his writ when the action is entered. The items in such bill shall be numbered consecutively, and it shall be deemed to be part of the record, and be answered or replied to as such. Mass. Pub. Stat. (1882), c. 167, § 10. For forms relating to bills of particulars see the title BILLS OF PARTICULARS, vol. 3, p. 473.

Profert by Administrator. — No profert of letters of administration is necessary, and the declaration need not set out where or by what authority the administration was granted. Langdon *v.* Potter, 11 Mass. 313.

2. Forms Under Hilary Rules. — The forms of declarations adopted under the new English rules prior to 1840 (Hilary Rules), so far as they are not inconsistent with either the statutes or the peculiar organization of the circuit courts, may be used; or the same may be drawn according to the forms heretofore in use. Mich. Cir. Ct. Rules, No. 3.

3. Title. — All papers, except process and pleadings, by which the cause is commenced, shall be entitled in the court and cause, and the plaintiff's name shall be placed first. Mich. Cir. Ct. Rules, No. 37. But it is not necessary to entitle any declaration, or other pleading in *Michigan*, of any term of the court, or of any day in term or vacation, nor shall it be necessary to mention the name of the state in the statement of the venue in any case. How. Anno. Stat. Mich. (1882), § 7777.

4. Venue. — A declaration is not demurrable for omitting venue. Danaher *v.* Hitchcock, 34 Mich. 516.

plains of *Richard Roe*, defendant[1] herein, of a plea of *trespass on the case upon promises*, filing this declaration as commencement of suit.[2] For that whereas (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title*),[3]

1. Parties — *Generally.* — Variance of declaration from summons in stating defendant's name is not a jurisdictional defect, and is amendable under How. Anno. Stat. Mich. (1882), § 7635. Bole *v.* Sands, etc , Lumber Co., 77 Mich. 239.

Corporations. — A general allegation that plaintiff or defendant is a corporation under the laws of this state, or descriptive words to that effect, is sufficient. Clark *v.* North Muskegon, 88 Mich. 309; Grand Rapids, etc., R. Co. *v.* Southwick, 30 Mich. 445; Palmiter *v.* Pere Marquette Lumber Co., 31 Mich. 183.

2. Declaration as Commencement of Suit. — For the statute authorizing the commencing of suit by declaration see How. Anno. Stat. Mich. (1882), § 7291 *et seq.*

It is proper and not unusual so to frame the commencement of the declaration as to indicate that it is filed in pursuance of the statute, and the following form in substance may be used: "*John Doe*, plaintiff in this suit, by *Jeremiah Mason*, his attorney, comes into this court, according to the form of the statute authorizing the commencement of suits by declaration, and complains of *Richard Roe*, defendant in this suit, of a plea" (*concluding as in the text*).

Suit Commenced by Capias. — Where the action is not commenced by filing declaration, but by capias ad respondendum, the declaration is as follows: "*John Doe*, plaintiff in this suit, by *Jeremiah Mason*, his attorney, complains of *Richard Roe*, defendant in this suit, being in custody, etc., of a plea" (*concluding as in the text*).

Suit Commenced by Summons. — Where the action is commenced by summons, the declaration is as follows: "*John Doe*, plaintiff in this suit, by *Jeremiah Mason*, his attorney, complains of *Richard Roe*, defendant in this suit, who has been summoned to answer the said plaintiff in an action of *trespass on the case*" (*concluding as in the text*).

3. Cause of Action — *Generally.* — A plain and clear statement of the facts constituting the wrong complained of is sufficient. Gooding *v.* Underwood, 89 Mich. 187; Antcliff *v.* June, 81 Mich 477; Ayres *v.* Toulmin, 74 Mich. 44; Merkle *v.* Bennington Tp., 68 Mich. 133; People *v.* Plymouth Plank Road Co., 31 Mich. 178; People *v.* Miller, 15 Mich. 354. And facts, and not the evidence of facts, nor conclusions drawn therefrom, should be stated. O'Neil *v.* Duluth, South Shore, etc., R. Co., 101 Mich. 437; Leland *v.* Goodfellow, 84 Mich. 357; Browne *v.* Moore, 32 Mich. 254; Picard *v.* McCormick, 11 Mich. 68; Bush *v.* Dunham, 4 Mich. 339. Mere conclusions of law may be regarded as surplusage. Williams *v.* Raper, 67 Mich. 427.

Separate Counts. — Two or more causes of action should not be joined in a single count. Bellant *v.* Brown, 78 Mich. 296; Perkins *v.* Hershey, 77 Mich. 512; Ives *v.* Williams, 53 Mich. 636; Schafer *v.* Boyce, 41 Mich. 256; Portage Lake Miners, etc., Benev. Soc. *v.* Phillips, 36 Mich. 22.

Statutes. — In an action based on a statutory liability, it has been held necessary to refer expressly to the statute, and by apt terms to show the source of right relied on, stating facts which bring the case within the statute. People *v.* Curtis, 95 Mich. 212; People *v.* Pendleton, 79 Mich. 317; Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538; Howser *v.* Melcher, 40 Mich. 189; Benalleck *v.* People, 31 Mich. 201; Myers *v.* Carr, 12 Mich. 63. But if the facts are stated, the objection that the declaration does not specifically refer to the statute, is waived by failure to demur. Hayes *v.* West Bay City, 91 Mich. 421; Fuller *v.* Jackson, 82 Mich. 480. And in Clark *v.* North Muskegon, 88 Mich. 310, it was held, on demurrer, that plaintiff is not required to refer expressly to the statute, provided he alleges facts which bring his case within its provisions.

Written Instruments. — In actions on bills of exchange or notes, a copy of the instrument may be filed and served with the declaration with the same effect as if it had been specially set out in the declaration. How. Anno. Stat. Mich. (1882), § 7646. And where a sealed instrument is set out in full in the declaration, no further profert is necessary. State University *v.* Detroit Young Men's Soc., 12 Mich. 138.

to the plaintiff's damage of *one thousand* dollars, and therefore he brings suit, etc.

Jeremiah Mason, Plaintiff's Attorney,[1]
316 Main Street, *Stanton, Mich.*[2]

MISSISSIPPI.

Form No. 6944.

State of *Mississippi*, } In the *Circuit* Court,
County of *Sunflower*.[3] } *October* Term, A. D. 1896.

John Doe, the plaintiff in this case, complains of *Richard Roe*,[4] the defendant, in an action of *trespass*. For that (*Here set forth the cause of action in the words and figures to be found in the appropriate form under the particular title*),[5] to the plaintiff's damage *two hundred* dollars.

1. Signature. — In all courts, the declaration must be signed by some one, and this signature is usually the test to determine who appears. Benalleck *v.* People, 31 Mich. 200.

2. Address of Attorney. — The business address of the plaintiff's attorney, in suits begun by declaration, shall appear upon the declaration. Mich. Cir. Ct. Rules, No. 3.

3. Venue. — The name of the county shall be stated in the margin of the declaration, and it shall not be necessary to state any venue in the body of the declaration, or in any subsequent pleading, nor to set forth in any manner the place in which an act is alleged to have been done, unless from the nature of the case the place be material or traversing. Miss. Anno. Code (1892), § 672.

4. Parties — *Generally.* — In actions on written instruments, the defendant may be sued by the initial letters or contraction of the christian name used by him in his signature to such writing. Miss. Anno. Code (1892), § 674. And when the plaintiff is ignorant of the defendant's name, such defendant may be designated by any name, and the pleading or proceeding amended when his true name shall be discovered. Miss. Anno. Code (1892), § 673.

Parties in Representative Character. — Parties suing in a representative character must describe themselves. Where the plaintiffs described themselves as "legal representatives," the declaration was held bad on general demurrer. Cushing *v.* Gibson, Walk. (Miss.) 87.

5. Cause of Action — *Generally.* — The declaration shall contain a statement of the facts constituting the cause of action in ordinary and concise language, and it shall not be an objection to maintain, in any action, that the form thereof should have been different. Miss. Anno. Code (1892), § 671. All that is required is a statement of the facts in ordinary and concise language. Lamkin *v.* Nye, 43 Miss. 241; Jordan *v.* Foxworth, 48 Miss. 608. The statute is said to abolish all forms of action. Evans *v.* Miller, 58 Miss. 120.

Proof of Unnecessary Averments. — The decisions in relation to the necessity of proving unnecessary averments in the declaration are not uniform; but except where the averment is descriptive of the subject matter to which it relates, it seems it will be unnecessary to prove it in all cases, where, if the converse of it were pleaded and proven, it would be an answer or defense. Thrasher *v.* Ely, 2 Smed. & M. (Miss.) 139; Hundley *v.* Buckner, 6 Smed. & M. (Miss.) 70.

Anticipation of Objections. — A declaration should not aver grounds relied on to avoid anticipated defense. That is the office of the replication. Brown *v.* Broach, 52 Miss. 536.

Statement of Consideration, When Necessary. — In declaring on a writing which is neither a deed, bill nor note, a consideration must be stated, and the omission to do so is not cured by verdict. Minor *v.* Michie, Walk. (Miss.) 24. And wherever the contract declared on does not import a consideration the declaration should set out the consideration. Willis *v.* Ives, 1 Smed. & M. (Miss.) 307.

Written Instrument. — It is an improper mode of pleading at law to set out the instrument sued on *in hæc*

Jeremiah Mason, Attorney for Plaintiff.[1]

NEW HAMPSHIRE.

Form No. 6945.

(N. H. Pub. Stat. (1891), c. 218, § 19.)[2]

The State of *New Hampshire.*

(SEAL) *Sullivan*, ss.

To *Richard Roe*,[3] of *Newport*, in said county:

We command you to appear at the *Supreme* Court, to be holden at *Newport*, in said county of *Sullivan*, on the *second Tuesday* of *October*

verba. Such instrument should be described according to its legal effect. Blackwell *v.* Reid, 41 Miss. 102; Marshall *v.* Hamilton, 41 Miss. 229; Lee *v.* Dozier, 40 Miss. 477; Berthe *v.* Biggs, 1 How. (Miss.) 195; Mullin *v.* Jelks, Walk. (Miss.) 205.

While the instrument on which an action is founded may by statute be filed with the declaration, and when so filed becomes a part of the record, it is not part of the declaration, and cannot be referred to in aid thereof. Whatever is material in such writing must be set out, by proper averments, according to its legal effect. Marshall *v.* Hamilton, 41 Miss. 229; Blackwell *v.* Reid, 41 Miss. 102.

A mere addition to the signature of the writing sued on, denoting the character in which a party signs it, or the purpose of the contract, as the words "in liquidation," appended to a partnership signature, may be safely omitted in the declaration. Fairchild *v.* Grand Gulf Bank, 5 How. (Miss.) 597.

If the declaration aver that the note sued on is due at a time prior to its date, it is a mere clerical error and cured by verdict. Shrock *v.* Bowden, 4 How. (Miss.) 426.

Statutes. — A declaration upon a statute giving an action which did not exist at common law should show by averment that the case is given by the statute and comes within its purview; but it is sufficient, if this be done, to a common intent. Scott *v.* Peebles, 2 Smed. & M. (Miss.) 546.

Damages. — Such damages as may be presumed necessarily to result from the breach complained of need not be stated, but if other special damages be claimed they must be stated. Vicksburg, etc., R. Co. *v.* Ragsdale, 46 Miss. 459; Burrage *v.* Melson, 48 Miss. 237.

In an action of debt, the plaintiff is not limited to the specific demand for damages made in the declaration, and he may recover the amount he is legally entitled to under the proof not to exceed the demand in the declaration. Hudson *v.* Poindexter, 42 Miss. 304. And though the declaration lay damages at a ludicrously excessive figure, it will not prevent plaintiff from recovering whatever he may show himself entitled to. Henry *v.* Shepherd, 52 Miss. 126.

Profert by Executor or Administrator.— A plaintiff suing in the character of administrator or executor is bound to make profert of his letters. Ligon *v.* Bishop, 43 Miss. 527.

1. Signature. — The pleading shall be signed by the party or his attorney. Miss. Anno. Code (1892), § 702.

2. In *New Hampshire* the declaration is inserted in the original writ or process. The form given in the text is where the declaration is inserted in the summons to defendant when property has been attached. For other forms of writs and process see N. H. Pub. Stat. (1891), c. 218, § 14 *et seq.*

3. Parties — *Generally.* — When the name of the defendant is unknown to plaintiff, the writ may be issued against him by a fictitious name, and, being duly served, it shall not for that cause be abated, but shall be amended on such terms as the court may order. N. H. Pub. Stat. (1891), c. 218, § 7. And where one sues in a representative capacity, the declaration should show that fact. Whittier *v.* Whittier, 31 N. H. 452; Low *v.* Tilton, 19 N. H. 272.

Executors and Administrators. — In a suit by an administrator or executor in his representative capacity, he must describe himself and make his claim "as" administrator or executor, describing himself "administrator" or "executor" being mere *descriptio personæ.* Keniston *v.* Little, 30 N. H. 318.

next, to answer to *John Doe*, of *Newport* in said county of *Sullivan*, in a plea of the *case* for that (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title*).[1] To the damage of the said plaintiff (as he says) the sum of *seven hundred* dollars. Which plea the said plaintiff has commenced against you, to be heard and tried at the said court; and your goods or estate are attached to the value of *eight hundred* dollars, for security to satisfy the judgment which may be recovered against you.

Fail not of appearance at your peril.

Witness, *Charles Doe*, Esquire, the *twentieth* day of *September*, A. D. 1898.

John McCullis, Clerk.

NEW JERSEY.

Form No. 6946.[2]

New Jersey Supreme Court of the *tenth* day of *February*, eighteen hundred and *ninety-eight*. *Bergen* County, ss. *Richard Roe*, the de-

1. Cause of Action — *Generally.* — Bad grammar will not vitiate a declaration if its fair meaning can be ascertained. Hovey *v.* Brown, 59 N. H. 114. But immaterial averments cannot be rejected as surplusage, unless every allegation which they go to identify by description, or to limit or define, may also be rejected. Boyce *v.* Cheshire R. Co., 42 N. H. 97; State *v.* Copp, 15 N. H. 212.

Statutes. — Where any qualification or exception is stated in the enacting clause of a statute, a declaration founded thereon must allege facts which bring the case within the qualification or exclude it from the exception. Clough *v.* Shepherd, 31 N. H. 490.

Private statutes and by-laws may be proved, though not set out, in pleading, where it is not necessary to state them as part of the cause of action. Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252.

Notice. — When necessary to be proved, special notice must be distinctly stated in the declaration. Hillsborough County *v.* Londonderry, 43 N. H. 451; Hicks *v.* Burns, 38 N. H. 141.

Damages. — Where the plaintiff seeks to recover special damages, they should be set forth circumstantially, in order that the defendant may be apprised of their nature. Woodbury *v.* Jones, 44 N. H. 206; Stevens *v.* Lyford, 7 N. H. 360. And the obvious intention of the pleader to allege special damages will not be affected by the mere fact that he commenced the allegation thereof as if it were a new count. Burnside *v.* Grand Trunk R. Co., 47 N. H. 554.

Profert. — Omission of profert where necessary is a defect to be taken advantage of by special demurrer. Probate Judge *v.* Merrill, 6 N. H. 256. Profert is unnecessary, except where a deed is the foundation of the action. Brown *v.* Copp, 5 N. H. 223.

Separate Counts. — A subsequent count may contain a general reference to matters stated with certainty in former counts without repeating them. Hitchcock *v.* Munger, 15 N. H. 97. But, in general, each count must stand or fall by its own merits. Rochester *v.* Roberts, 29 N. H. 360; Chapman *v.* Sloan, 2 N. H. 464; Cilley *v.* Jenness, 2 N. H. 87.

2. State of Demand. — All suits brought or commenced before any judge of any district court, which, under the former practice, would have been either actions of debt, covenant, assumpsit, or trespass on the case for injuries arising from breach of contract or the nonperformance of duties arising from contract, shall be in the name and style of actions upon contract, and in such cases the plaintiff may file a state of demand in the following or similar form, to wit:

"*District* Court of *Jersey City*, before *John Marshall*, Judge.

State of *New Jersey*, } ss.
Hudson County. }

John Doe }
against } In Contract.
Richard Roe. }

The plaintiff demands of the defend-

fendant in this suit, was summoned[1] to answer *John Doe*, the plaintiff therein, in an action upon *contract*,[2] and thereupon the plaintiff, by *Jeremiah Mason*, his attorney, complains: For that the defendant heretofore, to wit, (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title*);[3] to

ant *one hundred* dollars, in contract, for that whereas (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title*).

Jeremiah Mason, Attorney."

1. Recital of Writ. — The recital of a writ is considered as no part of a declaration, and hence a misrecital, as "summoned" instead of "attached," is not available error; nor will oyer of it be granted for the purpose of showing a variance. Bruen *v.* Ogden, 18 N. J. L. 124.

The allegation usual in the commencement of a declaration, "that the defendant is in custody," may be safely dispensed with. New Brunswick Bank *v.* Arrowsmith, 9 N. J. L. 284.

2. Style of Action — *Upon Contract.* — Actions of debt, covenant, assumpsit, and trespass on the case for injuries arising from breaches of contract or the nonperformance of duties arising from contract, shall hereafter be styled in the process and pleadings actions upon contract, and counts for the said causes of action may be joined in the same suit. Such joinder of causes of action shall not, however, deprive the defendant of any right of set-off or recoupment given by statute. N. J. Supreme Ct. Rules (1885), p. 15, § 15.

Of Tort. — Actions of trespass for injuries to property, real or personal, actions of trover and of trespass on the case for injuries to property, real or personal, shall hereafter be styled in the process and pleadings actions of tort, and counts for said causes of action may be joined in the same suit. N. J. Supreme Ct. Rules (1885), p. 15, § 16.

3. Cause of Action — *Generally.* — A declaration is good if it contains all that is necessary for the plaintiff to prove under a plea of the general issue in order to entitle him to recover. Beardsley *v.* Southmayd, 14 N. J. L. 534.

Conditions Precedent. — The plaintiff or defendant in any action may aver performance of conditions precedent generally; and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition precedent the performance of which he intends to contest. N. J. Gen. Stat. (1895), p. 2554, § 126. A general averment of performance by the plaintiff is sufficient. Vreeland *v.* Beekman, 36 N. J. L. 13; see also Ridgway *v.* Forsyth, 7 N. J. L. 98; Rice *v.* Porter, 16 N. J. L. 440; Patten *v.* Heustis, 26 N. J. L. 293; Hecht *v.* Taubel, 55 N. J. L. 421. Where the performance of a condition precedent is alleged in the declaration, the defendant, instead of pleading the general issue, may deny the alleged performance and put himself on the country; but where the condition and its performance are not alleged in the declaration, the defendant may set up noncompliance with the condition and conclude with a verification. Dewees *v.* Manhattan Ins. Co., 34 N. J. L. 244.

Statutes. — In an action founded on a penal statute, the subject of any exception in the enacting or prohibitory clause of the act must, in the declaration, be excluded by averment. But of any proviso or qualification in a separate substantive clause the declaration need not take notice: that must be introduced by way of defense. Clark Thread Co. *v.* Chosen Freeholders, 54 N. J. L. 265.

Exhibits. — If any writing, whereof a copy is annexed to the declaration, be referred to in the body thereof as so annexed, the said copy shall cure any defect by reason of not setting forth the same, or the insufficient setting forth of the same, in the body of the declaration; and in all cases where any copy of a writing signed by a party to the same shall be so annexed and referred to, the same shall be recorded with the pleadings, and form part of the record. N. J. Gen. Stat. (1895), p. 2554, § 123. But although a copy of the bond on which the suit is brought is annexed to the declaration, the court cannot take notice of it, if in the body of the pleading it is not referred to as so annexed. Harrison *v.* Vreeland, 38 N. J. L. 366.

Where a copy of the lease under seal is annexed and referred to in the body

the damage of the plaintiff *three thousand* dollars, and therefore he brings his suit, etc.[1]

Jeremiah Mason, Attorney of Plaintiff.

PENNSYLVANIA.

Form No. 6947.[2]

In the Court *of Common Pleas* No. *4*, of *Philadelphia* County.

John Doe against *Richard Roe.* } *October* Term, 1*898*. No. *313*.

City and County of *Philadelphia*, ss.

The plaintiff, *John Doe*, claims of the defendant, *Richard Roe*, the sum of *five hundred* dollars, with interest thereon from the *first* day of *January*, 1*898*, which is justly due, upon the cause of action whereof the following is a statement: (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title.*)[3]

of the pleadings as so annexed, it becomes part of the record: the defendant need not crave oyer and set it out on the face of the plea. Loeb *v.* Barris, 50 N. J. L. 382; Cole *v.* Smalley, 25 N. J. L. 374.

1. Conclusion. — The purpose of the conclusion "to the damage" is to give notice to the defendant of the extent of the plaintiff's claim, and where it is entirely omitted it may be treated as notice that only nominal damages will be insisted upon. Weber *v.* Morris, etc., R. Co., 35 N. J. L. 409.

Pledges to Prosecute. — The want of pledges to prosecute forms no valid objection to a declaration. New Brunswick Bank *v.* Arrowsmith, 9 N. J. L. 284, 290.

2. Forms of Action. — So far as relates to procedure, the distinctions heretofore existing between actions *ex contractu* are abolished, and all demands, heretofore recoverable in debt, assumpsit, or covenant, shall hereafter be sued and recovered in one form of action, to be called an "action of assumpsit." Bright. Pur. Dig. Pa. (1894), p. 1728, § 1. And the distinctions heretofore existing between actions *ex delicto* are abolished, and all damages heretofore recoverable in trespass, trover, or trespass on the case, shall hereafter be sued for and recovered in one form of action, to be called an "action of trespass." Bright. Pur. Dig. Pa. (1894), p. 1728, § 2.

The true intent and meaning of this act is that it applies only to the present acts of assumpsit, debt, covenant, trespass, trover and case, and that all other actions now existing shall remain as heretofore, and are in no way affected by the passage of this act. Bright. Pur. Dig. Pa. (1894), p. 1729, § 9.

3. Cause of Action — *Generally.* — The plaintiff's statement shall consist of a concise statement of his demand, as provided by the fifth section of the act of the twenty-first day of March, A. D. 1806. Bright. Pur. Dig. Pa. (1894), p. 1728, § 3; Pa. Ct. Rules (1892), p. 128, § 126*b*.

A statement which sets forth the circumstances on which the claim arises, and states the amount demanded, is sufficient. Blanchard *v.* Hunter, 7 Pa. Co. Ct. Rep. 552. Although the statement must still contain all the essential qualities of a declaration at common law. Emmens *v.* Gebhart, 7 Pa. Co. Ct. Rep. 522. But a common-law declaration containing different counts is not sufficient under this act, and will be stricken off. Rambo *v.* Nipple, 12 Pa. Co. Ct. Rep. 516.

The statement must aver facts, and not mere conclusions of law, sufficient to constitute a cause of action, and with particularity enough to notify defendant of the character and foundation of the claim he is to meet. Doriot *v.* Hagemann, 21 W. N. C. (Pa.) 556.

Amount Claimed. — The statement must contain a specific statement of the amount claimed to be justly due, otherwise it is demurrable. Schafer *v.* Brotherhood of Carpenters, etc., 22 W.

Jeremiah Mason, Plaintiff's Attorney.[1]

City and County of *Philadelphia*, ss.

John Doe, the plaintiff in the foregoing statement, being duly sworn (or *affirmed*) according to law, deposes (or *affirms*) and says, that the facts set forth in the foregoing statement as the basis of claim are true.

John Doe.

Sworn (or *affirmed*) to and subscribed before me this *tenth* day of *September*, 1*898*.

(SEAL) *Norton Porter*, Notary Public.

RHODE ISLAND.

Form No. 6948.

Providence, SC.

Supreme Court, *Common Pleas* Division,
Return Day,[2] *June 17*, A. D. 1*898*.

John Doe, of *East Providence*, in said county of *Providence*, com-

N. C. (Pa.) 312. Or must set forth facts from which a calculation of damages can be made. Kunkel *v.* Dundore, 47 Leg. Int. (Pa.) 94. But it is sufficient if the body of the statement contains an averment of the amount claimed. It is not necessary that such averment be in the affidavit. Prince *v.* Lindermann, 12 Pa. Co. Ct. Rep. 402.

1. Signature. — The statement shall be signed by the plaintiff or his attorney. Bright. Pur. Dig. Pa. (1894), p. 1729, § 4. And if not so signed it is a fatal defect. Com. *v.* Hoobaugh, 5 Pa. Dist. Rep. 502.

2. Declaration, When Filed — *Common Pleas.* — In any civil action at law, originally brought in the common pleas division of the supreme court, the plaintiff shall declare therein and file his declaration in the office of the clerk of the common pleas division with his writ on the return day thereof. R. I. Gen. Laws (1896), c. 238, § 1.

District Court. — In all civil actions in a district court, the declaration shall be filed with the writ at any time before the day and hour when the writ is returnable, or on said return day before the call of the docket; and the return day shall also be known as the entry day, and entry of appearance by the defendant shall be made on said day while said court is in session, excepting as provided in sections two and five of this chapter. R. I. Gen. Laws (1896), c. 237, § 1.

Writs issued by a district court shall be made returnable to such court on the days and hours provided by law, and at such place as the law directs, to be named in such writs, and shall be directed to the sheriff, his deputies, or to either of the town sergeants or constables of the county in which the suit shall be brought; and in case the defendant has estate, or in case any person upon whom it is necessary to make service of said writ be in any other county than the one in which the suit is brought, the writ may be also directed to the like officers of such county; and every such original writ may contain the declaration at length, or the declaration may be filed with the writ on the return day. R. I. Gen. Laws (1896), c. 252, § 7. When inserted in the writ, the declaration and writ are as follows:

"The State of *Rhode Island and Providence Plantations.*

Providence, SC.

To the Sheriff of the County of *Provi-*
(SEAL) *dence*, his Deputies, or to either of the Town Sergeants or Constables in the County of *Providence*, Greeting:

We command you to attach the goods and chattels and real estate of *Richard Roe*, of the city and county of *Providence*, in said county, and them in safe custody keep; and also to attach his personal estate in the hands or possession of *Leonard A. Ford*, of said city and county of *Providence*, as the trustee of the said *Richard Roe*, and also to

plains of *Richard Roe*,[1] of the city and county of *Providence*, in the custody of the sheriff, in an action of the *case*; for that the defendant *Richard Roe* at said *Providence*, on the *second* day of *January*, A. D. 1*898*, (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title.*)[2] To the plaintiff's damage *one thousand* dollars, as laid in his writ, dated the *seventeenth* day of *May*, A. D. 1*898*.

Wherefore he sues by his attorney,

Jeremiah Mason.

TENNESSEE.

Form No. 6949.

(Tenn. Code (1896), 4660.)[3]

attach his stock or shares in any banking association or incorporated company, to the value of *two hundred* dollars, and also summon the said *Richard Roe* to answer to the complaint of *John Doe*, of *East Providence* in said county of *Providence*, at a *District* Court of the *Sixth* Judicial District to be holden in the *Providence County Court-house*, in *Providence* in said county, within and for said district, on the *tenth* day of *June*, A. D. 1*898*, at *nine* of the clock in the *fore*noon, in an action of the case; for that (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title*). To the damage of the plaintiff (as he says) *three hundred* dollars

Hereof fail not, and make true return of this writ, with your doings thereon.

Witness, *William H. Sweetland*, Esq., Justice of the *District* Court of the *Sixth* Judicial District at *Providence*, this *tenth* day of *May*, in the year one thousand eight hundred and *ninety-eight*.

John Hancock, Clerk."

1. Parties. — No action shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added and summoned in and parties misjoined may be dropped by order of the court at any stage of the cause, as justice may require in the discretion of the court, and upon such terms as the court may order. Where any action has been commenced in the name of the wrong party as plaintiff, the court, if satisfied that it has been so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, may allow any other party or parties to be substituted, or added, as plaintiff or plaintiffs. R. I. Gen. Laws (1896), c. 233, § 23.

2. Cause of Action — *Generally.* — No summons, writ, declaration, return, process, judgment, or other proceeding in civil causes in any court, shall be abated, arrested, quashed, or reversed, for any defect or want of form, but the court shall proceed and give judgment according as the right of the cause and matter in law shall appear unto it, without regarding any imperfections, defects, or want of form, in such writ, declaration, or other pleadings, return, process, judgment, or proceeding whatsoever. R. I. Gen. Laws (1896), c. 235, § 3; Hawkins *v.* McNeal, 16 R. I. 386; Gorton *v.* Potter, 16 R. I. 493.

Consult also note 3, p. 246, *supra*.

Bill of Particulars. — Whenever an action shall be brought to recover a sum due on any book-account, or on money-counts, the plaintiff shall annex to his declaration, on filing the same, an account of the particulars of his claim, or, failing so to do within such time as may be fixed by the court, his action may on motion be dismissed by the court. R. I. Gen. Laws (1896), c. 239, § 9. For forms relating to bills of particulars see the title BILLS OF PARTICULARS, vol. 3, p. 473.

Profert by Executor or Administrator. — No profert of letters testamentary or of administration is necessary in *Rhode Island*. Ellis *v.* Appleby, 4 R. I. 462.

3. Code Forms. — Numerous forms of declarations and other pleadings are given in the *Tennessee* code, and any pleading which conforms substantially to these forms is sufficient. Tenn. Code (1896), § 4609.

John Doe
against
Richard Roe.[1]

The plaintiff sues the defendant for (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title*).[2]

Jeremiah Mason, Attorney for Plaintiff.

VERMONT.

Form No. 6950.

(Vt. Stat. (1894), § 5417.)[3]

State of *Vermont*, *Washington*, ss. } To any sheriff or constable of the state, Greeting:

By the authority of the state of *Vermont*, you are hereby commanded to attach the goods, chattels or estate of *Richard Roe*, of *Montpelier*, in the county of *Washington*, to the value of *four hundred* dollars, and him notify thereof according to law, and, for want thereof, take his body, if to be found within your precinct, and him safely keep, so that you have him to appear before the *County* Court next to be held at *Montpelier*, within and for said county of *Washington*, on

1. Parties. — Parties must be described by their christian and surnames, Cain *v.* Kersay, 1 Yerg. (Tenn.) 443.

2. Cause of Action — *Generally.* — The declaration shall state the plaintiff's cause of action. Tenn. Code (1896), §§ 4602, 4617. And contracts should be described according to their legal force and effect, slight variances not affecting the substance being immaterial. Deaton *v.* Tennessee Coal, etc., Co., 12 Heisk. (Tenn.) 650; Exchange, etc., Bank *v.* Swepson, 1 Lea (Tenn.) 355.

Conditions Precedent. — The performance of conditions precedent, or an excuse for nonperformance, must be alleged. Hyde *v.* Darden, 3 Heisk. (Tenn.) 515; Harmon *v.* Crook, 2 Yerg. (Tenn.) 127; Harwood *v.* Jarvis, 5 Sneed (Tenn.) 375.

Profert. — Profert shall be required as heretofore, and a demurrer may be filed for want thereof. Tenn. Code (1896), § 4608. And if profert be omitted, and the declaration be specially demurred to for that cause, it is fatal. The statutory provision is conclusive and the profert cannot be dispensed with. Everly *v.* Marable, 2 Yerg. (Tenn.) 113.

The *Tennessee* law as to profert varies from the common law only so far as profert is required to be made of unsealed instruments which are the foundation of the action; whereas, at common law, such instruments are not required to be shown by way of profert. Gardner *v.* Henry, 5 Coldw. (Tenn.) 458; Everly *v.* Marable, 2 Yerg. (Tenn.) 113.

In an action of debt upon a domestic judgment, profert of the original papers or an exemplification of them is not necessary. Gardner *v.* Henry, 5 Coldw. (Tenn.) 458.

Damages. — Special damages must be laid in the declaration. Rose *v.* Perry, 8 Yerg. (Tenn.) 156.

Separate Counts. — The declaration may contain several statements or counts. Tenn. Code (1896), § 4617.

Profert of letters of administration is sufficiently made when the declaration avers the plaintiff's representative character, and adds "letters of administration being here shown to the court." McMillan Marble Co. *v.* Black, 89 Tenn. 118.

3. Is Part of the Writ. — By Vt. Stat. (1894), § 1065, the writ and declaration are blended in one instrument and the declaration is thereby made a part of the writ. Hence the writ may be referred to to aid a defective averment in the declaration proper, as that one of the plaintiffs is wife of the other. Church *v.* Westminster, 45 Vt. 380.

For other forms of original writs in *Vermont* see Vt. Stat. (1894), § 5417.

the *second Tuesday* of *September*, and also to notify him to cause his appearance herein to be entered with the clerk of said court on or before the expiration of *forty-two* days from the date hereof, then and there, in said court, to answer to *John Doe*, of *East Montpelier*, in a plea of the *case*, for that (*Here set forth the cause of action in the words and figures to be found in the appropriate form under the particular title*);[1] to the damage of the plaintiff *four hundred* dollars, for the recovery of which, with just costs, the plaintiff brings suit.

Fail not, but service and return make within *twenty-one* days from date hereof.

Dated at *Montpelier*, in the county of *Washington*, the *fifteenth* day of *August*, A. D. 1*896*.

(SEAL) *John Hancock*, Clerk.

VIRGINIA.

Form No. 6951.

Circuit Court of the County of *Albemarle*, to wit, *October* Rules, 1*896*.

John Doe complains of *Richard Roe*,[2] who has been summoned to

1. Cause of Action — *Generally.* — The declaration, except its technical terms, shall be in the English language. Vt. Stat. (1894), § 900. And the mark commonly used to denote dollars ($) is not part of the English language, within the meaning of the statute which requires pleadings, etc., to be in the English language. Clark *v.* Stoughton, 18 Vt. 50.

Obvious Error. — The omission of a nominative case in a pleading does not vitiate, where the sense is plain. Williams *v.* Willson, 1 Vt. 266.

Consideration. — The consideration should be set out, that the court may see that it is a good and valuable one — that it is legally sufficient. Paddock *v.* Jones, 40 Vt. 474; Marshall *v.* Aiken, 25 Vt. 328.

Statutes. — The public statutes of another state are treated as private statutes, as to the necessity of pleading them. Peck *v.* Hibbard, 26 Vt. 698; Herring *v.* Selding, 2 Aik. (Vt.) 12.

Time. — The omission in a declaration to allege the time when a material or traversable fact happened is, ordinarily, only matter for special demurrer, and is cured by verdict. Ammel *v.* Noonar, 50 Vt. 402.

Written Contract. — A written contract must be declared on according to its legal effect, and not by setting out its words. It cannot be referred to, and so be made a part of the declaration, as is done in chancery. Estes *v.* Whipple, 12 Vt. 373. See also Royalton *v.* Royalton, etc., Turnpike Co., 14 Vt. 311.

Profert. — Where a deed is the foundation of the action, the declaration must make profert of it, though professed to be set out *in hæc verba*. Austin *v.* Dills, 1 Tyler (Vt.) 308. But the omission of a profert, when necessary, is only cause for special demurrer. Way *v.* Swift, 12 Vt. 390.

Matters of Record.—In declaring upon a matter of record of a justice court, it is not necessary to set forth the proceedings at large, as by a transcript, but only to aver the facts with a *prout patet per recordum*. Chittenden *v.* Catlin, 2 D. Chip. (Vt.) 22.

Separate Counts. — Where a declaration contains several counts, each for a separate cause of action, each count should be complete in itself, and not require aid by reference to the others. Where only such general reference is made, the court cannot be required to look into the pleadings and assort the parts, and appropriate them in aid of the needy counts. Holton *v.* Muzzy, 30 Vt. 365. See also Farnsworth *v.* Nason, Brayt. (Vt.) 192.

2. Parties. — It seems a declaration in behalf of a mercantile company by the name of the firm, not mentioning the partners' names, is good after verdict. Pate *v.* Bacon, 6 Munf. (Va.) 219; Totty *v.* Donald, 4 Munf. (Va.) 430; Murdock *v.* Herndon, 4 Hen. & M. (Va.) 200.

answer the said plaintiff of a plea of *trespass on the case in assumpsit.* For this, to wit, (*Here set forth the cause of action in the words and figures to be found in the appropriate form under the particular title*);[1] to the plaintiff's damage *four hundred* dollars.[2] And therefore he brings his suite.

Jeremiah Mason, p. q.

WEST VIRGINIA.

Form No. 6952.

State of *West Virginia*, } ss. In the *Circuit* Court thereof,
County of *Preston*. } at *October* Rules, 18*96*.

1. Cause of Action — *Generally.* — No action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the cause. Va. Code (1887), § 3246; Fulgham *v.* Lightfoot, 1 Call (Va.) 250; Horrell *v.* M'Alexander, 3 Rand. (Va.) 94. But where facts necessary to the gist of the action are not stated at all, the defect in a declaration is not cured by verdict. Chichester *v.* Vass, 1 Call (Va.) 83.

Within Jurisdiction of Court. — In a suit in a corporation court, it was necessary, at common law, that the declaration should state that the cause of action arose "within the jurisdiction of the court," and the want of these words could not be supplied by other equivalent words, or cured by verdict. Thornton *v.* Smith, 1 Wash. (Va.) 81. But otherwise in a district court. Turberville *v.* Long, 3 Hen. & M. (Va.) 309. But by statute this averment is no longer necessary in any case. Va. Code (1887), § 3244.

Venue. — It shall not be necessary, in any declaration or other pleading, to set forth the place in which any contract was made or act done, unless when, from the nature of the case, the place is material or traversable, and then the allegation may be as to a deed, note or other writing bearing date at any place that it was made at such place, or as to any other act, according to the fact, without averring or suggesting that it was at or in the county or corporation in which the action is brought, unless it was in fact therein. Va. Code (1887), § 3243. See Shaver *v.* White, 6 Munf. (Va.) 110.

Allegations Not Traversable Omitted.— All allegations which are not traversable, and which the party could not be required to prove, may be omitted, unless when they are required for the right understanding of allegations that are material. Va. Code (1887), § 3245. Where the declaration will be good without an averment of *scienter*, that averment may be treated as surplusage. Gerst *v.* Jones, 32 Gratt. (Va.) 518. And in actions of trespass, general averments that the defendant committed other wrongs, and that the acts charged were done with force and arms, and against the peace, may be omitted; and the plaintiff may prove all that he could have done if such averments had been inserted in the declaration. Va. Code (1887), § 3247.

Profert. — It shall be unnecessary to make profert of any deed, letters testamentary or commission of administration, but a defendant may have oyer in like manner as if profert were made. Va. Code (1897), § 3244.

Blanks. — An action for money had and received was adjudged good after verdict, although the sum received was left blank. Hall *v.* Smith, 3 Munf. (Va.) 550. And so of a declaration of assault and battery, where the time was left blank in the declaration. Digges *v.* Norris, 3 Hen. & M. (Va.) 268.

Conditions Precedent. — Where a condition precedent is alleged in the declaration to have been performed, or offered to have been performed, after the day appointed for its performance, the declaration will be fatally defective after verdict. Robertson *v.* Robertson, 3 Rand. (Va.) 68. But see Va. Code (1887), § 3449.

It is sufficient for a declaration to set out the performance of the condition precedent in the form of the condition. Smith *v.* Lloyd, 16 Gratt. (Va.) 295.

2. Damages. — The declaration is good although the damages are left blank therein. Digges *v.* Norris, 3 Hen. & M. (Va.) 268; Craghill *v.* Page, 2 Hen. & M. (Va.) 446; Taylor *v.* M'Clean, 3 Call (Va.) 557; Blane *v.* Sansun, 2 Call (Va.) 495.

John Doe complains of *Richard Roe* of a plea of *trespass on the case on promises*; for that whereas (*Here set out the cause of action in the words and figures to be found in the appropriate form under the particular title*);[1] to the damage of the plaintiff of *five hundred* dollars,[2] and therefore he brings his suit.

Jeremiah Mason, P. Q.

FEDERAL COURTS.[3]

Form No. 6953.

Circuit Court *of the United States*, in and for the District of *Rhode Island*.

1. Cause of Action — *Generally.* — No action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the case. W. Va. Code (1891), c. 125, § 9.

Unnecessary Averments. — All allegations which are not traversable, and which the party could not be required to prove, may be omitted, unless when they are required for the right understanding of allegations that are material. W. Va. Code (1891), c. 125, § 34. And in actions of trespass, general averments that the defendant committed other wrongs, and that the acts charged were done with force and arms, against the peace, may be omitted; and the plaintiff may prove all that he could have done if such averments had been inserted in the declaration. W. Va. Code (1891), c. 125, § 10.

Venue. — It shall not be necessary, in any declaration or other pleading, to set forth the place in which any contract was made or act done, unless when, from the nature of the case, the place is material or traversable, and then the allegation may be as to a deed, note or other writing bearing date at any place that it was made at such place, or as to any other act, according to the fact, without averring or suggesting that it was at or in the county in which the action is brought, unless it was in fact therein. W. Va. Code (1891), c. 125, § 32.

Within the Jurisdiction of Court. — It shall not be necessary, in any action, to aver that the cause of action arose or that the matter is within the jurisdiction of the court. W. Va. Code (1891), c. 125, § 33.

Profert. — It shall not be necessary to make profert of any deed, letters testamentary or commission of administration, but a defendant may have oyer in like manner as if profert were made. W. Va. Code (1891), c. 125, § 33.

Matter in Defeasance. — Matter in defeasance of the plaintiff's action need not be stated in the declaration. Wherever there is a circumstance the omission of which is to defeat the plaintiff's right of action, *prima facie* well founded, whether called by the name of a proviso or a condition subsequent, it must in its nature be a matter of defense and ought to be shown in the pleading by the opposite party. Simmons *v.* West Virginia Ins. Co., 8 W. Va. 474. But where, by reason of exceptions or provisos in a contract, a party is not in law absolutely bound, the declaration must notice the exceptions or provisos. Simmons *v.* West Virginia Ins. Co., 8 W. Va. 474.

2. Damages. — If a declaration contain several counts, and no damages are claimed at the end of each count, but the entire declaration concludes, "In all to the damage of the plaintiffs $500, and therefore they sue," it is sufficient. Postlewaite *v.* Wise, 17 W. Va. 1; see Kemble *v.* Herndon, 28 W. Va. 524.

3. Federal Courts. — The practice, pleadings, and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like cases in the courts of record of the state within which such circuit courts or district courts are held, any rule of court to the contrary notwithstanding. U. S. Rev. Stat. (1878), § 914. For forms of declarations in the various states see *supra*, Forms Nos. 6936 to 6952.

Of the *October* Term, A. D. 1896.

The United States of America, }
District of *Rhode Island.* } ss.

John Doe, who is a citizen of the state of *Massachusetts*, plaintiff in this suit, by *Jeremiah Mason*, his attorney, complains of *Richard Roe*, who is a citizen of the state of *Rhode Island*, defendant, who has been duly summoned to answer the plaintiff in a plea of *trespass on the case on promises.* For that whereas (*Here set forth the cause of action in the words and figures to be found in the appropriate form under the particular title*); to the damage of the said plaintiff of *five thousand* dollars, and therefore the said plaintiff brings his suit, etc.

Jeremiah Mason, Attorney for Plaintiff.

DECREES.

See the title JUDGMENTS AND DECREES.

DEDIMUS POTESTATEM.

See the titles ANSWERS IN EQUITY, vol. 1, *Form No. 1482 et seq.; DEPOSITIONS.*

DEFAMATION.

See the title SLANDER AND LIBEL.

DEFAULTS.

See the title JUDGMENTS AND DECREES.

DEFINITENESS AND CERTAINTY IN PLEADING.[1]

By Thomas E. O'Brien.

I. Notice of Motion to Make More Definite and Certain, 274.

II. Motion to Make More Definite and Certain, 274.

III. Order Granting Motion to Make More Definite and Certain, 279.

CROSS-REFERENCES.

For Forms relating to Amendment of Pleadings, generally, see the title AMENDMENTS, vol. 1, p. 712.

See also the title BILLS OF PARTICULARS, vol. 3, p. 473; *DEMURRERS, post*, 294; *and the GENERAL INDEX to this work.*

For matters of Procedure, see the title DEFINITENESS AND CERTAINTY IN PLEADING, 6 Encyclopædia of Pleading and Practice, p. 246.

1. Statutory Provisions. — Where one or more denials or allegations contained in a pleading are so indefinite or uncertain that the precise meaning or application thereof is not apparent, the court may require the pleading to be made definite and certain by amendment. N. Y. Code Civ. Proc., § 546, as *amended* Laws (1877), c. 416 (Birds. Rev. Stat. (1896), p. 2286, 69).

Analogous or similar statutes exist in the following states:

Arkansas. — Sand. & H. Dig. (1894), § 5771.

Colorado. — Mills' Anno. Code (1896), c. 4, § 60.

Indiana. — Horner's Stat. (1896), § 376.

Iowa. — Code (1897), § 3630.

Kansas. — 2 Gen. Stat. (1897), c. 95, § 123.

Kentucky. — Bullitt's Civ. Code (1895), § 134.

Minnesota. — Stat. (1894), § 5248.

Mississippi. — Anno. Code (1892), § 704.

Missouri. — Burns' Anno. Stat. (1896), § 430.

Nebraska. — Comp. Stat. (1897), § 5716.

New Mexico. — Comp. Laws (1897), § 2685, subs. 51.

North Carolina. — Code (1883), § 261.

North Dakota. — Rev. Codes (1895), § 5284.

Ohio. — Bates' Anno. Stat. (1897), § 5088.

Oregon. — Hill's Anno. Laws (1892), § 85.

South Carolina. — Code Civ. Proc., § 181 (Rev. Stat. (1893), p. 82, § 181).

South Dakota. — Dak. Comp. Laws (1887), § 4925.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4932.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2683.

Wyoming. — Stat. (1887), § 2475.

Federal Courts. — U. S. Rev. Stat. (2d. ed. 1878), § 914.

I. NOTICE OF MOTION TO MAKE MORE DEFINITE AND CERTAIN.[1]

Form No. 6954.

Supreme Court, *Albany* County.

John Doe, plaintiff,
against
Richard Roe, defendant.[2]

Please take notice that upon the affidavit and upon the pleadings (*naming them*) on file in this action, copies of which are herewith upon you served, a motion will be made by the undersigned, at the *special* term of the above entitled court, to be held at *the court-house* in the city of *Albany*, in said county, on the *tenth* day of *September*, 1897, at *ten* o'clock in the forenoon or as soon thereafter as counsel can be heard,* for an order requiring that the within complaint (or *answer* or *reply*) be made more definite and certain by amendment, in the following particulars, to wit, (*Here state specifically in what respect the pleading is indefinite and uncertain, and point out wherein it should be amended*),[3] with costs of this motion, and for such other and further relief as may be just.

Oliver Ellsworth, Attorney for *Defendant*,
140 Washington Street, *Albany*, *N. Y.*[4]

August 28, 1897.

To *Jeremiah Mason*, Esq., Attorney for the *Plaintiff*,
90 State Street, *Albany*, *N. Y.*

(*Affidavit of merits.*)[5]

II. MOTION TO MAKE MORE DEFINITE AND CERTAIN.[6]

1. *New York.* — Code Civ. Proc., § 546 (Birds. Rev. Stat. (1896), p. 2286, § 69). See list of statutes cited *supra*, note 1, p. 273, and cases cited *infra*, note 6.

Notice of the Motion Must be Given. — Jackins *v.* Dickinson, 39 S. Car. 436.

2. **For formal parts** of a motion in any particular jurisdiction consult the title MOTIONS.

3. **Notice Must be Specific.** — The notice must specify in what particular pleading should be corrected. Long *v.* Hunter, 48 S. Car. 179. See also *infra*, note 6.

4. **Office and Post-office Address.** — N. Y. Gen. Rules Prac. (Hun's Ct. Rules, 1896), No. 2.

5. **Affidavit of Merits.** — Before defendant's motion to make complaint more definite and certain can be entertained, he must either serve and file an affidavit of merits or refer to such service and filing as having been made. N. Y. Gen. Rules of Prac. (Hun's Ct. Rules, 1896), No. 23; Bingham *v.* Bingham, 1 Civ. Proc. Rep. (N. Y. Supreme Ct.) 166.

For form of such affidavit consult the title AFFIDAVITS OF MERITS, ETC., vol. 1, p. 637.

6. **Objection Must be Taken by Motion.** — The objection that a pleading is vague, indefinite or uncertain must be made upon the motion to make the pleading more specific.

Arkansas. — Ball *v.* Fulton County, 31 Ark. 379; Bushey *v.* Reynolds, 31 Ark. 657; Fordyce *v.* Merrill, 49 Ark. 277; Bush *v.* Cella, 52 Ark. 378; Ashley *v.* Little Rock, 56 Ark. 391; Sweet *v.* Desha Lumber Co., 56 Ark. 629; McFadden *v.* Stark, 58 Ark. 7; Dillahunty *v.* Little Rock, etc., R. Co., 59 Ark. 629; Johnson *v.* Douglass, 60 Ark. 39.

Colorado. — Rosenfeld *v.* Rosenfeld, 21 Colo. 16; Wason *v.* Frank, 7 Colo. App. 541; Travelers Ins. Co. *v.* Redfield, 6 Colo. App. 190.

Indiana. — American Wire Nail Co. *v.* Connelly, 8 Ind. App. 398; Bloomington *v.* Rogers, 9 Ind. App. 230; Nappanee *v.* Ruckland, 7 Ind. App. 361; Starkey *v.* Starkey, 136 Ind. 349; Penn-

Form No. 6955.

State of *Indiana*, *Posey* County. } In the *Posey Circuit* Court, *September* Term, 1897.

sylvania Co. *v.* Sears, 136 Ind. 460; Garard *v.* Garard, 135 Ind. 15; Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571; Dunkirk *v.* Wallace (Ind. App. 1896), 45 N. E. Rep. 614.

Iowa. — Webster *v.* Continental Ins. Co., 67 Iowa 393; McCormick *v.* Basal, 46 Iowa 235; Sieberling Co. *v.* Dujardin, 38 Iowa 403; Barthol *v.* Blakin, 34 Iowa 452.

Kansas. — Smith *v.* McCoole, 5 Kan. App. 713; Myer *v.* Moon, 45 Kan. 580; McPherson *v.* Kingsbaker, 22 Kan. 646.

Kentucky. — Posey *v.* Green, 78 Ky. 162; Pugh *v.* White, 78 Ky. 210.

Minnesota. — Colter *v.* Greenhagen, 3 Minn. 126.

Mississippi. — Jones *v.* Millsaps, 71 Miss. 10.

Missouri. — Gfeller *v.* Graefemann, 64 Mo. App. 162.

Nebraska. — Burr *v.* Boyer, 2 Neb. 265; Stevenson *v.* Anderson, 12 Neb. 83; Fitz *v.* Grosnicklaus, 20 Neb. 413; Darst *v.* Perfect, 42 Neb. 574.

New York. — Farmers' etc., Bank *v.* Sherman, 33 N. Y. 69; Kellogg *v.* Baker, 15 Abb. Pr. (N. Y. Super. Ct.) 286; Sere *v.* Coit, 5 Abb. Pr. (N. Y. Supreme Ct.) 481; Kerr *v.* Hays, 35 N. Y. 331; Simmons *v.* Simmons, 21 Abb. N. Cas. (N. Y. Supreme Ct.) 469; Cohen *v.* Jarecky, 90 Hun (N. Y.) 266; Dexter *v.* Fulton, 86 Hun (N. Y.) 433; Dougherty *v.* Horseheads, 73 Hun (N. Y.) 443; Rouget *v.* Haight, 57 Hun (N. Y.) 119; Marie *v.* Garrison, 83 N. Y. 14.

North Carolina. — Smith *v.* Summerfield, 108 N. Car. 284; Stokes *v.* Taylor, 104 N. Car. 394; Allen *v.* Carolina Cent. R. Co., 120 N. Car. 548.

Ohio. — Schrock *v.* Cleveland, 29 Ohio St. 499; Fornoff *v.* Nash, 23 Ohio St. 335; School Section 16, etc., *v.* Odlin, 8 Ohio St. 293; Lewis *v.* Coulter, 10 Ohio St. 451.

Oregon. — Wild *v.* Oregon Short Line, etc., R. Co., 21 Oregon 159; Freeksen, *v.* Turner, 19 Oregon 106; Jackson *v.* Jackson, 17 Oregon 110; Conroy *v.* Oregon Constr. Co., 23 Fed. Rep. 71.

South Carolina. — Garrett *v.* Weinberg, 50 S. Car. 310; Rutherford *v.* Johnson, 49 S. Car. 465; Spires *v.* South Bound R. Co., 47 S. Car. 28; Buist *v.* Salvo, 44 S. Car. 143; Burr *v.* Brantley, 40 S. Car. 538; Jackins *v.* Dickinson, 39 S. Car. 436; Westlake *v.* Farrow, 34 S. Car. 270; McCown *v.* McSween, 29 S. Car. 130; Chapman *v.* Charleston, 28 S. Car. 373.

South Dakota. — Busta *v.* Wardall, 3 S. Dak. 141; Hardy *v.* Purington, 6 S. Dak. 382.

Washington. — Fares *v.* Gleason, 14 Wash. 657; Wheeler *v.* Moore, 10 Wash. 309; Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648.

Wisconsin. — Allen *v.* Chicago, etc., R. Co., 94 Wis. 93; Johnston *v.* Northwestern Live Stock Ins. Co., 94 Wis. 117; Redmon *v.* Phœnix F. Ins. Co., 51 Wis. 292; Bue *v.* Ketchum, 51 Wis. 324; Riemer *v.* Johnke, 37 Wis. 258.

Wyoming. — Cone *v.* Ivinson, 4 Wyo. 203.

Federal Courts. — Proceedings in the district and circuit courts to make pleadings more definite and certain conform to the practice, pleading and forms existing at the time in the courts of the state within which such circuit, or district, courts are held. Rev. Stat. U. S. (2d ed. 1878), § 914; Chamberlain *v.* Mensing, 51 Fed. Rep. 669; Hagood *v.* Blythe, 38 Fed. Rep. 76; Herklotz *v.* Chase, 32 Fed. Rep. 433.

Must be in Writing. — A motion to make a pleading more definite and certain must be in writing. Alter *v.* Frick, 62 Mo. App. 453.

Supported by Affidavit, When. — *In Iowa*, if the reason for the motion exists outside of the pleadings, the motion must state the same and be supported by affidavit. Code (1897), § 3630.

Time of Making Motion — *Before Answer.* — The motion must be made before answer. Stevenson *v.* Anderson, 12 Neb. 83; German Nat. Bank *v.* Leonard, 40 Neb. 676; Smith *v.* Summerfield, 108 N. Car. 284; Allen *v.* Carolina Cent. R. Co., 120 N. Car. 548; Pugh *v.* White, 78 Ky. 210; Redmon *v.* Phœnix F. Ins. Co., 51 Wis. 292; Young *v.* Lynch, 66 Wis. 514; Neschke *v.* Wirth, 66 Wis. 319; Blumenthal *v.* Pacific Meat Co., 12 Wash. 331.

Before Trial. — Orman *v.* Mannix, 17 Colo. 564; Sylvis *v.* Sylvis, 11 Colo. 319; Park County *v.* Locke, 2 Colo. App. 508; Phenix Ins. Co. *v.* Arnoldy, 5 Kan. App. 174; St. Louis, etc., R.

Co. *v.* Snaveley, 47 Kan. 637; Barnsback *v.* Reiner, 8 Minn. 59.

In New York. — Motion must be made within twenty days from service of complaint. Gen. Rules of Ct., No. 22; Brooks *v.* Hanchett, 36 Hun (N. Y.) 70.

Where amended complaint is filed, motion must be made within twenty days from the time of filing such complaint. Walker *v.* Granite Bank, 1 Abb. Pr. N. S. (N. Y. Supreme Ct.) 404; Roosa *v.* Saugerties, etc., Turnpike Road Co., 8 How. Pr. (N. Y. Supreme Ct.) 237; New York Ice Co. *v.* Northwestern Ins. Co., 21 How. Pr. (N. Y. Supreme Ct.) 234; Simmons *v.* Simmons, 21 Abb. N. Cas. (N. Y. Supreme Ct.) 469.

When "time to plead or otherwise move" is granted, the motion may be made within that time. Hammond *v.* Earl, 5 Abb. N. Cas. (N. Y. Supreme Ct.) 105.

When extension of time is without any reservation of right to make a motion in respect to the complaint, it is fatal to an application to have the complaint made more definite and certain. Post *v.* Blasewirtz, (Supreme Ct.) 43 N. Y. Supp. 59; Brooks *v.* Hanchett, 36 Hun (N. Y.) 70.

Alternative Pleading. — The objection that a pleading is in the alternative should be made by motion, not by demurrer. Turner *v.* Keokuk First Nat. Bank, 26 Iowa 562. Daniels *v.* Fowler, 120 N. Car. 14.

Argumentativeness. — The remedy for this defect, which is one of form and not of substance, is by motion for an order to compel the party offering such pleading to make it more definite and certain. Dillahunty *v.* Little Rock, etc., Co., 59 Ark. 629; Daniels *v.* Fowler, 120 N. Car. 14; Smith *v.* Summerfield, 108 N. Car. 284.

Bill of Particulars. — Where a general allegation in the complaint is sufficient to make a good cause of action, the court will not compel the allegation of specific facts leading to the general conclusions alleged in the complaint. This office is served by a bill of particulars. McCreary *v.* Taylor, 38 Ark. 393; Lowenthal *v.* Philadelphia Rubber Works, (Supreme Ct.) 18 N. Y. Supp. 523; Langdon *v.* New York, etc., R. Co., 27 Abb. N. Cas. (N. Y. Supreme Ct.) 166; Jackman *v.* Lord, 56 Hun (N. Y.) 192; Whitner *v.* Perhacs, 25 Abb. N. Cas. (N.Y. Supreme Ct.) 130; Clegg *v.* American Newspaper Union, 7 Abb. N. Cas. (N. Y. Supreme Ct.) 59; Sloman *v.* Schmidt, 8 Abb. Pr. (N. Y. C. Pl.) 5. See title BILLS OF PARTICULARS, vol. 3, p. 473, for forms relating to bills of particulars.

Hypothetical Pleading. — Where a pleading is indefinite and uncertain, a motion to make more definite will not be granted if, after amendment, the pleading will still remain hypothetical. Goodman *v.* Robb, 41 Hun (N. Y.) 605.

Indefiniteness in Demand for Judgment.— A motion for a more specific statement will not lie for any indefiniteness in prayer or demand for judgment. Sieberling *v.* Dujardin, 38 Iowa 403.

Irrelevant and Redundant Allegations. — A motion to make more definite and specific allegations which are irrelevant and redundant will not be sustained. Spensley *v.* Janesville Cotton Mfg. Co., 62 Wis. 549; McCarville *v.* Boyle, 89 Wis. 651.

Narration of Evidence. — Motion cannot compel the disclosure of evidence in support of the pleading, and will be sustained only when the precise nature of the charge is not apparent. Kansas Pac. R. Co. *v.* McCormick, 20 Kan. 107; Lee *v.* Minneapolis, etc., R. Co., 34 Minn. 225; Bowers *v.* Schuler, 54 Minn. 99; Jackman *v.* Lord, 56 Hun (N. Y.) 192; Johnson *v.* Wilcox, etc., Sewing Mach. Co., 29 Fed. Rep. 373; Herklotz *v.* Chase, 32 Fed. Rep. 233; Hagood *v.* Blythe, 38 Fed. Rep. 76.

Uncertainty to be relieved against on motion is only such as appears upon the pleading itself, and not an uncertainty arising from some extrinsic facts as to what evidence will be produced to support it. Lee *v.* Minneapolis, etc., R. Co., 34 Minn. 225; Todd *v.* Minneapolis, etc., R. Co., 37 Minn. 358; Bowers *v.* Schuler, 54 Minn. 99; Brown *v.* Southern Michigan R. Co., 6 Abb. Pr. (N. Y. Supreme Ct.) 237; Orton *v.* Noonan, 18 Wis. 447.

But in Colter *v.* Greenhagen, 3 Minn. 126, it was held that proof outside of the pleading may be produced to satisfy the court that the allegations are intended to evade a direct averment which the pleader cannot, in conscience, make, and that the court may consider the nature of the allegations themselves, and the relations which the pleader sustained to the subject matter of them, as well as the words in which they are couched, to determine the propriety of compelling

John Doe, plaintiff, against *Richard Roe*, defendant. } Motion to make complaint more definite and certain.[1]

And now comes the above *defendant*, *Richard Roe*, by his attorney, *Oliver Ellsworth*, and moves the court that the *plaintiff* be required, by amendment, to make his *complaint* more definite and certain, in order that the precise nature of the *charge* may be apparent in the following particulars, namely, that the *plaintiff* be required to state:

[1. Whether any and, if so, what improvements were made to and upon the premises known by the street numbers *152* and *154 Third Avenue*.

2. Whether any additional taxes were imposed upon the premises known by the street numbers *152* and *154 Third Avenue* by reason of such additions and improvements, and, if so, the amount thereof.

3. The precise amount of all the additional taxes imposed, as alleged in the aforesaid *complaint*, and, if upon separate list, to state the same separately.][2]

And that the *defendant* have such other and further relief as to the court may seem proper.

Oliver Ellsworth, Attorney for the *Defendant*.

Form No. 6956.

(Precedent in Roe *v.* Elk County, 1 Kan. App. 219.)[2]

[State of *Kansas*, *Elk* County. } ss. In the *District* Court in and for the County and State aforesaid.

The Board of County Commissioners of Elk County, Kansas, plaintiff, against *R. W. M. Roe*, defendant. } Motion to make complaint more definite and certain.[1]

And now comes the defendant and moves the court to require the

more certainty and precision in their expression.

Waiver of Motion. — Filing of demurrer is a waiver of right to file motion for more specific statement. Fritz *v.* Grosnicklaus, 20 Neb. 413.

When Motion Will Not be Granted. — The motion is to be determined upon an inspection of the pleading, and if from such inspection the court can see, with reasonable certainty, the meaning of the allegations, and the cause of action intended therein to be set forth, the pleading will be held sufficient to resist a motion to make it more definite. American Nat. Bank *v.* Grace, 67 Hun (N. Y.) 432; Cook *v.* Matteson, 19 Civ. Proc. Rep. (Buffalo Super. Ct.) 321.

1. **For formal parts** of a motion in any particular jurisdiction consult the title MOTIONS.

2. **Based upon the facts** in Dudley *v.* Grissler, 37 N. Y. Super. Ct. Rep. 412. In the trial court the motion was denied, and on appeal it was held that the order denying the motion could not be reviewed in the appellate court, although the court stated that the defendant should have been informed more definitely and particularly of the facts constituting the breach of the covenant, and especially of the particulars stated in the motion.

3. It was held that this motion of the defendant to require the plaintiff to make his petition more definite and certain, and to make each count of the amended petition more definite, should have been sustained in the trial court and the action of the trial court in overruling said motion reversed.

plaintiff to make its petition more definite and certain in the following particulars:[1]][2]

1. By setting out and stating wherein the several amounts described in each cause of action were not legal claims against said county of *Elk*, and wherein and in what respect said claims were and are unlawful and in violation of law, and for what services said claims were presented, and when the same were paid, and how they were paid.

2. That the plaintiff be required to set out in each count to its amended petition when suit was commenced against the defendant, and when the same was terminated, and to set out what the order and judgment of the court in said suit were.

3. That the plaintiff be required to set out in its amended petition, and in each count thereof, separately, wherein the defendant did not honestly and faithfully discharge and perform the duties of his office as county commissioner.

4. That the plaintiff be required to set out separately and in each count, of its amended petition, wherein the said claim was not a legal claim against said county of *Elk*, and wherein the defendant had no legal right to receive same, and to set out fully wherein said claim was unauthorized by and in violation of law.

5. That the plaintiff be required to set out separately and in each count of its amended petition when demand was made on this defendant to pay or return to the plaintiff or to the county treasurer any of the sums sued for in this action, and how said demand was made, and by whom made.

6. That the plaintiff be required to set out fully, in its amended petition, wherein action could not be commenced against defendant on the several causes of action pretended to be set up in the plaintiff's amended petition, and who, if any one, prevented the commencement of said suit, and how the plaintiff was prevented from commencing suits against the defendant on the said several claims sued for in this action, and in what way the plaintiff was prevented from commencing suit on said claim, and who prevented said claim from being sued on.

7. That the plaintiff be required separately to state and number its several causes of action.

[*L. Scott*, Attorney for Defendant.][2]

1. Motion Must be Specific. — The motion to require a pleading to be made more definite and certain must state wherein and in what particular the pleading complained of is indefinite and uncertain, and the requests so presented to the court that they may be sustained or overruled, and not require the court to sift out and inquire if it may grant some part of the request. National State Bank *v.* Delahaye, 82 Iowa 34; Ambrose *v.* Parrott, 28 Kan. 494; Kerr *v.* Reece, 27 Kan. 338; Gilmore *v.* Norton, 10 Kan. 491; Truesdell *v.* Hull, 35 Minn. 468; O'Connor *v.* Koch, 56 Mo. 253; Fisher *v.* Coons, 26 Neb. 400; Rathbun *v.* Markham, 43 How. Pr. (N. Y. Supreme Ct.) 271; Long *v.* Hunter, 48 S. Car. 179; Nischke *v.* Wirth, 66 Wis. 398.

Motion will be denied unless it can be granted in the exact form presented to the court. McDuffie *v.* Bentley, 27 Neb. 380.

If the pleading consists of two or more paragraphs, a motion in a single specification and addressed to the paragraphs jointly is unavailing if either paragraph is not subject to such motion. Corns *v.* Clouser, 137 Ind. 201.

2. The matter enclosed by [ ] will not be found in the reported case, but should be added to render the form complete.

III. Order Granting Motion to Make More Definite and Certain.[1]

Form No. 6957.

At the *special* term of the *Supreme* Court, held within and for the county of *Albany*, at *the court-house* in *Albany*, in said county, on the *twentieth* day of *September*, 1897.

Present, the Honorable *John Marshall*, Justice (or *Judge*).[2]

John Doe, plaintiff,
against
Richard Roe, defendant.

Upon reading and filing (*Here enumerate the motion papers*), together with satisfactory proof of service of said notice of motion and papers upon *Jeremiah Mason*, attorney for *John Doe*, the *plaintiff* above named, and upon reading and filing (*Here specify papers, if any, filed by the plaintiff in opposition to the motion*), and upon hearing *Oliver Ellsworth*, attorney for the above *defendant* in argument, in support of said motion, and *Jeremiah Mason*, attorney for *plaintiff* (or *no one appearing*), in opposition;

Ordered, that the complaint (or *answer* or *reply of the plaintiff* or *defendant*) in this action be amended as follows, to wit, (*Here state particulars in which pleading is to be amended*),[3] and that within *ten* days from date of service of a copy of this order upon the *plaintiff's* attorney, a copy of the *complaint* (or *answer* or *reply*) as amended, be served upon the *defendant's* attorney; and it is further ordered, that the *plaintiff* pay to the *defendant ten* dollars, the costs of this motion.

Enter: *John Marshall*, J. *S.* C.

Form No. 6958.[4]

In the *Posey Circuit* Court, *September* Term, 1897.

John Doe, plaintiff,
against
Richard Roe, defendant.

Order that complaint (or *answer*) be made more definite and certain.[2]

1. *New York.* — Code Civ. Proc., § 546 (Birds. Rev. Stat. (1896), p. 2286, c. 69). See list of statutes cited *supra*, p. 273, note 1.

2. **For formal parts** of an order in any jurisdiction consult the title Orders.

3. **Order Must be Specific.** — The order should specify in what particulars the pleading is to be amended. Long *v.* Hunter, 48 S. Car. 179.

When the order specifies in what particulars the complaint is to be amended, and there is failure to comply with the order, complaint may be struck out on motion. Long *v.* Hunter, 48 S. Car. 179.

When the order fails to specify in what particulars the pleading is to be amended, and the pleadings, as amended, are uncertain and indefinite, the proper remedy is a motion to make the amended pleadings certain and definite, but not to strike out the amended pleadings on the ground that there has not been a compliance with the order requiring, in general terms, that the pleading be made definite and certain. Long *v.* Hunter, 48 S. Car. 179.

When Order Will be Granted. — It is only when the allegations are so indefinite and uncertain that the precise meaning and application thereof is not apparent that the court is authorized to direct the statement to be made more definite and certain. Winchester *v.* Browne, (Supreme Ct.) 27 N. Y. St. Rep. 359.

4. *Indiana.* — Horner's Stat. (1896), § 376. See list of statutes cited *supra*, note 1, p. 273.

And now comes the above named parties, by their attorneys, and the motion of the said *defendant*, *Richard Roe*, to make the complaint (or *answer*) more definite and certain coming on to be heard, and the counsel of the aforesaid parties having been heard, in argument,* the aforesaid motion is sustained by the court, and it is therefore ordered that within *ten* days from the date hereof the *plaintiff* amend his said *complaint* in the following particulars, namely: (*Here specify in what respect the complaint is to be amended.*)[1]

And upon failure of said *plaintiff* to amend his *complaint* as above directed, it is ordered that the said *complaint* be stricken out.

[And it is further ordered that the *defendant* in this action be granted *ten* days from the filing of said amended *complaint* in which to demur (or *answer*) or take other action in relation to the same.]

Form No. 6959.[2]

(*Commencing as in Form No. 6958, and continuing down to* *) and it appearing to the court that the plaintiff has combined several causes of action in a single count in his complaint, it is therefore ordered that within *ten* days from the date of this order the plaintiff correct his complaint by stating separately his causes of action in separate paragraphs and by numbering the same. (*Concluding as in Form No. 6958.*)

1. **Order Must be Specific.** — See *supra*, note 3, p. 279.

2. *Indiana.* — Horner's Stat. (1896), § 376. See list of statutes cited *supra*, p. 273, note 1.

Causes or Defenses Improperly Mingled.— Where several causes of action are improperly mingled in one complaint, the remedy is by motion to require plaintiff to make his complaint more definite and certain by stating severally his different causes of action. City Carpet Beating, etc., Works *v.* Jones, 102 Cal. 506; Blake *v.* Barnes, (Supreme Ct.) 30 N. Y. St. Rep. 299; Bass *v.* Comstock, 36 How. Pr. Rep. (N. Y. Ct. App.) 382; Commercial Bank *v.* Pfeiffer, 108 N. Y. 242; Hellams *v.* Switzer, 24 S. Car. 39; Holland *v.* Kemp, 27 S. Car. 623; Latimer *v.* Sullivan, 30 S. Car. 111; Westlake *v.* Farrow, 34 S. Car. 270; Riemer *v.* Johnke, 37 Wis. 258; Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648.

In Westlake *v.* Farrow, 34 S. Car. 270, it was held that where a complaint in a single count (so to speak) contained several allegations, some of which were appropriate to one cause of action and some to another, which it is claimed cannot be properly joined in the same action, the remedy is not by demurrer, but by a motion to make the pleading more definite by stating the two causes of action separately.

In McCown *v.* McSween, 29 S. Car. 132, in an action to foreclose a mortgage, plaintiff interposed an oral demurrer to defendant's answer, one of the grounds of which was the following: "I. That the defense and counterclaim set forth therein are improperly united; whereas they should be separately stated and intelligibly distinguished," etc. The court, in this case, said: "It is quite clear that the demurrer could not be sustained on the first ground stated. The defect * * * was remediable, not by demurrer but by a motion to make the allegation more distinct and specific," *citing* State *v.* Norris, 15 S. Car. 256.

Also in Buist *v.* Salvo, 44 S. Car. 143, it was held that while a demurrer might be interposed to the whole complaint or to one of the causes of action, still an objection to irrelevant paragraphs should be by motion, under Code Civ. Proc., § 181, and not under § 165.

DE HOMINE REPLEGIANDO.

I. THE WRIT, 281.
II. THE BOND, 283.

CROSS-REFERENCES.

For Forms in Habeas Corpus Proceedings, see the title HABEAS CORPUS.

I. THE WRIT.[1]

Form No. 6960.

(Fitzh. N. B. 66*E*.)[2]

The king to the sheriff of *Lincolnshire*, greeting: We command you, that justly and without delay you cause to be replevied *Richard*

1. Definition. — De homine replegiando is a writ which lies to replevy a man out of prison, or out of the custody of a private person, upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. This writ has been superseded almost wholly, in modern practice, by that of habeas corpus; but it is still used, in some of the states, in an amended and altered form. Black's L. Dict.

Precedents. — In Gurney *v.* Tufts, 37 Me. 130, the writ, omitting formal parts, was as follows:

"We command you, that justly and without delay, you cause to be replevied *John Gurney*, who (as it is said) is taken and detained in a place called *Alfred*, within our said county of *York*, by the duress of *Thomas P. Tufts*, of *Saco*, in the county of *York*, and is there unlawfully imprisoned and restrained of his liberty, by the said *Thomas P. Tufts*; that he, the said *John Gurney*, may appear at our *District* Court, for the *Western* District, next to be holden at *Alfred*, within and for our said county of *York*, upon the *third Monday* of *October*, A. D. 1851, then and there in our said Court, to demand right and justice against the said *Tufts*, for the duress and imprisonment aforesaid, and to prosecute his replevin as the law directs; provided that the said *John Gurney* shall, before his deliverance, give bond to the defendant, in such sum as you shall judge reasonable, and with two sufficient sureties, with condition to appear at said Court to prosecute his replevin against the defendant, and to have his body there, to be redelivered, if thereto ordered by the Court, and to pay all such damages and costs as may be awarded against him; and if this plaintiff is delivered by you at a day before the sitting of said Court, you are to summon the defendant to appear at said Court."

See also a form in Johnson *v.* Medtart, 4 Har. & J. (Md.) 24, in which case it was held that the writ could not issue from any of the courts of law in *Maryland*.

2. Other Forms. — For form of *pluries* writ, where he who apprehendeth the man do claim him as his villain and the same be returned by the sheriff upon the *alias* or *pluries* writ, see Fitzh. N. B. 67.

For a form directed to the constable of Dover, where a man be taken within the cinqueports, see Fitzh. N. B. 67*A*.

For a form directed to the keeper of the forest, where a man be taken by the officers of the forest, see Fitzh. N. B. 67*A*.

Roe and *Samuel Short*, whom you yourself have taken, and taken keep, as it is said; or, whom *John Doe* and *Leonard A. Ford* have taken, and taken keep, as it is said, unless they were taken by the special command of us, or of our chief justice, or for the death of man, or for our forest, or for any other right for which they may not be replevied according to the custom of *England*,[1] that we may hear no more clamor thereupon for want of justice. Witness *Richard, Lord Gowan* at *Westminster*, the *fifth* day of *May* in the *eighth* year of our reign.

Form No. 6961.

(Me. Rev. Stat. (1883), c. 101, § 3.)[2]

(SEAL) State of *Maine*.

Somerset, ss. To the sheriff of our county of *Somerset*, or his deputy, Greeting.[3]

We command you, that without delay you cause to be replevied, *Richard Roe*,[4] who, as it is said, is taken and detained in a place called *Skowhegan*, in our said county of *Somerset*, by the duress of *John Doe*, that he may appear at our supreme judicial (or *superior*) court,[5] next to be held at *Skowhegan*, within and for the county of *Somerset*, on the *third Tuesday* of *September next*, then and there in our said court to demand right and justice against said *John Doe* for the duress and imprisonment aforesaid, and to prosecute his replevin, as the law directs; provided that the said *Richard Roe*, before his deliverance, gives bond[6] to the defendant, in such sum as you judge reasonable, with *two* sufficient sureties, with condition to appear at said court to prosecute his replevin against the defendant, and to have his body there to be redelivered, if thereto ordered by the court, and to pay all such damages and costs as are awarded against him; and if the plaintiff is redelivered by you at a day before the sitting of said court, you shall summon the defendant to appear at said court.

Witness *John A. Peters*, Esquire, Chief Justice of our said court, at

1. For cases in which a man could not be replevied according to the law of *England* see Fitzh. N. B. 66*E*.

2. **Who Entitled to Writ.** — If any person is imprisoned, restrained of his liberty, or held in duress, unless by a lawful writ, warrant, or other process, civil or criminal, he may have the writ for replevying the person. Me. Rev. Stat. (1883), c. 101, § 1.

For cases in which it was held the writ would lie see Garland *v.* Williams, 49 Me. 16; Gurney *v.* Tufts, 37 Me. 130. The writ in this latter case is set out in note 1, p. 281, *supra*.

For cases in which it was held the writ would not lie see Nason *v.* Staples, 48 Me. 123; Farnsworth *v.* Richardson, 35 Me. 267; Hutchings *v.* Van Bokkelen, 34 Me. 126; Richardson *v.* Richardson, 32 Me. 560; Bridges *v.* Bridges, 13 Me. 408.

3. **To Whom Directed.** — The writ shall be directed to a proper officer and served, as soon as may be, at least fourteen days before the return day. Me. Rev. Stat. (1883), c 101, § 2.

4. **Brought in Whose Name.**—The writ can be brought only in the name of the person unlawfully imprisoned or restrained of liberty, although it may be at the procurement of another. Richardson *v.* Richardson, 32 Me. 560.

5. **Whence Issued, Where Returnable.**—The writ shall issue from and be returnable to the supreme judicial or either of the superior courts in the county where the plaintiff is confined. Me. Rev. Stat. (1883), c. 101, §§ 1, 2.

6. **Bond.**—For form of bond see *infra*, Form No. 6963.

Skowhegan, the *tenth* day of *August*, in the year of our Lord eighteen hundred and *ninety-eight*.

John Hancock, Clerk.

Form No. 6962.

(Mass. Pub. Stat. (1882), c. 185, § 43.)[1]

Commonwealth of *Massachusetts*.

Suffolk, ss. To the sheriff of our county of *Suffolk*, or his deputy, (SEAL) or to the special sheriff thereof, Greeting.[2]

We command you that justly and without delay you cause to be replevied *Richard Roe*,[3] who (as it is said) is taken and detained at *Chelsea*, within our said county, by the duress of *John Doe*, that said *Richard Roe* may appear at our *superior*[4] court next to be holden at *Boston*, within our county aforesaid, then and there in our said court to demand right and justice against said *John Doe* for the duress and imprisonment aforesaid, and to prosecute his replevin as the law directs:

Provided, said *Richard Roe* shall before his deliverance give bond[5] to said *John Doe* in such sum as you shall judge reasonable, with at least *two* sureties having sufficient within your county, and with condition to appear at our said court to prosecute his replevin against said *John Doe* and to have his body there ready to be redelivered, if thereto ordered by the court; and to pay all such damages and costs as shall be then and there awarded against him. Then, and not otherwise, are you to deliver him. And if said *Richard Roe* is by you delivered at any day before the sitting of our said court, you are to summon said *John Doe* by serving him with an attested copy of this writ, that he may appear at our said court to answer to said *John Doe*.

Witness *John Marshall*, Esq., at *Boston*, the *twentieth* day of *May* in the year 1*898*.

Joseph A. Willard, Clerk.

II. THE BOND.[6]

1. Who Entitled to Writ. — If a person is imprisoned, restrained of his liberty, or held in duress, unless in the custody of some public officer of the law by force of a lawful warrant of process, civil or criminal, issued by competent authority, he shall be entitled as of right to the writ of personal replevin, and to be thereby delivered in the manner hereinafter provided. Mass. Pub. Stat. (1882), c. 185, § 40. And see *supra*, note 2, p. 282.

2. To Whom Directed. — It shall be directed to the sheriff of the county or his deputy, or to the special sheriff thereof, and shall be served without delay by either to whom it is delivered. Mass. Pub. Stat. (1882), c. 185, § 42.

3. Description of Prisoner, if Unknown. — If the name of the defendant or person to be delivered is unknown or uncertain, he may be described and proceeded with in the writ of personal replevin, or in any process under the same, as is prescribed in relation to the writ of habeas corpus by sections eight and nine. Mass. Pub. Stat. (1882), c. 185, § 55.

4. Whence Issued, When Returnable. — The writ shall be issued from and returnable to the superior court in the county in which the plaintiff is confined, and shall be issued fourteen days at least before the return day. Mass. Pub. Stat. (1882), c. 185, § 41.

5. Bond. — For form of bond see *infra*, Form No. 6963.

6. Necessity For. — In those states where the writ still exists it is provided that no person shall be delivered thereon until a bond has been filed.

Form No. 6963.[1]

Know all men by these presents, that we, *Richard Roe*, of *Chelsea*, in the county of *Suffolk*, as principal, and *Samuel Short* and *William West*, both of said *Chelsea*, as sureties, are holden and stand firmly bound unto *John Doe* of *Boston* in said county of *Suffolk* in the sum of *five hundred* dollars, to the payment of which to the said *John Doe*, or his executors, administrators, or assigns, we hereby jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such, that whereas the above bounden *Richard Roe*, on the *twentieth* day of *May current*, sued out a writ of personal replevin returnable before the *Superior* Court to be holden at *Boston*, within and for the county of *Suffolk*, on the *first* Monday of *October next:*

Now if the above bounden *Richard Roe* shall well and truly appear at said *Superior* Court and prosecute his said action of replevin against said *John Doe* and have his body there ready to be redelivered if thereto ordered by the court and to pay all such damages and costs as shall be then and there awarded against him, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

In witness whereof we hereunto set our hands and seals this *twenty-first* day of *May*, A. D. 1*898*.

Richard Roe. (SEAL)
Samuel Short. (SEAL)
William West. (SEAL)

Me. Rev. Stat. (1883), c. 101, § 4; Mass. Pub. Stat. (1882), c. 185, § 44. And such security was required at common law. See *supra*, note 1, p. 281.

1. **For requisites of bond** see Forms Nos. 6961 and 6962, *supra*, and the following statutes:

Maine. — Rev. Stat. (1883), c. 101, § 4.

Massachusetts. — Pub. Stat. (1882), c. 185, § 44.

DELIVERY BONDS.

See the titles ATTACHMENT, ETC., vol. 2, p. 303; *BONDS AND UNDERTAKINGS (ACTIONS ON)*, vol. 3, p. 528; *DE HOMINE REPLEGIANDO, ante*, p. 281; *EXECUTIONS; REPLEVIN.*

DEMURRAGE.

By Charles E. Harris.

I. Actions for Demurrage Proper, 285.

II. Actions for Damages in Nature of Demurrage, 289.

CROSS-REFERENCES.

For other Forms in Actions for Demurrage, see the title CHARTER-PARTIES, vol. 4, p. 759.

I. Actions for Demurrage Proper.[1]

Form No. 6964.

(3 Wentw. Pl. 352.)[2]

Markham and Le Blanc.

Trin. Term, *49 Geo. III.*

London, ss. *Richard Moorson* complains of *Anthony Brough*, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of breach of covenant; for that whereas by a certain charter-party of affreightment, indented and made on the *tenth* day of *September*, A. D. *1789*, to wit, at *London* aforesaid, by the said *Richard* (by the name and addition of *Richard Moorson*, of *London*, owner of the good ship or vessel called the *Sally*, of the burthen of *four hundred and seventy* tons or thereabouts,

1. For the formal parts of a complaint, petition, declaration or libel see the titles Complaints, vol. 4, p. 1019; Declarations, *ante*, p. 244.

2. **Precedents.**—See also precedents in 3 Wentw. Pl. 341, 344, 364, 366.

When the contract was not under seal, the action was assumpsit. For a precedent in assumpsit see 1 Wentw. Pl. 218.

Under Hilary Rules.—The declaration under the Hilary Rules, omitting the formal parts, may be as follows:

"For the use of a ship or vessel of the plaintiff (or *whereof the plaintiff was master*), retained and kept on demurrage for a long time then elapsed, at the defendant's request." Petersd. Prec. in Pl. 162.

now in the river *Thames*, whereof *John Akenhead* is master), of one part, and the said *Anthony* (by the name and addition of *Anthony Brough*, of *London*, merchant), of the other part (one of which said charter-parties of affreightment, sealed with the seal of the said *Anthony*, the said *Richard* now brings here into court, the date whereof is the same day and year aforesaid): It was witnessed that the said owner, for the considerations thereinafter mentioned, had granted and letten the said ship to freight unto the said *Anthony*, who had accordingly hired and taken the same for the voyage, and upon the terms and conditions following: whereupon first the said owner did thereby, for himself, his executors and administrators, covenant, promise, and agree, to and with the said freighter, his executors, administrators and assigns, that the said ship should, with all convenient speed, depart from and out of the river *Thames*, and directly, as wind and weather would permit, sail and proceed to *Archangel*, or so near thereunto as she could safely come; where being arrived, and being tight, staunch, strong, and well manned, provided, and furnished, fitting for the voyage thereafter mentioned, and ready to load goods, she should stay *thirty* running days, if required, to commence and be accounted from the day of the said master's giving notice to the correspondents of the said freighter at *Archangel* of the ship's arrival at that port, and of her being ready to load goods; during which time the said master should load, receive, and take on board the said ship, of and from the said freighter, his factors or assigns, *one hundred and fifty-five* tons of iron, *eighty* tons of tallow, *fifty thousand* matts, and *five thousand* standard deals, or other goods equal to the said quantity of deals, or as much of the goods before described as the said ship would reasonably stow and carry in her, besides her tackle, apparel, provisions, and furniture; and the said *thirty* days being expired, and the said ship there loaded and dispatched, she should directly, as wind and weather would permit, sail and proceed to the port of *London*, and there stay *twenty* running days, if required, during which time the said master should unload and deliver unto the said freighter, his factors or assigns, all the goods of him or them loaded on board the said ship at *Archangel* aforesaid, and so on such delivery to end her voyage, the perils and dangers of the seas, and restraints of princes and rulers during the said voyage, always excepted; and further, the said owner did agree, that the said ship should be addressed to the correspondents of the said freighter at *Archangel*, in consideration whereof the said freighter did thereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree, to and with the said owner, his executors, administrators and assigns, that he the said freighter, his executors, administrators and assigns, should and would load and put on board the said ship at *Archangel* aforesaid, *one hundred and fifty-five* tons of iron, etc., or as much of all the said goods as the said ship could reasonably stow and carry as aforesaid, and at the port of *London* unload and discharge the same out of her the whole within the several days above limited for doing thereof, or days of demurrage thereinafter mentioned; and also well and truly pay, or cause to be paid unto the said owner,

his executors, administrators and assigns, in full, for the freight and hire of the said ship for the voyage aforesaid, the full and just sum of *six hundred* pounds sterling, and pay the same in manner following, to wit, *one-half* part thereof at and immediately on the unloading and delivery of the said goods at the port of *London*, and the remainder within *three* months next following, with average accustomed, and *two-third* parts of all port-charges and pilotage that should arise on the said ship at and from *Archangel* to the time she should be entirely unloaded of the said goods; and the said freighter did also agree, that after the several quantities of goods above-mentioned should be shipped and properly stowed on board the said ship, the said master might load and take on board her such goods as he should think proper, provided always, that it should and might be lawful to and for the said freighter, his factors, or assigns, to keep the said ship on demurrage, at his loading and unloading ports, *ten* days at each place if required, over and besides the several days above limited for her stay at the same, he or they paying unto the said owner, or his assigns, the sum or value of *three* pounds *ten* shillings sterling per day, day by day, as the same should grow due, any thing aforesaid to the contrary notwithstanding, as in and by the said charter-party of affreightment (relation being thereunto had) will amongst other things more fully and at large appear: And the said *Richard* in fact saith, that the said ship did, with all convenient speed, next after the making of the said charter-party of affreightment, to wit, on the *tenth* day of *September* aforesaid depart from and out of the river *Thames*, and did directly, as wind and weather would permit, sail and proceed to *Archangel* in the said charter-party of affreightment mentioned, and that the said ship or vessel being there arrived, being tight, staunch, and strong, and well manned, provided, and furnished, fitting for the voyage in the said charter-party of affreightment mentioned, and ready, to load goods; the said master did afterwards, to wit, on the *tenth* day of *October*, A. D. *1789*, give notice to the correspondents of the said freighter at *Archangel* aforesaid (to whom the said ship was addressed), of the said ship's arrival at that port, and of her being ready to load goods in manner aforesaid: And the said *Richard* in fact further says, that the said ship being thereto required, did stay at *Archangel* aforesaid *thirty* running days, commencing and being accounted from the day of the said master's giving such notice as aforesaid (being the time above limited for her stay at the same); and also *eight* days over and besides the *thirty* running days (being so long kept on demurrage there by the said *Anthony*, his factors or assigns, during which respective times the said master did load, receive, and take on board the said ship of and from the said *Anthony*, his factor or assigns, a certain cargo, consisting of *one hundred and fifty-five* tons, etc., and that, at the expiration of the respective times aforesaid, the said ship being there loaded and dispatched, did directly, as the wind and weather would permit, sail and proceed to the port of *London*, and there, to wit, at the port of *London* aforesaid (being thereto required), did stay *twenty* running days (being the time above limited for her stay at the same), and also *six* days over

and besides the said *twenty* running days (being so long kept on demurrage there by the said *Anthony*, his factors and assigns), during which said last mentioned times, the said master unloaded and delivered unto the said *Anthony*, his factors or assigns, all the goods by him or them loaded on board the said ship at *Archangel* aforesaid, and so on such delivery ended her said voyage, to wit, at *London* aforesaid; and although the said *Richard*, from the time of the making of the said charter-party of affreightment, hitherto hath always well and truly observed, performed, and fulfilled, and kept all and singular the covenants, clauses, and agreements, therein contained on his part and behalf to be observed, performed, fulfilled, and kept; yet, protesting that the said *Anthony* hath not well and truly observed, performed, and kept any thing in the same contained on his part and behalf to be observed, performed, fulfilled and kept; in fact the said *Richard* saith, that the said *Anthony* did not, during the respective times the said ship was so kept on demurrage as aforesaid, or either of them, pay unto the said *Richard* or his assigns the sum or value of *three* pounds *ten* shillings sterling per day, day by day, as the same did grow due, or any part thereof, nor hath he at any time since hitherto paid the same, or any part thereof to the said *Richard*, but hath hitherto wholly refused and neglected so to do, and therein wholly failed and made default, contrary to the form and effect of the said charter-party of affreightment, and of the said covenant of the said *Anthony* by him in that behalf made with the said *Richard* in manner and form aforesaid, to wit, at *London* aforesaid: and so the said *Richard* in fact says, that the said *Anthony* (although often requested so to do) hath not kept his said covenant so by him made with the said *Richard* as aforesaid, but hath broken the same, and to keep the same with the said *Richard* hath hitherto wholly refused, and still refuses so to do, to the damage of the said *Richard* of *eighty* pounds; and therefore he brings his suit, etc.

Pledges to prosecute { *John Doe* and *Richard Roe.*

Form No. 6965.

(Conn. Prac. Act, p. 75, No. 111.)[1]

(*Commencement of writ as in Form No. 5912.*)

First Count.

1. On *May 1st*, 1879, the plaintiff and defendant signed a charter-party, for the hire of the ship, *Starlight*, of which Exhibit *A*, hereto annexed, is a copy.

1. **Sufficient Complaint.** — In Murray *v.* Worcester Coal Co., 51 Conn. 103, the complaint, which though not perfect in form was held sufficient, was as follows:

"1. That the plaintiff is the owner of the barge *James Murray*.

2. That he received on board the barge a cargo of coal consigned to the defendant at *Norwich*.

3. That he arrived at said port and having got into a proper berth for discharging notified the defendant of such fact and that he desired to be discharged.

4. That the defendant, without any fault on the part of the plaintiff, neglected and refused to discharge the plaintiff in a reasonable time, but improperly and unlawfully detained him and his said barge an unreasonable time," etc.

2. The plaintiff duly performed all the conditions thereof, on his part.

3. The defendant kept said ship on demurrage *nine* days over and above the periods agreed upon for loading and discharging in said charter-party.

4. Said demurrage has not been paid.

Second Count.[1]

1. All the statements of the first count are made a part of this count.

2. The defendant also detained the ship *four* days beyond the periods agreed on for loading, discharging, and demurrage in said charter-party, whereby the plaintiff, during all that time, was deprived of the use of the ship, incurred $*100* expense in keeping the same and maintaining the crew.

3. *Forty* dollars a day is a reasonable compensation for such detention and expense.

The plaintiff claims $*600* damages.

(*Conclusion of writ as in Form No. 5912.*)

II. ACTIONS FOR DAMAGES IN NATURE OF DEMURRAGE.[2]

Form No. 6966.

(Precedent in Miller *v.* Georgia R., etc., Co., 88 Ga. 567.)[3]

[*Georgia*, *Richmond* County.

To the *City* Court of said County.

The *Georgia Railroad Company* brings this its petition against *James Miller* and *John Smith* as partners doing business under the firm name of *Miller & Company*, and shows the following facts:][4]

1. On the *first* of *January*, 1*890*, and on various days thereafter up to the time of filing this complaint, petitioner stored on its tracks in said county certain car-loads of corn, wheat, grain and other produce, at the special instance and request of said *Miller & Company*, by means whereof said *Miller & Company* became indebted to your petitioner for said storage at the rate of *one* dollar per day for each and every of said car-loads, amounting to the aforesaid sum of $*892*.

2. Your petitioner further shows that said *Miller & Company* is further indebted to your petitioner in the sum of $*892*, besides interest; for that heretofore, to wit, before the *first* day of *January*, 1*890*, your petitioner, who is a common carrier of goods and merchandise,

1. The second count in this complaint is for damages in the nature of demurrage. For other forms see *infra*, Forms Nos. 6966 to 6968.

2. For the formal parts of a complaint, petition or declaration see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

For another form see the second count to Form No. 6965, *supra*.

3. It was held in this case that it is competent for a common carrier, whose customers at their option have the privilege of unloading for themselves the vehicles in which their freights are shipped, to adopt and enforce a reasonable regulation as to the time within which the vehicles may be unloaded free of any expense for storage, and to fix a reasonable rate per day at which storage will thereafter be charged for the use of such vehicles so long as they remain unloaded.

4. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

made and put in operation a reasonable rule[1] or regulation for the conduct of its business, of which rule or regulation said *Miller & Company* had notice, by virtue of which said *Miller & Company* became liable to pay your petitioner the sum of *one* dollar for every day, commencing *forty-eight* hours after notice of arrival, on each and every car-load of property stored by your petitioner on its tracks or elsewhere. Your petitioner shows that after said *first* day of *January*, 1*890*, and up to the time of filing this complaint, your petitioner has so stored a large number of car-loads of property, a schedule of which is hereunto annexed; by means whereof said *Miller & Company* have become indebted to your petitioner in the sum of $*892*, besides interest.

Your petitioner shows that said *Miller & Company* fail and refuse to pay said sum. [Wherefore petitioner prays that process may issue requiring said defendants to be and appear at the next term of this court to answer this complaint.

Joseph B. Cumming, Petitioner's Attorney.][2]

Form No. 6967.

(Precedent in Hall *v.* Barker, 64 Me. 339.)[3]

[(*Commencement of writ.*)][4] In a plea of the case for that the plaintiff, on the *fourteenth* day of *June*, A. D. 1*867*, was the master and had the sole possession, management and control of the schooner *Mabel Hall*, of *two hundred and forty* tons capacity, and on said day the defendants, in consideration that the plaintiff, at the special request of the defendants,[5] undertook and promised to carry in said schooner from *Vinalhaven*, in *Maine*, to the *Delaware Breakwater*, so

1. **The rule** or regulation referred to is as follows:

"Demurrage Rules.

Concerning loaded cars to be unloaded by consignees.

Bulk-meats, bulk-grain, hay, cotton-seed, lumber, lime, coal, coke, sand, brick, stone, wood, and such other freights in bulk or otherwise, as it may be a stipulation of the rates thereupon, or contract for the transportation thereof, or where it is the custom for the cars to be loaded and unloaded by the owners of the property, which is not unloaded from the cars containing it in forty-eight hours, not including Sundays or legal holidays, computed from ten o'clock a. m. of the day following the day of arrival, shall be subjected thereafter to a charge for demurrage of one dollar for each day or fraction of a day that said car or cars remain loaded in the possession of the company, by whom to be delivered as the last carrier at interest; it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and that when the period of such demurrage charge commences they are to remain accessible to the consignee for unloading purposes."

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. It was held in this case that where a bill of lading is silent as to demurrage, and the vessel is unreasonably detained at the port of delivery before being unloaded, the shipper will be liable to the master, in an action of assumpsit on the implied contract that his vessel would be discharged in a reasonable time after arrival, for the damages incurred in the nature of demurrage.

4. The declaration in *Maine* is inserted in the original writ. For the commencement and conclusion see *ante*, Form No. 6940.

5. **Parties Defendant.** — The shipper is the one against whom the action should be brought, as demurrage is only an extended freight. Jesson *v.* Solly, 4 Taunt. 53.

called, in the state of *Delaware*, a cargo of granite, and then and there to deliver the same to *Maj. Charles S. Stuart*, *Brevet Lieutenant Col. Engineers*, or his successor, at the port of *Delaware Breakwater*, for a freight of *one* dollar and *sixty* cents a ton, to be paid by the defendants, then and there undertook and promised that said consignee should be ready to receive and discharge said cargo immediately, and without any unreasonable delay, or to pay a reasonable compensation to the plaintiff as demurrage for all the time that the plaintiff, his crew and schooner were delayed beyond that time.[1] And the plaintiff avers that in pursuance of said promise and undertaking on the part of the defendants, he did take said cargo and carry the same to *Delaware Breakwater*, in *Delaware*, where he arrived and was ready to discharge the same on the *fourth* day of *July*, 1867, then and there gave due notice thereof to said consignee; but that the defendants, regardless of their said promise and undertaking, did not have said consignee or any other authorized person in readiness to receive and discharge said cargo on that day, or on any other day between that day and the *twenty-second* day of *July*, 1867; whereby the plaintiff, with his crew and schooner, was unreasonably delayed for the space of *nineteen* days from said *fourth* day of *July* to said *twenty-second* day of *July*, and lost their time, expenses and earnings of themselves and schooner; and the plaintiff avers that a reasonable compensation therefor, with interest to the date hereof, is *one thousand* dollars. Yet the defendants, notwithstanding their promise and undertaking as aforesaid, have not paid said sum, but though often thereto requested, neglect and refuse so to do.

Also for that the defendants, at *Augusta*, on the day of the date hereof, being indebted to the plaintiff in the sum of *one thousand* dollars for the demurrage of a certain schooner called the *Mabel Hall*, belonging to the plaintiff, before that time detained and kept at the *Delaware Breakwater*, in the state of *Delaware*, with a cargo of granite on board thereof, on demurrage for the space of *nineteen* days, in consideration hereof, then and there promised the plaintiff to pay him the same on demand; but though often thereto requested, have not paid the same, but neglect and refuse so to do. To the damage of the said plaintiff (as he says) the sum of *two thousand* dollars. [(*Conclusion of writ.*)][2]

Form No. 6968.

(Precedent in Sprague *v.* West, Abb. Adm. 548.)

To the Honorable *Samuel R. Betts*, [Judge of the *District* Court *of the United States* for the *Southern* District of *New York.*][3]

1. Damages. — In regard to damages in the nature of demurrage, it has been held that "assumpsit will lie for them because resulting from a breach of contract, but the count must be special, as for unliquidated damages in other cases of breach of an implied contract." Wordin *v.* Bemis, 32 Conn. 268. See also Hall *v.* Barker, 64 Me. 339; Cross *v.* Beard, 26 N. Y. 85; Clendaniel *v.* Tuckerman, 17 Barb. (N. Y.) 185.

2. The declaration in *Maine* is inserted in the original writ. For the commencement and conclusion see *ante*, Form No. 6940.

3. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

The libel of *James Sprague*, *Charles Keen*, *David Crowell*, and *Daniel Butler*, owners of the schooner *John R. Watson*, against *J. Selby West*[1] of said district, coal dealer, in a cause of contract, civil and maritime, alleges as follows:

First. — That in the month of *December last*, the said schooner lying at *Philadelphia* and destined on a voyage to *New York*, *Richard Jones & Co.* shipped on board the said schooner *one hundred and ninety-four* tons of coal, or thereabouts, to be delivered in like good order and condition, (the dangers of the sea only excepted,) to *J. Selby West*, or his assigns, to whom the same belonged, he or they paying the freight for the same at the rate of *ninety* cents per ton; and accordingly, the master of said schooner at *Philadelphia*, on the *fifteenth* day of *December last*, signed the usual bill of lading, a copy of which is hereto annexed.[2]

Second. — That shortly afterwards the said schooner set sail from *Philadelphia* to *New York* with the said coal on board, and there safely arrived on or about the *nineteenth* day of *December*; and on the next day *James Sprague*, the master of said vessel, caused a written notice to be served on *J. Selby West*, the consignee and owner of the coal, as follows: (*Here was set out a copy of the notice.*)[3]

Third. — That the said *West* accepted the said cargo, and commenced to receive the said coal, but refused to take it save in very small quantities and at irregular times, capriciously and vexatiously; and when urged and requested to take the same more expeditiously, replied that he would take it when it suited him, and no faster, and would keep the schooner as long as he wanted to, for the captain could not help himself; and in accordance with such threat, he detained the said schooner until the *fourth* day of *January*, *instant*, on which day *fifty* tons of coal were still on board and were taken out by him and his agents, and the schooner completely discharged.

1. Liability of Consignee and Freighter. — The court in this case said: "And probably, upon the more modern authorities (Abbott on Shipp. 304; Robertson *v.* Bethune. 3 Johns. (N. Y.) 342), a consignee cannot be made liable on an implied obligation for demurrage, no express agreement or stipulation being made in the charter-party or bill of lading, in respect to it or to lay days. But the doctrine is different in regard to the freighter. He is held liable to the vessel for any unnecessary detention in loading or unloading, although no express contract is made on the subject."

2. Contract for Demurrage Unnecessary. — That an express contract for demurrage is unnecessary to entitle the owner of the vessel to compensation for unnecessary detention see The M. S. Bacon *v.* Erie, etc., Transp. Co., 3 Fed. Rep. 344; Fulton *v.* Blake, 5 Biss. (U. S.) 371; Two Hundred and Seventy-five Tons of Mineral Phosphates, 9 Fed. Rep. 209; Reed *v.* Weld, 6 Fed. Rep. 304; The Norman, 16 Fed. Rep. 879; The William Marshall, 29 Fed. Rep. 328; Hawgood *v.* One Thousand Three Hundred and Ten Tons of Coal, 21 Fed. Rep. 681. See also The Mary Riley *v.* Three Thousand Railroad Ties, 38 Fed. Rep. 254; Riley *v.* A Cargo of Iron Pipes, 40 Fed. Rep. 605.

3. The notice was as follows:

"*New York, December 20, 1848.*

Sir: You will please take notice, that the schooner *John R. Watson*, under my command, and loaded with coal consigned to you, was ready to discharge cargo this morning, of which fact you have been duly notified. And you will further take notice, that demurrage will be demanded for every day she is detained.

Yours, etc.

James Sprague.

To *J. Selby West*, Esq."

Fourth. — That during the whole time the said schooner was so detained she was obliged to lie at the foot of *Forty-second* street, in the *North River*, that being the place designated in the bill of lading, in danger of being frozen up and compelled to winter here; and her crew were detained at the expense of the vessel, and *two* extra men and a horse were kept constantly waiting on the dock during very severe and cold weather, ready to deliver the coal whenever the said *West* should take it away. And the said *West* was often notified by the master of the said schooner that said master was constantly ready to deliver said coal, and that the expense and damage of such detention would be demanded of him.

Fifth. — That the usual and sufficient time to discharge such a cargo of coal is *four* days, and these libellants claim to be entitled to have of the said *West* the damages sustained by them by reason of the unjust detention of said vessel beyond that time, which they allege amounts to the sum of *two hundred and thirty-one* dollars and upwards.

Sixth. — That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

Wherefore these libellants pray that a warrant of arrest in due form of law, according to the course of this Honorable Court, in admiralty and maritime cases, may issue against the said *J. Selby West*, and that he may be compelled to answer upon oath all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of the damages aforesaid, with costs, and that he may have such other relief as in law and justice he may be entitled to recover.

James Sprague.

(*Verification.*)[1]

1. For the form of verification consult the title VERIFICATIONS.

DEMURRERS.

By Joseph Creeden.

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CROSS-REFERENCES.

For Forms in other Proceedings for Raising Objections to Pleadings, see the titles ABATEMENT, PLEAS IN, vol, 1, p. 21; *AFFIDAVIT OF MERITS, ETC., Form No. 1034*; *AMENDMENTS*, vol. 1, p. 712; *ANSWERS IN EQUITY*, vol. 1, p. 854; *ARREST OF JUDGMENT*, vol. 2, p. 189; *CERTIORARI*, vol. 4, p. 427; *DEFINITENESS AND CERTAINTY IN PLEADING, ante*, p. 273; *REDUNDANT MATTER; SHAM AND FRIVOLOUS PLEADINGS; and the GENERAL INDEX to this work.*

For Forms of Demurrers to Evidence, see the title DEMURRERS TO EVIDENCE, post, p. 467.

For matters of Pleading and Practice relating to Demurrers, generally, see the titles DEMURRERS, 6 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 292, *DEMURRERS IN CHANCERY*, 6 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 391; *DEMURRERS TO EVIDENCE*, 6 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 438.

I. To Declaration.[1]

1. In General.

a. General Demurrer.[2]

Form No. 6969.

(2 Chit. Pl., p. 726.)

In the *King's Bench* (or *Common Pleas* or *Exchequer of Pleas.*)

Trinity Term, 29 Geo. III.

Richard Roe ats. *John Doe.* } And the said *Richard Roe*, by *Jeremiah Mason*, his attorney, comes and defends the wrong and injury when, etc.,[3] and says, that the said declaration[4] (or *the said first count of the said declaration*) and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said *John Doe* to have or maintain his aforesaid action thereof against him, the said *Richard Roe*,[5] and that the said *Richard Roe* is not bound by the law of the land to answer the same, and this he is ready to verify; wherefore for want of sufficient declaration (or *first count of the said declaration*) in this behalf, the said *Richard Roe* prays judgment, and that the said *John Doe* may be barred from having or maintaining his aforesaid action thereof against him, etc.

b. Special Demurrer.[6]

(1) Generally.

Form No. 6970.

(2 Chit. Pl., p. 726.)

(*When the causes of demurrer are stated, as is in general advisable, proceed as in Form No. 6969 to the end, and then as follows :*)[7] And the

1. **Defects must appear on face of pleading,** in order that demurrer may lie. Davies *v.* Penton, 6 B. & C. 216, 13 E. C. L. 147.

No particular form of pleading is necessary to constitute a valid demurrer. Leaves *v.* Bernard, 5 Mod. 132; Rex *v.* Butler, 3 Lev. 222; Coppin *v.* Hurnard, 2 Saund. 129, note 6; 1 Chit. Pl., p. 645; Davies *v.* Gibson, 2 Ark. 118.

2. **General demurrer** is one which raises an objection without specifying any particular cause or defect, and is sufficient only to reach matters of substance. 8 Encycl. of Pl. and Pr. 306; 1 Chit. Pl., p. 639.

3. **Significance of "etc."** is explained in vol. 1, p. 24, note 1, p. 184, note 3; vol. 2, p. 109, note 2.

4. **To the whole declaration,** general demurrer is proper, when, see Powdick *v.* Lyon, 11 East 565.

5. **Sufficient Statement.** — At common law, the objection in a general demurrer to a declaration is sufficiently stated by an averment that the facts which the declaration states are not sufficient in law to allow the pleader to maintain his action. 1 Chit. Pl., p. 639.

6. **Special demurrer** is one which points out specifically the objection relied on, and is necessary to reach defects which are merely formal. 8 Encycl. of Pl. and Pr., p. 307; 1 Chit. Pl., p. 639.

For objection in matter of form special demurrer is proper in all cases. Bowdell *v.* Parsons, 10 East 359.

7. **Assignments of causes of demurrer,** where the demurrer is special, are generally introduced at the end of the general demurrer, as indicated in Form No. 6970, *supra*. 1 Chit. Pl., p. 645.

said *Richard Roe*, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the said declaration (or *to the said first count of the said declaration*), that is to say, * for that, etc., (*Here state the particular causes, and conclude thus :*) and also for that † the said declaration (or *first count of the said declaration*) is in other respects uncertain, informal, and insufficient, etc.[1]

(2) Precedents.

(*a*) *For Defects with Respect to Entitling.*

aa. Entitling of Preceding Term, Cause of Action having Arisen Since.

Form No. 6971.

(3 Chit. Pl., p. 564.)[2]

(*Commencing as in Form No. 6970, and continuing down to* *) for that the bill aforesaid appears to have been exhibited in and entitled of *Michaelmas* term last past, whereas the several supposed causes of action therein mentioned, and each and every of them appear to have arisen and accrued on a day subsequent to that term; and also for that the said bill, by the memorandum thereof appears to have been exhibited before the said several supposed causes of action in the said bill mentioned, or any or either of them, did accrue, and also for that (*continuing and concluding as in Form No. 6970, after* †).

bb. Entitling of Term, Cause of Action Accruing After First Day Thereof.[3]

1. Conclusion.— It is usual, after stating the cause of demurrer, to conclude, "and also for that the said declaration (or *first count* or *plea* or *replication*) is in other respects uncertain, informal, and insufficient;" but these latter words are wholly unavailing, for when it is necessary to demur specially it is not sufficient that the demurrer be *quia caret forma*, but it must be shown specially in what point in particular the form is defective. 1 Chit. Pl., p. 646.

2. Consult also precedent in Dodsworth *v.* Bowen, 5 T. R. 325.

3. Form of demurrer to declaration entitled of Hilary term, and relating to the first day of that term, to wit, to the twenty-third day of January, whereas the causes of action had not accrued before the tenth day of February subsequent, is set out in 10 Wentw. Pl., p. 465, as follows:

"*Ganston* at suit of *Kray.* } And the said *Robert*, by *Jeremiah Mason* his attorney, comes and defends the force and injury when, etc., and says, that the declaration aforesaid and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law for the said *William* to have his aforesaid action thereof maintained against him, and that he the said *Robert* is not under any necessity nor in anywise bound by the law of the land to answer the same; and this he is ready to verify, wherefore for want of a sufficient declaration in this behalf he prays judgment, and that the said *William* may be barred from having his aforesaid action thereof maintained against him; and for causes of demurrer in law the said *Robert*, according to the form of the statute in such case made and provided, sets down and shows to the court here the causes following, that is to say, for that although the said declaration is intituled generally of *Hilary* term in the *thirtieth* year of the reign of his present majesty, which refers and relates to the first day of that term, being the *twenty-third* day of *January* in the same year, yet the several tres-

Form No. 6972.

(3 Chit. Pl., p. 564.)[1]

(*Commencing as in Form No. 6970, and continuing down to* *) for that the said declaration appears to be exhibited and is entitled of *Michaelmas* term generally, whereby it has relation to and must be deemed a declaration of the first day of that term, whereas the said several promises, in the said declaration mentioned, are all of them therein laid to have been made by the said defendant, and the said several causes of action therein also mentioned, to have arisen on the *seventh* day of *November*, in the year of our Lord *1785*, which said *seventh* day of *November*, was a day after the first day of that same *Michaelmas* term, wherein the said plaintiff hath so declared against him the said defendant, and whereof the said declaration is so generally entitled as aforesaid; and also for that the said declaration, by the memorandum thereof, appears to have been exhibited before any of the causes of action of the said plaintiff therein mentioned, appear to have accrued; and also for that (*continuing and concluding as in Form No. 6970, after* †).

(*b*) *For Defects with Respect to Statement of Cause of Action.*[2]

aa. Being Too General.

passes in the said declaration mentioned are thereby alleged to have been committed on the *tenth* day of *February* in that year, which is subsequent to the said time of the exhibiting of the declaration of the said *William* against the said *Robert*, and for that it appears by the said declaration that the pretended cause of action therein specified had not, nor had either of them accrued to the said *William* at the time of the exhibiting of his said bill in manner aforesaid, and also for that the said declaration is in various other respects uncertain, defective, and informal, etc."

1. Consult also precedent in Pugh *v.* Robinson, 1 T. R. 116, upon the facts of which the form given in the text seems to have been based.

2. **Not Showing Writ of Process.**— Form of demurrer to declaration for alleging defendant to be in the custody of the sheriff of Middlesex, but not showing by virtue of what writ of process, is given in 10 Wentw. Pl., p. 467, as follows:

"*Trinity* Term, *29 Geo. 3.*

George Wilson at the suit of *Robert Wilson.* } And the said *George* by *Jeremiah Mason* his attorney, comes and defends the wrong and injury when, etc., and says, that the said declaration aforesaid, and the matters therein contained in manner and form as the same are above stated and set forth, are not sufficient in law for the said *Robert* to have his aforesaid action thereof maintained against him, and that he the said *George* is not under any necessity, nor in any wise bound by the law of the land to answer the same; and this he is ready to verify; wherefore for want of a sufficient declaration in this behalf he prays judgment, and that the said *Robert* may be barred from having his aforesaid action thereof maintained against him: And for causes of demurrer in law, the said *George*, according to the form of the statute in such case made and provided, sets down and shows to the court here the causes following, that is to say, for that although the said *Robert* hath declared against the said *George*, as being in the custody of the sheriff of the county of *Middlesex*, yet the said *Robert* hath not by his said declaration shown by virtue of what writ or process the said *George* was in the custody of the said sheriff as he ought to have done, neither doth it by the said declaration appear out of what court or at whose suit such writ or process issued; and also for that the said declaration is in various other respects uncertain, insufficient, and informal, etc."

The case of Williams *v.* Wills, 1 Wils. 119, is direct authority in support of this demurrer.

Form No. 6973.

(Chit. Pl , p. 569.)

(*Commencing as in Form No. 6970, and continuing down to *; then continuing as in Form No. 6974, from † to*; then continuing as in Form No. 6987, from † to * ; and then continuing as in Form No. 6994, from † to **) † and also for that in the said third and last counts of the said declaration there are certain words which are wholly unintelligible, and the words "twelve other different articles do & curtins" are uncertain and unintelligible; * and for that (*continuing and concluding as in Form No. 6970, after* †).

bb. Improperly Declaring Against Defendant as Assignee, etc.

Form No. 6974.

(3 Chit. Pl., p. 569.)

(*Commencing as in Form No. 6970, and continuing down to **) † for that the said plaintiff hath declared against the said defendants, as assignees of *Edward Fraser*, a bankrupt, whereas if they are liable at all, they are liable on their own personal liability, and not as assignees as aforesaid; * (*continuing as in Form No. 6987, from † to *; then continuing as in Form No. 6994, from † to *; and then continuing as in Form No. 6973, from † to **); and also for that (*continuing and concluding as in Form No. 6970, after* †).

cc. Joining Counts in Trover and Assumpsit.

Form No. 6975.

(3 Chit. Pl., p. 565.)[1]

(*Commencing as in Form No. 6970, and continuing down to **) for that in and by the said declaration in the first count thereof, the said plaintiff hath declared and complained against the said defendant in a plea of trespass on the case for a certain supposed wrongful conversion and disposal of the said spaniel and setting-dog therein mentioned of the said plaintiff to the use of him the said defendant, and yet in the second and last counts of the said declaration, the said plaintiff hath declared against the said defendant in the above suit in an action of assumpsit for supposed breaches of express or implied promises in not returning and redelivering certain spaniels therein respectively mentioned, supposed to be lent and delivered by the said plaintiff to the said defendant, and not for any supposed wrongful conversion and disposal thereof; and also for that there are in the said declaration pretended causes of action, different in their natures, comprehended and included in the same declaration, to wit, a pretended cause of action founded on a supposed wrongful conversion and disposal of a spaniel and setting-dog of the said plaintiff, and pretended causes of action grounded on promises which are incompatible with each other, and ought not to be joined in the same declaration; and

1. The declaration was held sufficient; but the causes of demurrer afford a useful precedent. 3 Chit. Pl., p. 566.

also for that causes of action, founded on supposed wilful and determined wrongs and injuries, ought not, and cannot be blended and included in one and the same declaration,[1] with causes of action founded on promises or contracts; and also for that (*continuing and concluding as in Form No. 6970, after* †).

dd. LEAVING DIVERS BLANKS, AND OTHER OMISSIONS.

Form No. 6976.

(3 Chit. Pl., p. 564.)[2]

(*Commencing as in Form No. 6970, and continuing down to *; and then continuing as in Form No. 6979, from † to **)† and for that there are divers blanks left in each and every count of said declaration, and there are divers omissions of material statements and averments, namely, of places, terms, and distances, in each and every count of said declaration; [and for that the said declaration is drawn in a negligent, slovenly and untechnical manner, disgraceful to the records of the courts,][3] and is in other respects insufficient, uncertain, defective, and informal, etc.

ee. NOT MAKING PROFERT OF DEED.

Form No. 6977.

(3 Chit. Pl., p. 568.)[4]

(*Commencing as in Form No. 6970, and continuing down to **) for that the said plaintiff hath not brought the said supposed deed of release into court, or made any profert thereof, and because the defendant, in the manner the said supposed deed of release is above pleaded, cannot have oyer of the same, so that she might know whether it is or is not the deed of the said defendant, and because it doth not appear by the plea whether the said supposed deed of release is actually destroyed, or whether it doth not still exist, and is only lost or mislaid. And also for that (*continuing and concluding as in Form No. 6970, after* †).

ff. NOT SPECIFYING THE NUMBER OR KIND OF CATTLE DISTRAINED.

Form No. 6978.

(3 Chit. Pl., p. 568.)

(*Commencing as in Form No. 6970, and continuing to *; and then continuing as in Form No. 6984, from † to **) † nor hath specified or shown in his said declaration the number or kind of cattle by the said dec-

1. **Must demur to the whole declaration** for misjoinder, and not to any particular count. Kingdon *v.* Nottle, 1 M. & S. 355.

2. **For another form** of demurrer for leaving divers blanks and void spaces in the declaration, which renders the sense thereof uncertain and obscure, see *infra*, Form No. 6980.

3. Though this demurrer was framed by a very eminent pleader, yet the adoption of these harsh, abusive expressions seems unnecessary, and it is more judicious to omit them. 3 Chit. Pl., p. 564.

4. Consult on this demurrer Read *v.* Brookman, 3 T. R. 151.

laration alleged and supposed to have been taken by the said defendant; by means whereof the said plaintiff hath endeavored to prevent the said defendant from making a proper defense to said declaration;* and also for that (*continuing and concluding as in Form No. 6970, after* †).

gg. NOT STATING SUFFICIENT CAUSE OF ACTION.

Form No. 6979.

(3 Chit. Pl., p. 564.)

(*Commencing as in Form No. 6970, and continuing down to* *) for that there is not in all or any of the counts of the said declaration, any cause of action shown or stated by or for the said plaintiff to have or maintain his aforesaid action against the said defendant, inasmuch as in the said declaration the number of miles which the said horses, in the said counts respectively mentioned, were hired or let out to draw the said several carriages or hearses, in those counts respectively mentioned, is not stated, alleged, or specified in any of the counts of the said declaration, nor are the places from and to which the said horses were to draw the carriages or hearses, or any of them, specified; and for that there is no specific offense charged against the said defendant in any of the counts of the said declaration; (*continuing and concluding as in Form No. 6976, from* †).

hh. RELATING TO TIME AND DATES.

(*aa*) *Omitting Date.*

DEMURRER TO DECLARATION IN ASSUMPSIT BECAUSE DAY OF MONTH DOES NOT APPEAR WHEN PROMISES WERE MADE.

Form No. 6980.

(3 Chit. Pl., p. 565.)

(*Commencing as in Form No. 6970, and continuing down to* *) for that it does not appear in or by the said declaration on what day, or in what month, the said defendant made the said several supposed promises and undertakings therein mentioned, or any of them; [and also that there are divers blanks and void spaces in the said declaration which render the sense thereof uncertain and obscure;] [1] and also for that (*continuing and concluding as in Form No. 6970, after* †).

(*bb*) *Impossible Date Stated.*

DEMURRER TO DECLARATION IN ASSUMPSIT FOR LAYING PROMISES ON AN IMPOSSIBLE DAY.

Form No. 6981.

(3 Chit. Pl., p. 567.)

(*Commencing as in Form No. 6970, and continuing down to* *) for that

1. **For another form** of demurrer for leaving divers blanks and void spaces in the declaration, which renders the sense thereof uncertain and obscure, see *supra*, Form No. 6976.

the several supposed promises and undertakings, in the said second, third, and last counts of the said declaration mentioned, are and each and every of them is laid and alleged to have been made on the *31st* day of *November*, in the year of our Lord *1789*, when there was no such day, and it was therefore impossible that such last-mentioned promises and undertakings, or any of them, should have been made thereon. And also for that (*continuing and concluding as in Form No. 6970, after* †).

(*cc*) *Stating Assault to have been Committed upon Divers Days and Times.*

Form No. 6982.

(3 Chit. Pl., p. 569.)[1]

(*Commencing as in Form No. 6970, and continuing down to* *) for that the said plaintiffs have, in and by the said first count of the said declaration, complained against the said defendants of and for a personal trespass therein and thereby supposed to have been committed by the said defendants on, etc., and to have been from thence continued on divers days and times from and between that day and the day of the commencement of the said suit, when by law they ought to have declared against the said defendants for the said trespass, if any hath been committed, as having been committed on some certain or stated day, and to have confined and limited the said trespass to that day in particular, and not have continued the same, from time to time, and in manner and form as in the said first count is above set forth; and also for that the said defendants cannot either deny, plead to, or justify the matters contained in the said first count of the said declaration as the said first count of the said declaration is pleaded and set forth; and also for that the said first count of the said declaration is in other respects uncertain, etc.

ii. Relating to Venue and Place.

(*aa*) *Omitting Venue.*

Form No. 6983.

(3 Chit. Pl., p. 565.)[2]

(*Commencing as in Form No. 6970, and continuing down to* *) for that there is no venue or place alleged in or by the said second count of the said declaration where the said *Richard Roe* was indebted to the said *John Doe* as therein mentioned, and also for that (*continuing and concluding as in Form No. 6970, after* †).

1. Consult Macfadzen *v.* Olivant, 6 East 387, upon the point raised by this demurrer.

2. **Demurrer to last counts** of declaration for not laying venue where offenses are supposed to have been committed, as given in 1 Chit. Pl., p. 569, omitting the formal parts, is as follows: "For that there is no venue or place alleged in and by the said last-mentioned counts, or any or either of them, at which the said defendant is supposed to have committed the several offenses therein respectively mentioned, or any or either of them, and for that the said last-mentioned counts are in other respects uncertain, etc."

(*bb*) *Not Describing Locus in Quo.*

aaa. In Distress.

Form No. 6984.

(3 Chit. Pl., p. 568.)

(*Commencing as in Form No. 6970, and continuing down to* *) for that the said plaintiff hath not in and by his said declaration, alleged or shewn in what particular place or places, within the parish of ———, the said defendant took the said goods and chattels in the said declaration mentioned, or any part thereof, * (*continuing as in Form No. 6978, from* † *to* *); and also for that (*continuing and concluding as in Form No. 6970, after* †).

bbb. In Replevin.

Form No. 6985.

(3 Chit. Pl., p. 568.)

(*Commencing as in Form No. 6970, and continuing down to* *) for that it is not alleged, nor does it appear by the said declaration of the said plaintiff, when or in what particular place or places in the said parish, in the said declaration mentioned, the goods and chattels, in the said declaration mentioned, or any part thereof, were taken, whereby the said defendant is totally prevented from making a proper defense to the said declaration, and for want of naming or mentioning in the said declaration the place or places where the said goods and chattels, or any part thereof, are above supposed to have been taken, the defendant is prevented from taking any issue upon the place of taking, and also for that (*continuing and concluding as in Form No. 6970, after* †).

(*cc*) *Venue Improperly Laid.*

DEMURRER TO DECLARATION IN SCIRE FACIAS ON JUDGMENT FOR NOT LAYING VENUE IN THE COUNTY WHERE JUDGMENT WAS OBTAINED.

Form No. 6986.

(3 Chit. Pl., p. 567.)

(*Commencing as in Form No. 6970, and continuing down to* *) for that the said plaintiff hath, in and by his said declaration, declared upon a judgment supposed to have been given, and a cause of action supposed to have arisen in the county of *Middlesex*, and yet hath laid the venue of and in his said action in *London*, and hath not shewn any cause of action arising there whereon to ground the said suit, and for that the said plaintiff hath not laid any proper venue therein; and also for that (*continuing and concluding as in Form No. 6970, after* †).

(*dd*) *Venue Insufficiently Laid.*

Form No. 6987.

(3 Chit. Pl., p. 569.)

(*Commencing as in Form No. 6970, and continuing down to *; and then continuing as in Form No. 6974, from † to **) † and for that the venue in each and every of the counts of said declaration is not sufficiently laid, the same being laid in *Walworth Common*, without naming any parish, town, or village, * (*continuing as in Form No. 6994, from † to *; and then continuing as in Form No. 6973, from † to **); and also for that (*continuing and concluding as in Form No. 6970, after* †).

jj. USING WORD "PLAINTIFF" FOR "DEFENDANT," AND VICE VERSA.

DEMURRER TO DECLARATION IN ASSUMPSIT FOR LAYING PROMISE TO PAY WHENEVER "PLAINTIFF" SHOULD BE REQUESTED, ETC.

Form No. 6988.

(3 Chit. Pl., p. 566.)

(*Commencing as in Form No. 6970, and continuing down to **) for that it is stated and alleged in and by the said first count of the said declaration, that the said defendant undertook, and to the said plaintiff faithfully promised to pay to him the said sum of money in that count mentioned, whenever afterwards he the plaintiff should be thereunto requested; and also for that the supposed promise and undertaking, in the said second count of the said declaration mentioned, is thereby stated and alleged to have been made in consideration that the said defendant had done, performed, and bestowed, by himself and his servants, the said work and labour in that count mentioned; and also for that (*continuing and concluding as in Form No. 6970, after* †).

kk. IN ACTIONS BY OR AGAINST EXECUTORS AND ADMINISTRATORS.[1]

(*aa*) *Not Showing Proper Letters Granted to Plaintiff.*

1. Form of demurrer to declaration, brought by one as administratrix for not alleging that deceased died intestate, or by whom such administration was committed, or at what time or at what place, is given in 10 Wentw. Pl., p. 466, as follows:

"*Trinity* Term, *29 Geo. III.*

Archell at suit of *Fisher, Administratrix.* } And for causes of demurrer in law according to the form of the statute, etc., the said *Thomas* sets down and shows to the court here the causes following, that is to say, for that although the said *Ann* has brought this action as administratrix of all and singular the goods and chattels, rights and credits which were of the said *John Fisher*, deceased, at the time of his death, yet she has not in or by her said declaration alleged that the said *John Fisher* died intestate, or shown under what other circumstances administration thereof was granted to her, and for that it is not in or by the said declaration alleged or shown by whom such administration was committed to the said *Ann*, or that the same was committed to her by any person having authority so to do; and for that it is not stated at what time or at what place such administration was granted; and also for that the said declaration is in various other respects uncertain, insufficient, and informal, etc."

DEMURRER TO DECLARATION AT SUIT OF ADMINISTRATOR WITH WILL ANNEXED.

Form No. 6989.

(3 Chit. Pl., p. 566.)[1]

(*Commencing as in Form No. 6970, and continuing down to* *) for that it is not stated in or by the said declaration, that administration, with the will annexed, of all and singular the goods and chattels, rights, and credits, which were of the said *Edward Grant* deceased, at the time of his death, was in due form of law committed to the said plaintiff after the decease of him the said *Edward Grant*, but in lieu thereof there is the following allegation mentioned in the said declaration, that is to say, "To which said *John Doe* (the plaintiff) administrator of all and singular the goods, chattels, rights, and credits, which were of the said *Edward Grant* deceased, at the time of his death, was by *John*, by Divine Providence, archbishop of Canterbury, primate of all England, and metropolitan, after the decease of the said *Edward Grant*, to wit, on, etc., at, etc., aforesaid, in due form of law committed," and also for that (*continuing and concluding as in Form No. 6970, after* †).

(*bb*) *Declaring Against Executors in Debet and Detinet.*

Form No. 6990.

(3 Chit. Pl., p. 567.)[2]

(*Commencing as in Form No. 6970, and continuing down to* *) for that the said plaintiffs in their said declaration complain of the said defendant's executors as aforesaid in the *debet* and *detinet*, whereas the said plaintiffs ought to have declared against them the said defendants in the *detinet* only, since the said plaintiffs sue the said defendants as executors of the last will and testament of *Edward Grant* deceased; and for that it appears in and by the said declaration, that the said defendants, executors as aforesaid, cannot owe the said money demanded of them to the said plaintiff, inasmuch as they the said plaintiffs sue the said defendants as executors as aforesaid; and also for that (*continuing and concluding as in Form No. 6970, after* †).

1. The declaration stated, that "J. H., late of, etc., was summoned to answer J. P., administrator, with the will annexed," etc., but which latter words were omitted in the breach, where the granting of letters of administration is stated, which was the cause of demurrer. 3 Chit. Pl., p. 566.

2. **Form of demurrer** to declaration in debt by executors against defendant declaring against him in the *debet* and *detinet* is given in 3 Chit. Pl., p. 567, which, omitting the formal parts, is as follows: "For that the said plaintiffs have declared against the said defendant in the *debet* and *detinet*, although the said plaintiffs are stated to be executors of the last will and testament of the said *Edward Grant*, deceased, and ought therefore to have declared against him in the *detinet* only."

ll. In Actions of Trespass.

(*aa*) *Omitting "Contra Pacem."*

Form No. 6991.

(3 Chit. Pl., p. 568.)

(*Commencing as in Form No. 6970, and continuing down to *; then continuing as in Form No. 6992, from † to *; and then continuing as in Form No. 6993, from † to **) † and also that it is not alleged that the supposed trespass was committed with force and arms, nor against the peace; * and also for that (*continuing and concluding as in Form No. 6970, after* †).

(*bb*) *Omitting "Vi et Armis."*

Form No. 6992.

(3 Chit. Pl., p. 568.)[1]

(*Commencing as in Form No. 6970, and continuing down to* *) † for that the said plaintiff by his said declaration complained against the said defendant, as if the supposed cause of action, in the said declaration mentioned, had been a mere consequential injury, whereas it appears to have been an immediate and direct trespass committed by the said defendant to the property of the said plaintiff, and for that the said plaintiff hath complained against the said defendant as in a plea of trespass on the case, whereas the declaration ought to have been in a plea of trespass *vi et armis*, * (*continuing as in Form No. 6991, from † to *; and then continuing as in Form No. 6993, from † to* *); and also for that (*continuing and concluding as in Form No. 6970, after* †).

(*cc*) *Stating Trespass by Way of Recital.*

Form No. 6993.

(3 Chit. Pl., p. 568.)

(*Commencing as in Form No. 6970, and continuing down to *; then continuing as in Form No. 6992, from † to* *) † that the said defendant was not, by the said declaration, positively charged with any of the facts therein contained, and the same were only charged by way of recital, whereas they ought to have been positively averred upon him, * (*continuing as in Form No. 6991, from † to* *); and also for that (*continuing and concluding as in Form No. 6970, after* †).

Form No. 6994.

(3 Chit. Pl., p. 569.)

(*Commencing as in Form No. 6970, and continuing down to *; then continuing as in Form No. 6974, from † to *; and then continuing as in Form No. 6987, from † to* *) † and for that the said supposed trespasses in the said first count of the said declaration mentioned are not charged directly, expressly, or positively, but the same are only

1. **Similar precedent** of a demurrer of this kind is set out in Day *v.* Edwards, 5 T. R. 648, in which case judgment was for the defendant.

stated and set forth by way of recital and inducement * (*continuing as in Form No. 6973, from* † *to* *); and for that (*continuing and concluding as in Form No. 6970, from* †).

2. In Common-law States.

ALABAMA — CONNECTICUT.[1]

DELAWARE.[2]

Form No. 6995.

In the *Superior* Court of the State of *Delaware* in and for *Kent* County.

1. *Alabama.* — In this state, the common-law rules of pleading relating to demurrers have been modified by statute. For form of the demurrer to complaint see *infra*, Form No. 7086.

Connecticut. — In Hotchkiss *v.* Hoy, 41 Conn. 570, to a declaration in an action upon a statute concerning the driving of carriages, brought by the plaintiff in his own behalf and in behalf of the town of Waterbury, defendant filed the following special demurrer:

"The defendant defends and says that the plaintiff's declaration, and each count thereof are insufficient in the law for the said plaintiff to have or maintain his said action against him the said defendant; and for special causes of demurrer the defendant assigns the following, to wit:—1. That it is not alleged in said declaration, or in either count thereof, what section or sections of the statute therein referred to is sued upon, nor what particular section or sections is claimed to have been violated. 2. That it is not alleged in said declaration, or in either count of the same, that the defendant was at the time, etc., '*a teamster*.' 3. That it is not alleged in said declaration, or in either count of the same, that the defendant at the time, etc., was driving '*a team*.' 4. That there is no allegation in said declaration, or in either count thereof, that the facts therein stated and relied upon to constitute a cause of action, took place in the town of *Waterbury*, and there is no statement of fact to justify joining the town of *Waterbury* as plaintiff, and there is no allegation that a demand was made, or that it was necessary or practicable for the defendant to turn out of the road while in the town of *Waterbury*. 5. That there is no direct and positive allegation in said declaration, or in either count thereof, that the said *Hotchkiss* with his team had occasion to pass the defendant and his horse and sleigh; nor is it alleged in said either count directly and positively that it was necessary and practicable for the defendant to turn his team so far on one side of the road as to give the vehicle of said *Hotchkiss* an opportunity to pass; and if either of such facts appear they are stated by ways of recital merely. Wherefore he, the said defendant, prays judgment, etc." In this case the court said: "We think this declaration is fatally defective on various grounds. * * * We are quite satisfied that the demurrer was well taken."

In Andrews *v.* Thayer, 40 Conn. 157, defendant demurred specially, assigning as cause of demurrer "that the plaintiff has not alleged or shown, in his declaration, the day or time when the said several acts of trespass, in the said declaration alleged and supposed to have been committed, or any of them, were done and committed; and that it does not appear in or by the said declaration on what day or what month, or in what year, the defendants committed the several supposed trespasses therein mentioned, or any of them." The court rendered judgment for the defendant, holding the declaration to be insufficient.

For form of demurrer in *Connecticut*, under the Practice act, see *infra*, Form No 7088.

2. *Delaware.* — Rev. Stat. (1893), c. 112. The rules of pleading at common law govern the demurrer to a declaration in this state. For forms of demurrers to a declaration at common law see *supra*, Forms Nos. 6971 to 6994.

John Doe against *Richard Roe.* } Demurrer.

And the said defendant, *Richard Roe*, by *Jeremiah Mason*, his attorney, comes and defends the wrong and injury, when, etc.,[1] and says, that the plaintiff's said declaration[2] and the matters and things therein contained in manner and form as the same are above set forth are not sufficient in law for him the said plaintiff to maintain his aforesaid action against this defendant, and that he the said defendant is not bound by law to answer the same, and this he is ready to verify; wherefore for want of a sufficient declaration in this behalf the said defendant prays judgment, etc.

(*And if the demurrer is special, add the following:*) And the said defendant states and shows to the court here the following causes of demurrer to the said declaration, that is to say, that (*Here set forth the particular cause or causes of demurrer*);[3] and also that the declaration is in other respects uncertain, informal, and insufficient, etc.

Jeremiah Mason, Attorney for Defendant.

DISTRICT OF COLUMBIA.[4]

Form No. 6996.

(Dist. of Col. Supreme Ct. Com. Law Rules (1898), Nos. 28, 112 § 7.)

In the *Supreme* Court of the *District of Columbia*, *tenth* day of *May*, 1*898*.

John Doe, plaintiff, against *Richard Roe*, defendant. } At *Law*, No. *204*.

The defendant says that the declaration (or *plea*, or other pleading, naming it) is bad in substance.

[*Jeremiah Mason*, Attorney for the Defendant.][5]

Note. — One of the matters of law intended to be argued is that (*state the ground of demurrer concisely*).[6]

1. **Significance of "etc."** is explained in vol. 1, p. 24, note 1, p. 184, note 3; vol. 2, p. 109, note 2.

2. **If to one or more counts** in the declaration, the demurrer should so indicate.

3. **Specification.** — Upon a demurrer the court shall not consider any defect not specially alleged, if upon the whole matter appearing judgment can be given according to the merits of the case. Del. Rev. Stat. (1893), c. 112, § 1.

4. *District of Columbia.*— Comp. Stat. (1894), c. 55, §§ 28, 96, 97; Supreme Ct. Com. Law Rules (1898), Nos. 20, 112.

Must be in Writing. — Dist. of Col. Comp. Stat. (1894), c. 55, § 28.

5. **Shall be signed** by the party or by counsel, showing in this way whether the party appears in person or by attorney, and not alone by stating the fact in the body of the pleading. Dist. of Col. Supreme Ct. Com. Law Rules (1898), No. 20.

The words to be supplied in [ ] are not found in the rules, but have been added to render the form complete.

6. **In the margin of the demurrer** some substantial matter of law intended to be argued shall be stated, and a demurrer without such statement, or with a frivolous statement, may be set aside. Dist. of Col. Com. Law Rules, No. 28. The grounds of demurrer must be distinctly specified. Dist. of Col. Comp. Stat. (1894), c. 55, §§ 96, 97.

FLORIDA.[1]

Form No. 6997.

(Fla. Rev. Stat. (1892), § 1053; Prac. Act, § 36.)

[State of *Florida*, *Jackson* County. } In the *Circuit* Court of *Jackson* County, *First* Judicial District.

John Doe against *Richard Roe*.][2]

The defendant (or *plaintiff*) says that the declaration[3] (or *plea*) is bad in substance.

Jeremiah Mason, Attorney for the *Defendant*.

Note.—One of the matters of law intended to be argued is that (*state the ground of demurrer concisely*).[4]

FLORIDA — ACCOMPANYING CERTIFICATE.[5]

Form No. 6998.

(*Annexed to the demurrer the following certificate:*)

I, *Jeremiah Mason*, hereby certify that I am the attorney (or *of counsel*) for *Richard Roe*, the defendant in this cause, and that I

Consult the forms of demurrers at common law given in Forms Nos. 6971 to 6994, *supra*.

Amendment. — For provisions as to amendment after demurrer see Dist. of Col. Com. Stat. (1894), c. 55, § 97.

1. *Florida.* — Rev. Stat. (1892), § 1050 *et seq.*

Defects must appear upon face of pleading in order that demurrer may lie. State *v.* Putnam County, 23 Fla. 632.

2. The words to be supplied in [ ] are not found in the statute, but have been added to render the form complete.

3. **Demurrer and Plea.** — Party may demur and plead at same time. Rev. Stat. Fla. (1892), § 1051.

4. **Specification.** — Every demurrer shall be accompanied by a statement of the substantial matters of law intended to be argued. If any demurrer shall be delivered without such a statement, or if a frivolous statement, it may be set aside by the court. Fla. Rev. Stat. (1892), § 1053.

Consult also the common-law demurrers set out in Forms Nos. 6971 to 6994, *supra*.

Causes of demurrer should be indicated in its margin, and when not so indicated the practice of presenting them in argument should be discouraged. Stephens *v.* Bradley, 24 Fla. 201.

Ground of Demurrer. — Either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defense or reply, as the case may be, and when such demurrer shall be disposed of, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto said court, without regarding any imperfection, omission, defect in or lack of form. Fla. Rev. Stat. (1892), § 1050.

Precedent. — In Stephens *v.* Bradley, 24 Fla. 204, the grounds of demurrer to the declaration were as follows:

"1st. That the allegations are not specific enough to demand a response from defendant.

2nd. There are no particulars of demands set forth in the declaration.

3rd. The description of the land is not sufficiently designated."

See also Walsh *v.* Western R. Co., 34 Fla. 7, for a statement of grounds of demurrer to a declaration by an employee against a railroad company for injuries sustained through negligence.

5. **Must be accompanied with certificate** of the counsel, or attorney, that he believes it to be well founded in law. Fla. Cir. Ct. Com. Law Rules (1892), No. 26.

believe (or *in my opinion*) the foregoing demurrer of the said *Richard Roe*, the said defendant, to the declaration of *John Doe*, the plaintiff, is well founded in law, and proper to be filed in the above cause.

Jeremiah Mason, Attorney for the Defendant.

FLORIDA — ACCOMPANYING AFFIDAVIT.[1]

Form No. 6999.

(*Annexed to the demurrer this affidavit:*)

State of *Florida*, } ss.
Jackson County. }

Before me personally appeared *Richard Roe*, the defendant in the above cause, who being duly sworn, on oath deposes and says, that he has heard read the foregoing demurrer to the declaration of *John Doe*, the plaintiff in the above entitled cause, and that the same is not interposed for the purpose of delay.

Richard Roe.

Subscribed and sworn to before me this *tenth* day of *May*, 1*898*.

Calvin Clark, Clerk of the *Circuit* Court.

GEORGIA.[2]

ILLINOIS.[3]

Form No. 7000.

State of *Illinois*, } In the *Circuit* Court of *Cook* County of the *October*
Cook County. } Term, A. D. 1*898*.

Richard Roe }
ats. } *Assumpsit.*
John Doe. }

And the said defendant, *Richard Roe*, by *Jeremiah Mason*, his attorney, comes and (*continuing and concluding as in Form No. 6995.*)[4]

1. **Must be verified by the oath** of the party, his agent or attorney, that it is not interposed for the purpose of delay. Fla. Cir. Ct. Com. Law Rules (1892), No. 26; Taylor *v.* Brown, 32 Fla. 334.

2. *Georgia.* — In this state the common-law rules of pleading relating to demurrers have been modified by statute. For form of the demurrer see *infra*, Form No. 7089.

3. **Rules of pleading, at common law,** govern the demurrer in *Illinois*. For forms of demurrers to declarations, at common law, see *supra*, Forms Nos. 6969 to 6994.

Precedent of form of special demurrer to declaration is set out in Bogardus *v.* Trial, 2 Ill. 63.

Office of the demurrer is not to state facts, but to raise an issue of law upon the sufficiency of the pleading demurred to. Affeld *v.* People, 12 Ill. App. 502.

Defects must appear upon face of pleading in order that demurrer may lie. Stout *v.* Whitney, 12 Ill. 218; Cornwell *v.* Broom, 34 Ill. App. 391.

Cannot demur and file plea in bar at same time to same matter Claycomb *v.* Munger, 51 Ill. 375.

Parties defendant improperly joined alone can demur for misjoinder. Bruschke *v.* Der Nord Chicago Schuetzen Verein, 145 Ill. 433.

Affidavit of merits need not be filed with a demurrer. Myers' Rev. Stat. Ill. (1895), p. 1100, § 37.

4. **General demurrer** is sufficient to reach all substantial defects in a pleading without specification. People *v.* Weber, 92 Ill. 288; Lindley *v.* Miller, 67 Ill. 244; Independent Order of Mutual Aid *v.* Paine, 17 Ill. App. 573, Massachusetts Mut. L. Ins. Co. *v* Kellogg, 82 Ill. 614; Mutual Acc. Assoc. *v.*

MAINE.[1]

Form No. 7001.

State of *Maine.*

Kennebec, ss.

Superior (or *Supreme Judicial*) Court, *June* Term, 1*898*, No. *102*.

John Doe against *Richard Roe.*

And now the said defendant comes and defends, etc., when, etc.,[2] and says, that the plaintiff's declaration is insufficient in law.

Wherefore he prays judgment for his costs.

By *Jeremiah Mason*, his Attorney.

Tuggle, 138 Ill. 428. The Illinois Practice act, § 24, does not do away with general demurrers. Mutual Acc. Assoc. *v.* Tuggle, 138 Ill. 428.

Objection to form of pleading must be by special demurrer. Holmes *v.* Chicago, etc., R. Co., 94 Ill. 439; Read *v.* Walker, 52 Ill. 333. And special demurrer to declaration must minutely set forth the particular exception relied on. Bogardus *v.* Trial, 2 Ill. 63.

Defective statement of cause of action is ground for special demurrer, although the declaration may be good in substance. If such defective statement is not so taken advantage of, it cannot be raised on motion in arrest. Matson *v.* Swanson, 131 Ill. 255.

Duplicity as a ground of demurrer requires the demurrer to state wherein the duplicity consists. Kipp *v.* Bell, 86 Ill. 577; Holmes *v.* Chicago, etc., R. Co., 94 Ill. 439.

1. *Maine.* — Rev. Stat. (1883), c. 82, § 23.

2. **Significance of "etc."** is explained in vol. 1, p. 24, note 1, p. 184, note 3; vol. 2, p. 109, note 2.

General demurrer may be filed to the declaration. Me. Rev. Stat. (1883), c. 82, § 23.

Special demurrer still exists in *Maine.* Bean *v.* Ayers, 67 Me. 490.

Precedent of demurrer to declaration in assumpsit is set out in Weeks *v.* Trask, 81 Me. 128, which, though special in form, was held general in legal intendment and effect.

"1st. That in and by said declaration the said *Abial Trask* is not charged with doing any act which by the alleged agreement and awards set forth in said declaration, he was restrained or prohibited from doing, nor with neglecting or refusing to do any act which he was by said alleged assignment or awards required to do.

2d. That it appears by said declaration that if the said *William Weeks* has any cause of action against the said *Abial Trask*, as therein alleged, the same is by an action of trespass or writ of entry, and not in assumpsit.

3d. That the alleged agreement set forth in said declaration is unconscionable, without consideration, and void.

5th. (*In substance*) That the controversy related to the title and possession of real estate not described or located in the agreement or awards.

6th. (*In substance*) That the boundary line was not so defined and described as to be capable of location upon the face of the earth, and was not designated by any permanent, definite and ascertainable monuments or objects.

8th. That the said alleged agreement and award as sought by the said declaration to be applied to the alleged causes of action therein set forth is against public policy, in restraint of the legal and constitutional rights of the parties and in derogation of the authority and jurisdiction of the courts." This demurrer was sustained, the court holding that entering upon the disputed land and erecting thereon a fence several rods from the line between the parties' adjoining lands designated by arbitrators, to whom the finding and fixing the true line was submitted, do not constitute a breach of the agreement to abide and perform the awards, and that the remedy is not in assumpsit on the agreement, but in trespass.

Amendment. — After the declaration is deemed defective plaintiff may amend on payment of costs from the time of filing demurrer. If the demurrer is filed and overruled, defendant may amend on payment of costs unless demurrer is deemed frivolous, in which case judgment is rendered. Me. Rev. Stat. (1883), c. 82, § 23.

Defendant may plead anew, notwithstanding he has excepted to the decision overruling the demurrer. Me. Rev. Stat. (1883), c. 77, § 76.

MARYLAND.[1]

Form No. 7002.

Richard Roe (or *John Doe*) ats. (or *against*) *John Doe* (or *Richard Roe.*) } In the *Circuit* Court for *Washington* County.

And the defendant (or *plaintiff*) *Richard Roe* (or *John Doe*) by *Jeremiah Mason*, his attorney, says that the declaration (or *plea*) is bad in substance (or *is not sufficient in law*).

Jeremiah Mason, Attorney for *Defendant.*

MASSACHUSETTS.[2]

Form No. 7003.

John Doe against *Richard Roe.* } *Middlesex Sup.* Ct. Defendant's Answer.[3]

And now comes the defendant in the above entitled cause and demurs to the plaintiff's declaration[4] and says, that the said declaration and the matters therein contained, in manner and form as the same are stated and set forth, are not sufficient in law for the plaintiff to have his action against the defendant, for that (*pointing out particularly the ground of demurrer relied on*).[5] Wherefore, for want of a sufficient declaration, the defendant prays judgment.

By *Jeremiah Mason*, his Attorney.

1. *Maryland.* — Pub. Gen. Laws (1888), p. 1093, §§ 6, 7, art. 16, § 135 *et seq.*

Office of the demurrer is not to state facts, but to raise an issue of law upon the sufficiency of the pleading demurred to. Brooke *v.* Widdicombe, 39 Md. 401.

Defects must appear upon face of pleading in order that demurrer may lie. Baltimore, etc., R. Co. *v.* Ritchie, 31 Md. 198.

No general demurrer shall be allowed for a mere informal statement of a cause of action or defense, provided such statement is sufficient in substance. Md. Pub. Gen. Laws (1888), art. 75, § 7; McAleer *v.* Horsey, 35 Md. 439; Miller *v.* Miller, 41 Md. 623; Mitchell *v.* McCleary, 42 Md. 374; Wilms *v.* White, 26 Md. 380; Spencer *v.* Trafford, 42 Md. 15.

No special demurrer shall be allowed in any civil case. Md. Pub. Gen. Laws (1888), art. 75, § 6; Blackburn *v.* Beall, 21 Md. 208; Gott *v.* State, 44 Md. 319; Spencer *v.* Trafford, 42 Md. 1.

Duplicity as a ground of demurrer requires the demurrer to state wherein the duplicity consists. Stewardson *v.* White, 3 Har. & M. (Md.) 455.

2. *Massachusetts.* — To raise an issue in law, the "answer" shall contain a statement that the defendant demurs to the declaration, or to some one or more counts therein, as the case may be, and shall assign specially the causes of demurrer. Mass. Pub. Stat. (1882), c. 167, § 11.

Defects must appear upon face of pleading in order that demurrer may lie. Dennehey *v.* Woodsum, 100 Mass. 195.

3. **Demurrer is Made in the Answer.** — Mass. Pub. Stat. (1882), c. 167, § 11.

4. **May be made to a distinct allegation** in an answer or to a distinct allegation in a count. Montague *v.* Boston, etc., Iron Works, 97 Mass. 502.

5. **Ground of Demurrer.** — Demurrers may be for the following among other causes:

First. That counts in contract and in tort, or either with replevin, or a count in the plaintiff's own right and a count in some representative capacity, are improperly joined in the declaration.

Second. That the declaration, or some count thereof, as the case may be, does not state a legal cause of action substantially in accordance with the rules contained in this chapter. Mass. Pub. Stat. (1882), c. 167, § 12.

MASSACHUSETTS — ACCOMPANYING CERTIFICATE.[1]

Form No. 7004.

(*Annexed to the demurrer the following certificate :*)

I, *Jeremiah Mason*, certify that I am the attorney for the defend-

Consult forms of common-law demurrers set out in Forms Nos. 6970 to 6994, *supra*.

Improper joinder of causes of action. Barlow *v.* Leavitt, 12 Cush. (Mass.) 483.

Specification.—The particulars in which the alleged defect consists shall be specifically pointed out. Mass. Pub. Stat (1882), c. 167, § 12. Billings *v.* Mann, 156 Mass. 203; Washington *v.* Eames, 6 Allen (Mass.) 417; Train *v.* Boston Disinfecting Co., 144 Mass. 523.

Demurrer to the whole ground of action may be sufficiently averred in the general words of the statute; but defects or omissions in the form of statement must be specifically pointed out. Steffe *v.* Old Colony R. Co., 156 Mass. 262; Johnson *v.* Reed, 136 Mass. 421. "That the matters set out in the declaration are insufficient in law to enable the plaintiff to maintain his action" was held to be a sufficient statement of the cause of demurrer in Chenery *v.* Holden, 16 Gray (Mass.) 125.

Precedents. — In Colt *v.* Learned, 118 Mass. 381, to a declaration of contract defendants demurred, and assigned as cause of demurrer that "the same does not state a legal cause of action substantially in accordance with Gen. Stat., c. 129, in this, that the defendants would not be and are not liable to the plaintiffs upon any such contract as alleged under said declaration and action." Demurrer was sustained.

In Worthington *v.* Houghton, 109 Mass. 486, to a declaration for libel defendants demurred, and assigned specially for cause "that the declaration does not state a legal cause of action substantially in accordance with the rules of law, in this, that it does not set forth anything which is by its natural import libellous or which furnishes legal ground for an action for libel, or is actionable on any ground." The demurrer was overruled, the court holding that the publication in question was a libel.

In Dennehey *v.* Woodsum, 100 Mass. 196, to a declaration for malicious prosecution defendant demurred "'for the reason that said declaration does not state a legal cause of action,' and assigned specially, 'as the particular in which said declaration is defective, that it conclusively appears by said declaration that there was probable cause for the complaints therein alleged to have been made by the said defendants against the plaintiff.'" The demurrer was sustained.

In Suffolk Bank *v.* Lowell Bank, 8 Allen (Mass.) 355, to a declaration in tort to recover a statutory penalty defendants filed the following demurrer: "And now the defendants demur to the plaintiffs' amended declaration, because no cause of action is therein set forth substantially in compliance with the rules of law, in this: because the substantive facts necessary to constitute the cause of action are not stated with substantial certainty. Because it does not set forth the bills alleged to have been presented, or copies of them, or give any reason why the same are not set forth. And because said declaration is in other respects insufficient." No objection was made to the form of the demurrer, but it was overruled, the court holding that it was not necessary to set out copies of the bills in the declaration.

Defect of form, either in the declaration or in subsequent allegation, shall be assigned as a cause of demurrer. Mass. Pub. Stat. (1882), c. 167, § 25.

General demurrer is abolished in *Massachusetts*, by statute (Gen. Stat. (1882), c. 129, §§ 11, 12); Washington *v.* Eames, 6 Allen (Mass.) 417; Dennehey *v.* Woodsum, 100 Mass. 195; Suffolk Bank *v.* Lowell Bank, 8 Allen (Mass.) 356; *compare* Chenery *v.* Holden, 16 Gray (Mass.) 127; Witt *v.* Pott, 125 Mass. 363.

Amendment and New Pleading. — When a demurrer is sustained, overruled or withdrawn, the court shall make such order as may be fit respecting the filing of an answer or replication or a trial of the facts. Mass. Pub. Stat. (1882), c. 167, § 67.

1. Certificate of Attorney. — The attorney, if any, shall certify upon the demurrer that he is of opinion that there is such probable ground in law therefor as to make it a fit subject of the judicial inquiry and trial and that it is not intended merely for delay. Mass. Pub. Stat. (1882), c. 167, § 12.

ant in the above cause, and that I am of the opinion that there is such probable ground, in law, for the above demurrer as to make it a fit subject for judicial inquiry and trial, and that the same is not intended merely for delay.

Jeremiah Mason, Attorney for the Defendant.

MICHIGAN.[1]

Form No. 7005.[2]

State of *Michigan*,
In the *Circuit* Court,
For the County of *Lenawee*. } On the *First* day of *October*, A. D. 1898.

John Doe
against
Richard Roe. } [3]

And the said defendant, *Richard Roe*, by *Jeremiah Mason*, his attorney, comes and (*continuing and concluding as in Form No. 6995*).[4]

1. *Michigan.* — How. Anno. Stat. (1882), § 7358. Rules of pleading, at common law, relating to demurrer, may be followed in *Michigan*. For forms of demurrers at common law see *supra*, Forms 6969 to 6994.

Defects must appear on face of pleading in order that demurrer may lie. Warner *v.* Cameron, 64 Mich. 188.

Must be in Writing or Printed. — All papers and copies thereof for service shall be fairly and legibly written or printed, and indorsed, as provided in the rules of court. Mich. Rev. Cir. Ct. Rules (1896), No. 37 (*a*); Jenks *v.* Brown, 38 Mich. 651.

2. **A simpler form** of demurrer is authorized by the rules of practice (Mich. Rev. Cir. Ct. Rules, former Rule No. 17, revised Rule (1896) No. 5); which form, omitting the formal parts, may be as follows, to wit: "The defendant says that the declaration of the plaintiff is not sufficient in law" (*adding briefly, but plainly, the special reasons in matters of substance as well as form*).

Under the Hilary Rules (1840) (1 Chit. Pl., 16th Am. ed. 839, Stephen's Pl. 45), it is provided that "in the margin of every demurrer, before it is signed by counsel, some matter of law, intended to be argued, should be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or judge."

By said rules the following form of general demurrer was prescribed: (*Title of court, etc.*) "and the said defendant, by *Jeremiah Mason*, his attorney, says that the declaration is not sufficient in law."

It seems that the Hilary Rules, so far as they are not inconsistent with the statutes, which are the peculiar organization of the circuit courts in *Michigan*, may be followed in pleading. Mich. Rev. Cir. Ct. Rules (1896), No. 3 (*a*).

3. **Entitling.** — All papers, except process and pleadings, by which the cause is commenced, shall be entitled in the court and cause. Mich. Rev. Cir. Ct. Rules (1896), No. 37 (*b*).

It shall not be necessary to entitle any pleading of any term of court or of any day in term or vacation. How. Anno. Stat. Mich. (1882), § 7777.

Plaintiff's name shall be placed first in the title of the cause. Mich. Rev. Cir. Ct. Rules (1896), No. 37 (*b*). And where there are two or more plaintiffs or two or more defendants, it shall be sufficient, in entitling papers, to name the first named plaintiff and the first named defendant, with the usual indication of other parties, provided there shall be added the official number of the cause. Mich. Rev. Cir. Ct. Rules (1896), No. 37 (*c*).

Only parties defendant improperly joined can demur for misjoinder. Bigelow *v.* Sanford, 98 Mich. 657

4. **General Demurrer Distinguished from Special Demurrer.** — *General demurrer*, under the present practice, in *Michigan*, relates to matters of substance. Thompson *v.* Moran, 44 Mich. 603.

Special demurrer, under the present practice, in *Michigan*, relates to matters

MICHIGAN — ACCOMPANYING CERTIFICATE.[1]

Form No. 7006.

(*Annexed to the demurrer the following certificate:*)

I, *Jeremiah Mason*, do hereby certify that I am the attorney having principal charge of the above cause in behalf of *Richard Roe*, the defendant, the party filing the above demurrer; that the said demurrer is not interposed for delay; and that, in my opinion, it is well founded.

Jeremiah Mason, Attorney for the Defendant.

MISSISSIPPI.[2]

Form No. 7007.

John Doe against *Richard Roe.* } *Circuit* Court of *Madison* County. *October* Term, 1898.

And the said defendant, *Richard Roe*, by *Jeremiah Mason* his attorney, comes and defends the wrong and injury when, etc.,[3] and says that the plaintiff's said declaration and the matters and things therein contained, in the manner and form as the same are above set forth, are not sufficient in law for him, the said plaintiff, to maintain his aforesaid action against this defendant, and that he, the said defendant, is not bound, by law, to answer the same. And the said defendant states and shows to the court here the following causes of demurrer to the said declaration, that is to say, that (*Here set forth*

of form. Thompson *v.* Moran, 44 Mich. 603.

Special reasons for the demurrer, in matters of substance as well as form, must be plainly added, whether the demurrer be construed as a general demurrer or as a special demurrer. Thompson *v.* Moran, 44 Mich. 603; How. Anno. Stat. Mich. (1882), § 7359; Adrian Michigan Water Works *v.* Adrian, 64 Mich. 585.

Specification of reasons for demurrer must be such as to apprise the court of the real objection relied on. Kellogg *v.* Hamilton, 43 Mich. 271; Randall *v.* Evening News Assoc., 92 Mich. 467.

Demurrer and Plea. — Demurrer may be filed to one or more counts of the declaration, and a plea to the residue. Bosman *v.* Akeley, 39 Mich. 711. But both demurrer and plea to the same matter at the same time cannot be interposed. Cicotte *v.* Wayne County, 44 Mich. 173; Peterson *v.* Fowler, 76 Mich. 258.

Amendment. — For provisions as to amendment after demurrer see How. Anno. Stat. Mich. (1882), §§ 6737, 7359; Mich. Rev. Cir. Ct. Rules, No. 5 (*b*).

Justices' Courts.—No special demurrer is allowed in justices' courts. How. Anno. Stat. Mich. (1882), § 6875.

Ejectment. — The defendant in ejectment may demur to the declaration. How. Anno. Stat. Mich. (1882), § 7808.

1. **Certificate of Counsel.** — To every demurrer there shall be added the individual certificate of counsel having principal charge of the cause in behalf of the party filing the demurrer, to the effect that the demurrer is not interposed for delay, and that, in his opinion, it is well founded. A demurrer not accompanied by such certificate shall be stricken from the files, on motion, unless the court shall deem it proper to allow the certificate to be added. Mich. Rev. Cir. Ct. Rules (1896), No. 5 (*c*).

2. *Mississippi.* — Anno. Code (1892), § 696.

3. **Significance of "etc."** is explained in vol. 1, p. 24, note 1, p. 184, note 3; vol. 2, p. 109, note 2.

the particular cause, or causes, of demurrer);[1] and this the said defendant is ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the said defendant prays judgment, etc.

Jeremiah Mason, Attorney for the Defendant.[2]

NEW HAMPSHIRE.

Form No. 7008.[3]

Supreme Court.

Sullivan, ss.

John Doe
v.
Richard Roe.

And the said defendant comes and defends, etc., when, etc.,[4] and says that the said plaintiff's said declaration is not sufficient in law, and that he is not bound to answer the same; and this he is ready to verify. Wherefore he prays judgment, and for his damages and costs to be adjudged to him.

By his Atty.,
Timothy Titus.

NEW JERSEY.[5]

1. Specification of Grounds. — When a demurrer shall be interposed, the court shall not regard any defect or imperfection in the pleadings except such as shall be assigned for causes of demurrer, unless something so essential to the action or defense be omitted that judgment, according to law and the right of the cause of action, cannot be given. Miss. Anno. Code (1892), § 696; Shoults *v.* Kemp, 57 Miss. 218; State *v.* Bowen, 45 Miss. 347.

For forms of demurrers to a declaration at common law see *supra*, Forms Nos. 6969 to 6994.

Special demurrer is abolished by statute, and a pleading shall not be deemed insufficient for any defect which could have been objected to by special demurrer, at common law. Miss. Anno. Code (1892), § 703; State *v.* Swinney, 60 Miss. 39, to the effect that no defect of form merely can be assigned as a ground of demurrer.

2. Pleadings must be signed by the party or his attorney. Miss. Anno. Code (1892), § 702.

3. No particular form of pleading is necessary to constitute a valid demurrer. State *v.* Beasom, 40 N. H. 372.

Rules of pleading, at common law, govern the demurrer in *New Hampshire.* For forms of demurrers to a declaration at common law see *supra.* Forms Nos. 6969 to 6994.

Special demurrers do not exist in *New Hampshire*, under the statute. Berry *v.* Osborn, 28 N. H. 286, construing the statute. But formerly argumentativeness and duplicity in pleading could be taken advantage of only on special demurrer. Quimby *v.* Melvin, 28 N. H. 250.

4. Significance of "etc." is explained in vol. 1, p. 24, note 1, p. 184, note 3; vol. 2, p. 109, note 2.

5. *New Jersey.* — Gen. Stat. (1895), p. 2551 *et seq.*

Defects must appear upon face of pleading in order that demurrer may lie. Coddington *v.* Beebe, 29 N. J. L. 550.

Special demurrers are abolished by statute. No pleading shall be deemed insufficient for any defect which could heretofore be objected to only by special demurrer. Where issue is joined on demurrer, the court shall give judgment according as the very right of the cause and matter in law shall appear, disregarding any imperfection, omission, defect in, or lack of, form. N. J. Gen. Stat. (1895), p. 2557, § 139.

Form No. 7009.

New Jersey Supreme Court.

Charles D. Deshler ads. *William E. Andrew.* } In *Tort.*

And the said defendant by *Bedle, Muirheid & McGee*, his attorneys, comes and defends the wrong and injury when, etc.,[1] and says that the said *amended* declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and he the said defendant is not bound by law to answer the same. And this he is ready to verify. Wherefore, by reason of the insufficiency of the said *amended* declaration in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against him.

Bedle, Muirheid & McGee, Attorneys of Defendants.

NEW JERSEY — ACCOMPANYING AFFIDAVIT.[2]

Form No. 7010

(*Annexed to the demurrer this affidavit:*)

State of *New Jersey*, *Hudson* County. } ss. *Charles D. Deshler*, of full age, being duly sworn on his oath says, that he is the defendant within named; that the demurrer by him above pleaded is not intended for the purpose of delay, and he verily believes that he hath a just and legal defense to said action on the merits of the case.

C. D. Deshler.

1. **Significance of "etc."** is explained in vol. 1, p. 24, note 1, p. 184, note 3; vol. 2, p. 109, note 2.

Amendment. — Adverse party may amend, of course, by paying costs on demurrer and serving copy of amended pleading within twenty days after filing of demurrer. Demurrant shall plead to this amended pleading within thirty days or such further time as the court may grant. N. J. Gen. Stat. (1895), p. 2586, § 316.

2. **Affidavit to be filed with demurrer** is required by the statute. The affidavit shall be to the effect that the demurrer "is not intended for the purpose of delay, and that the affiant verily believes that the defendant hath a just and legal defense to said action, on the merits of the case." N. J. Gen. Stat. (1895), p. 2552, § 114.

Who May Make Affidavit. — *Defendant* shall make the affidavit; but in his absence it may be made by his attorney, or agent, in the action. For want of such affidavit, plea, the demurrer shall be treated as a nullity; provided, however, that the court, or judge, may give the defendant leave to plead, or demur without filing any affidavit therewith. N. J. Gen. Stat. (1895), p. 2552, § 114.

One or more of several defendants in an action upon a contract may make the affidavit. Mattix *v.* Steelman, 35 N. J. L. 467.

Put in by a corporation, an affidavit to a demurrer is insufficient if made by an attorney, or agent, in the suit, unless it be shown that the officers of the company are absent. McTague *v.* Pennsylvania, etc., R. Co., 44 N. J. L. 62.

Municipal corporation defendant need not file such affidavit. N. J. Gen. Stat. (1895), p. 2589, § 330.

Contract Case. — If the defendant has filed an affidavit of merits in the contract case required by *New Jersey* Gen. Stat. (1895), p. 2590, § 335, no affidavit on demurrer is required. N. J. Gen. Stat. (1895), p. 2595, § 357.

Sworn and subscribed before me this *6th* day of *August*, A. D. 1*880*.
John Griffin, Jr., Notary Public, *N. J.*

NEW JERSEY — DEMAND FOR SPECIFICATION OF CAUSE OF DEMURRER.[1]

Form No. 7011.

Hudson Circuit Court.

Isaiah H. Huson
vs.
Samuel W. Garrison.
} In *Tort.*
Demand, etc.

Gentlemen: Please to take notice, that the plaintiff in above cause hereby requires a specification of the cause or causes of the demurrer in above suit, on which the demurrant intends to rely upon the hearing of said demurrer.

Dated the *ninth* day of *February*, 1*883*.

Yours very respectfully,
Romeyn & Griffin, Attorneys of Plaintiff

To Messrs. *Collins & Corbin*, Attorneys of Defendant.

NEW JERSEY — SPECIFICATION OF CAUSE OF DEMURRER.[2]

Form No. 7012.

Hudson Circuit Court.

John Doe
against
Richard Roe.
} On *Contract.*

Sir: As causes of demurrer to the declaration heretofore filed by you in the above named cause, the defendant specifies the following:

I. (*Pointing out particularly the defects in the declaration relied on for grounds of demurrer.*)[3]

And also that said declaration is in other respects uncertain, informal, and insufficient, etc.

Jeremiah Mason, Attorney of Defendant.

Dated the *fifteenth* day of *June*, 1*898*.

To *Oliver Ellsworth*, Attorney of Plaintiff.

1. **Demand for Specification of Cause of Demurrer.** — Whenever, in an action at law, a demurrer shall be filed, the adverse party shall be at liberty by a demand, in writing, to require a specification of the cause, or causes, of demurrer, on which demurrant intends to rely, upon the hearing of such demurrer. N. J. Gen. Stat. (1895), p. 2586, § 315.

2. **Specification of Causes of Demurrer.**— Demurrant shall, within twenty days after proper demand for the same, furnish the adverse party, or his attorney, with a specification, in writing, of the cause, or causes, of demurrer. Demurrant shall be confined to the causes specified. Upon refusal to furnish such specification, the demurrer shall be treated as a nullity, in the discretion of the judge, or court. N. J. Gen. Stat. (1895), p. 2586, § 315, p. 29, § 12.

"That the declaration does not show a sufficient cause of action" is not sufficient after a notice to specify ground of demurrer. It may be stricken out on motion; but if the plaintiff elects to let it stand as an answer to his demand, the defendant may avail himself of any substantial infirmity in the pleading. Bradley *v.* Johnson, 46 N. J. L. 271.

3. **For illustration** of specifications of grounds of demurrer sustained as sufficient see Williamson *v.* Updike, 14 N. J. L. 271.

For forms of demurrers to a declaration at common law see *supra*, Forms Nos. 6969 to 6994.

PENNSYLVANIA.[1]

Form No. 7013.

John Doe against *Richard Roe.* } In the Court *of Common Pleas* of *Chester* County. No. *229.* *July* Term, 1*898.*

And the said defendant, *Richard Roe*, by *Jeremiah Mason*, his attorney, says that the *statement*[2] is not sufficient in law. [And the said defendant, according to the statute in such case made and provided, shows the court here the following causes of demurrer to the said statement, that is to say (*pointing out particularly the specific points of demurrer relied on*); and also that the said statement is in other respects uncertain, informal, insufficient, etc.][3]

Jeremiah Mason, Attorney for Defendant.

PENNSYLVANIA — SUPPORTING AFFIDAVIT.[4]

Form No. 7014.

(*Annexed to the demurrer this affidavit:*)

Chester, ss.

Richard Roe, the above named defendant, being duly sworn according to law deposes and says that the foregoing demurrer is not interposed for delay.

Richard Roe.

Sworn and subscribed to before me this *third* day of *July*, 1*898.*

(SEAL) *Peter Perley*, Prothonotary.

1. *Pennsylvania.* — Brews. Pr. (Pa. 1896), § 2803.

For forms of demurrers to a declaration at common law see *supra*, Forms Nos. 6969 to 6994.

Defects must appear on face of pleading in order that demurrer may lie. Wyoming County *v.* Bardwell, 84 Pa. St. 104.

An affidavit of defense amounting to a demurrer is often used in *Pennsylvania.* For form of this affidavit see vol. 1, p. 651, Form No. 1034.

2. **Demurrer and Answer or Plea.** — A demurrer may be filed to one part of a declaration, petition or complaint, and plea or answer to another part, but a demurrer and plea or answer cannot be filed at the same time to the same part of the pleading. McFate *v.* Shallcross, 1 Phila. (Pa.) 75.

General Demurrer. — When a pleading is good in part, a demurrer which reaches the whole pleading will not be sustained. Insurance Co. *v.* Drach, 40 Leg. Int. (Pa.) 70; Wilkinson *v.* Starr, 14 W. N. C. (Pa.) 359. If some counts are good and others bad and defendant demurs to the whole declaration, plaintiff will have judgment. Neiler *v.* Kelley, 69 Pa. St. 403.

3. The matter in [ ] should be omitted when the demurrer is for matters of substance only, and not for matters of form.

Special demurrer points out specifically the objection relied on and is necessary to reach defects which are merely formal. Gould *v.* Crawford, 2 Pa. St. 90. Objection to a declaration good in substance but defective in form must be made by special demurrer. Halderman *v.* Martin, 10 Pa. St. 369.

Duplicity in a declaration can be taken advantage of only by special demurrer. Smith *v.* Latour, 18 Pa. St. 247.

Demurrer should be confined to those parts which are defective when the matter in a single count is divisible in its nature. Neiler *v.* Kelley, 69 Pa. St. 403.

4. Brews. Pr. (Pa. 1896), § 2776.

RHODE ISLAND.[1]

Form No. 7015.

Supreme Court, *Common Pleas Division.*

Providence, Sc.

John Doe against *Richard Roe.* } No. *6549.*

The defendant demurs to the declaration of the plaintiff and states the following specific grounds of demurrer.

First. It does not appear from the said declaration that the defendant has agreed to pay to the plaintiff the money claimed by the plaintiff in his declaration, or any sum of money whatever.

Second. It does not appear from the said declaration that the plaintiff on his part has performed conditions precedent to any liability on the part of defendant.

Third. That (*Here set out any other ground of demurrer*).

Jeramiah Mason, Defendant's Attorney.

TENNESSEE.[2]

Form No. 7016.

John Doe against *Richard Roe.* } *Circuit* Court of *Maury* County, *Tennessee.* *June* Term, 1*898.*

The defendant, *Richard Roe*, says that the declaration is not sufficient in law because it is bad in substance; and for cause of demurrer to said declaration says (*pointing out particularly the specific grounds of demurrer relied on*).[3]

Jeremiah Mason, Attorney for Defendant.

1. Demurrer need not be more formal than that the party demurring demurs to such declaration or plea, but shall be accompanied with a statement of the specific grounds of demurrer; and no other grounds shall be considered under such demurrer than those so stated unless for cause shown and in proper terms. R. I. Gen. Laws (1896), c. 239, § 16.

For forms of common-law demurrer to declarations see *supra*, Forms Nos. 6969 to 6994.

Hearing. — *In common pleas division* of the supreme court, demurrers are finally disposed of by the justice of that division in Providence, but may be heard in counties in which they arise if the division is sitting there. R. I. Gen. Laws, c. 238, § 8.

In the district court and common pleas divisions of the supreme court, demurrers which go to the substance of the cause shall be certified to the appellate court division of the supreme court. R. I. Gen. Laws (1896), c. 239, § 1.

Appeal from ruling on demurrer shall be heard in the appellate division, the first Monday of the month, twenty days after the case is certified, except in August and September. R. I. Gen. Laws (1896), c. 250, § 18.

Amendments.—Formal demurrers shall be finally disposed of by said justice with power to grant amendment. The defendant shall plead over and the case shall come up for assignment on regular assignment day. R. I. Gen. Laws (1896), c. 238, § 9.

2. *Tennessee.* — Code (1896), § 4655 *et seq.* See also Stover *v.* Allen, 6 Heisk. (Tenn.) 614.

Special and general demurrers, as known at common law, are abolished by the *Tennessee* code (1896), § 4655, which enacts in effect that demurrers for former defects are abolished, and those only for substantial defects allowed. Hobbs *v.* Memphis, etc., R. Co., 12 Heisk. (Tenn.) 530; Waggoner *v.* White, 11 Heisk. (Tenn.) 741.

3. Duplicity is a formal defect, and a

TEXAS.[1]

VERMONT.[2]

Form No. 7017.

John Doe against *Richard Roe.* } In the *Windham County* Court. *March* Term, 1*898.*

And the said defendant, *Richard Roe*, by *Jeremiah Mason*, his attorney, comes and defends the wrong and injury, when, etc.,[3] and says that the plaintiff's said declaration and the matters and things therein contained, in manner and form as the same are above set forth, are not sufficient in law for him, the said plaintiff, to maintain his aforesaid action against this defendant, and he, the said defendant, is not bound by law to answer the same, and this he is ready to verify, wherefore, for want of a sufficient declaration in this behalf, the said defendant prays judgment, etc.*

Form No. 7018.

(*If the demurrer be only for defect in form, commence as in Form No. 7017, and continue to *; then proceed to assign particularly the causes, or grounds, of objection, thus:*) and for causes of demurrer, in law, the said declaration of said *Richard Roe*, according to the form of the statute in such case made and provided, sets down and shows to the court here the causes following, to wit, for that (*particularly setting out the objections to the declaration*);[4] and also for that the said declaration is in other respects uncertain, insufficient, and informal.

VIRGINIA.[5]

demurrer specified as for that reason cannot be taken to a declaration at law under the code. (Tenn. Code (1896), § 4655); Cherry *v.* Smith, 10 Heisk. (Tenn.) 389.

That declaration fails to show a substantial cause of action is a good ground of demurrer. Tenn. Code (1896), § 4606.

Profert shall be required as heretofore, and a demurrer may be filed for want thereof. Tenn. Code (1896), § 4608.

Specification.—The grounds of demurrer must be distinctly specified. Tenn. Code (1896), § 4655.

For forms of common-law demurrers consult Forms Nos. 6969 to 6994, *supra.*

Amendment and Pleading Over. — For provisions as to amendment and pleading over after demurrer see Tenn. Code (1896), §§ 4656, 4657.

1. *Texas.* — In this state, the rules of pleading relating to demurrers have been modified by statute. For form of demurrer in the answer contained by way of "exception," as it is termed, see *infra.* Forms Nos. 7092, 7093.

2. *Vermont.* — Stat. (1894), § 1147.

3. **Significance of "etc."** is explained in vol. 1, p. 24, note 1, p. 184, note 3; vol. 2, p. 109, note 2.

4. **Specification.** — The court shall proceed and give judgment according to the right of the case and the matters in law, without regarding any defects or want of form, except those only in case of demurrer which the party demurring shall specially set down and express, together with his demurrer as the cause thereof. Vt. Stat. (1894), § 1147.

For forms of common-law demurrers consult Forms Nos. 6969 to 6994, *supra.*

To Separate Counts. — Demurrer general to all counts by enumeration and special to some is equivalent to a separate demurrer to each count. Darling *v.* Clement, 69 Vt. 292.

Demurrer incorporated in the answer is waived unless brought forward for hearing before the case is heard on petition and answer. Dyer *v.* Dean, 69 Vt. 370.

5. *Virginia.* — Code (1887), § 3271 *et seq.*

Form No. 7019.

(Va. Code (1887), § 3271.)[1]

[*Circuit* Court of *Albemarle* County, to wit:

John Doe
against
Richard Roe.][2]

The defendant (or *plaintiff*) says that the declaration (or *plea*) is not sufficient in law.

[*Jeremiah Mason*, p. d.][2]

WEST VIRGINIA.[3]

Form No. 7020.

(W. Va. Code (1891), c. 125, § 28.)[4]

[State of *West Virginia*, *Preston* County. } In the *Circuit* Court.

Richard Roe (or *John Doe*)
ads. (or *against*)
John Doe (or *Richard Roe*).][5]

Defendant (or *plaintiff*) says the declaration (or *plea*) is not sufficient in law.

[*Jeremiah Mason*, p. d.][5]

3. In Federal Courts.[6]

1. **This form** of demurrer is outlined in the Va. Code (1887), § 3271.

2. The words to be supplied in [ ] will not be found in the statute, but have been added to render the form complete.

Defect of form cannot be made ground of demurrer. Va. Code (1887). § 3272.

Duplicity in a declaration relates to the form and not to the substance, and hence can be taken advantage of only by special demurrer. But special demurrers have been abolished in *Virginia*, and consequently mere duplicity in a count of a declaration is no longer a ground of demurrer. Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108.

Counts ex delicto and ex contractu cannot be properly joined in the same declaration, and a demurrer specifying such misjoinder as a defect must be sustained. Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

Amendment after ruling on demurrer is a waiver of objection to such ruling. Connell *v.* Chesapeake, etc., R. Co., 93 Va. 44.

3. *West Virginia.* — Code (1891), c. 125, § 28.

4. **This form** is outlined in W. Va. Code (1891), p. 803, § 28.

5. The words to be supplied in [ ] are not found in the statute, but have been added to render the form complete.

Defect of form cannot be made ground of demurrer. W. Va. Code (1891), p. 804, § 29.

6. *Federal Courts.* — U. S. Rev. Stat., § 914, providing that "the practice, pleadings, and forms and modes of proceedings in civil causes, other than equity and admiralty causes in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms, and modes of proceedings existing at the time in like causes in the courts of record of the state within which said circuit and district courts are held." See also vol. 4, note 5, p. 1065; *ante*, note 3, p. 271.

For form of demurrer at common law, or in any common-law state, consult Forms Nos. 6969 to 7020, *supra*.

Office of the demurrer is not to state facts, but to raise an issue of law upon the sufficiency of the pleading demurred to. Walden *v.* Craig, 14 Pet. (U. S.) 153; Rutz *v.* St. Louis, 7 Fed. Rep. 438.

Defects must appear upon face of pleading in order that demurrer may lie. Tyler *v.* Hand, 7 How. (U. S.) 582.

Form No. 7021.

Circuit Court of the *United States* for the *Southern* District of *New York*.

John Doe
against
Richard Roe.

And the said defendant, by *Jeremiah Mason*, his attorney, comes and (*continuing and concluding as in Form No. 6995*).

II. TO BILL IN EQUITY.

1. Generally.

a. To Whole Bill.

IN GENERAL.

Form No. 7022.

(2 Harr. Ch. Pr., p. 411; Curt. Eq. Prec., p. 139.)

The demurrer of *Richard Roe*, the defendant, to the bill of complaint of *John Doe*, complainant.[1]

1. Title of the demurrer, instead of being as in the text set out, may be as follows: "The demurrer of *Jeremiah Mason*, attorney (or *solicitor*) general," etc.; or "the demurrer of *Jeremiah Mason*, Esq., attorney (or *solicitor*) general of the state of ———," etc.; or "the demurrer of the mayor and aldermen of the city of ———," etc.; or "the demurrer of *Samuel Short*, an infant under the age of twenty-one years, by *Henry Irving*, his guardian," etc.; or "the demurrer of *John King*, an idiot (or *lunatic*), by *Henry Irving*, his guardian," etc.; or "the demurrer of *Moses Newman* and *Ora* his wife," etc.; or "the demurrer of *Phyllis*, the wife of *Robert Strong*, who has duly obtained an order of this honorable court for liberty to defend separately from her husband," etc.; or "the demurrer of *Tullia*, the wife of *Victor Young*," "defendant(*s*) to the bill of complaint of *Zeno Xavier*, complainant," etc. See Daniell's Ch. Pr. (6th Am. ed.), p. 585; Curt. Eq. Prec., p. 139.

Other forms of headings to demurrers in equity, which may be used in the particular cases requiring them, are given in various precedents of demurrers, some of which are as follows:

"The demurrer of *Richard Roe*, defendant, to the bill of complaint of *John Doe*, the above named plaintiff."

"The demurrer of *Robert Roe* in the bill by mistake called *Richard Roe*, the above named defendant, to the bill of complaint of *John Doe*, the above named plaintiff (or *complainant*)."

"The demurrer of *Richard Roe*, *Robert Roe* and *Reginald Roe*, three of the defendants, to the bill of complaint of *John Doe*, complainant."

"The demurrer of *Richard Roe* and *Ann Roe*, his wife, defendants, to the bill of complaint of *John Doe*, complainant."

"The joint and several demurrer of *Richard Roe* and *Samuel Short*, two of the above named defendants, to the bill of complaint of *John Doe* and *James Doe*, the above named plaintiffs."

"The joint and several demurrer of *Richard Roe* and *Samuel Short*, two of the defendants to the bill of complaint of *John Doe*, an infant, by his father and next friend."

"The joint demurrer of *Richard Roe* and *Ann Roe*, his wife, two of the above named defendants, to the bill of complaint of *John Doe*, the above named plaintiff (or *complainant*)."

"The joint demurrer of *Richard Roe* and *Ann Roe*, his wife, lately, and in the bill called *Ann Anderson*, spinster, to the bill of complaint of *John Doe*, the above named plaintiff."

"The joint and several demurrer of *Richard Roe* and *Robert Roe*, two of the defendants, to the bill of complaint of *Sarah Doe*, widow, complainant."

See also titles and headings for particular jurisdictions found in Forms Nos. 7023 to 7082, *infra*.

This defendant, by protestation,[1] not confessing or acknowledging all, or any of the matters and things in and by said complainant's bill [set forth and complained of,] to be true in [such] manner and form as the same are therein [and thereby] set forth and alleged,* [saith he is advised by his counsel that there is no matter or thing in the said bill contained, good and sufficient in law, to call this defendant in question in this honorable court for the same, but that there is good cause of demurrer thereunto, and therefore this defendant] doth demur thereunto, and for cause of demurrer, [this defendant] saith ‡ that (*pointing out particularly the special defects relied on by demurrant*).[2] Wherefore and for divers other errors and imperfections [in the said bill appearing,] this defendant [doth demur, in law, thereunto, and] humbly demands the judgment of this honorable court whether he shall be compelled to put in any farther or other answer to said bill; and humbly prays to be hence dismissed with his reasonable costs in this behalf most [wrongfully][3] sustained.[4]†

[(*Signature of solicitor.*)][5]

1. Protestation Clause. — This is the usual form of the protestation clause that is incorporated in almost all equity demurrers. Redesdale Pr. Ch. Pl., p. 172; Cooper's Eq. Pl., p. 111; Story's Eq. Pl., p. 452; Beach's Mod. Eq. Pr , p. 268; Daniell's Ch. Pr. (6th Am. ed.), p. 585.

Commencement of demurrer, in many jurisdictions, may and often does omit the protestation clause, and is as follows.

"The defendant, *Richard Roe*, demurs to the bill in this cause," etc.; or, "The defendant, *Richard Roe*, demurs to the bill filed against him in this cause," etc.

For forms of demurrers to bills for particular causes see *infra*, Forms Nos. 7057 to 7083.

2. Some cause of demurrer must be assigned. 6 Encycl. of Pl. and Pr., p. 421; Nash *v.* Smith, 6 Conn. 422.

Demurrer to discovery is proper. Daniell's Ch. Pr. (5th Am. ed.), p. 547.

Demurrer to relief prayed is proper. Daniell's Ch. Pr. (5th Am. ed.), p. 547.

Demurrer both to the discovery and the relief prayed may be proper. Daniell's Ch. Pr. (5th Am. ed.), p. 547.

3. The words in [ ] indicate the variance in language between the form as set out in Curt. Eq. Prec. and in Harr. Ch. Pr.

4. This is the proper prayer for judgment, as indicated in Daniell's Ch. Pr. (6th Am. ed.), p. 589.

Conclusion of demurrer, instead of as in the text, may be and often is couched in these words: "Wherefore, these defendants respectively demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to said bill, or any of the matters and things therein contained, and pray to be hence dismissed, with their reasonable costs in this behalf wrongfully sustained."

It is usual to insert one of the following general causes before the prayer for judgment: "Wherefore and for divers other errors and imperfections this defendant," etc.; or "Wherefore and for divers other good causes of demurrer appearing in the said bill." Story Eq. Pl. (10th. ed.), p. 455.

5. Signature of counsel may be as follows: "*Jeremiah Mason*, Solicitor for the Defendant. *Daniel Webster*, of Counsel."

It is essential that the demurrer be signed by counsel. Defendant, however, need not sign it himself. Daniell's Ch. Pr. (6th Am. ed.), p. 590; Story's Eq. Pl., p. 461; Graham *v.* Elmore, Harr. (Mich.) 265; Schuyler *v.* Yates, 11 Wend. (N. Y.) 185; Anonymous, 2 Cow. (N. Y.) 578, Marsh *v.* Barney, 10 Wend. (N. Y.) 539; Graham *v.* Elmore, Harr (Mich.) 265.

Oath is not required in the absence of statute to the contrary, since the demurrer asserts no facts and relies merely upon matters apparent on the face of the bill. Daniell's Ch. Pr. (6th Am. ed.), p. 590; Carroll *v.* Waring, 3 Gill & J. (Md.) 497.

ALABAMA.[1]

Form No. 7023.

The State of *Alabama*, *Jefferson* County.

John Doe, complainant, against *Richard Roe*, defendant.

In Chancery, at *Birmingham*, *Alabama*, *Sixteenth* District *North-Western* Chancery Division. *August* Term, 1898.

The demurrer of *Richard Roe*, the defendant, to the bill of complaint of *John Doe*, the above named complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill of complaint (*continuing as in Form No. 7022, down to* †).[2]

Jeremiah Mason, Attorney for Defendant.

DELAWARE.[3]

Form No. 7024.

Richard Roe ats. *John Doe.*

In Chancery. *Kent* County, ss.

The demurrer of *Richard Roe*, the defendant, to the bill of complaint of *John Doe*, the above named complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's bill of complaint (*continuing as in Form No. 7022, down to* †).

Jeremiah Mason, Solicitor and of Counsel for Defendant.

1. **Rules of English Chancery.** — In all cases where the statutes of this state, the decisions of this court, or the rules prescribed by it, do not apply, the practice in chancery shall be regulated by the rules, orders and practice of the English court of chancery, prior to and including those of May, 1845, but not afterwards, so far as the same may reasonably be applied, consistently with the institutions of this country, not as positive rules, but as furnishing proper analogies to regulate the practice. The English rules and orders of practice in courts of chancery are not peremptory, but only advisory. Childress *v.* Harrison, 47 Ala. 556; Goodrich *v.* Goodrich, 44 Ala. 670.

Defect must appear upon the face of bill in order that demurrer may lie. Lewis *v.* Elrod, 38 Ala. 17.

2. **Must set forth specifically the causes,** or grounds, of demurrer, and the court cannot consider any other ground not specifically assigned. Ala. Civ. Code (1886), § 3443. Planters, etc., Mut. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585. See also Wellborn *v.* Tiller, 10 Ala. 305; Chapman *v.* Hamilton, 19 Ala. 121; Cochran *v.* Rison, 20 Ala. 463; Chambers *v.* Wright, 52 Ala. 444; Hart *v.* Clark, 54 Ala. 490; Erwin *v.* Reese, 54 Ala. 589; Masterson *v.* Pullen, 62 Ala. 145; Planters, etc., Mut. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585.

For forms of demurrers to bills for particular causes see *infra*, Forms Nos. 7057 to 7083.

General demurrers in equity have been abolished in *Alabama*, and every demurrer must assign the reason wherein the want of equity consists. Lesslie *v.* Richardson, 60 Ala. 563.

Bill not fatally wanting in equity, the appellate court can consider only the causes of demurrer specifically assigned in the demurrer. Humphreys *v.* Burleson, 72 Ala. 1.

Demurrer to a whole bill cannot be sustained where, under the bill, complainant is entitled to any relief. Beall *v.* Lehman Durr Co., 110 Ala. 446; Barksdale *v.* Davis, (Ala. 1897) 22 So. Rep. 17.

3. *Delaware.* — Rev. Stat. (1893), c. 96.

For forms of demurrers to bills for particular causes see *infra*, Forms Nos. 7057 to 7083.

DISTRICT OF COLUMBIA.[1]

Form No. 7025.

In the *Supreme* Court of the *District of Columbia*, the *fifth* day of *June*, 1897.

John Doe, plaintiff,
against
Richard Roe, defendant.
} In Equity. No. *172*.

The demurrer of *Richard Roe*, defendant, to the bill of complaint of *John Doe*, the above named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill of complaint (*continuing as in Form No. 7022, down to* †).[2]

Jeremiah Mason, Solicitor and of Counsel for Defendant.

DISTRICT OF COLUMBIA — ACCOMPANYING AFFIDAVIT.[3]

Form No. 7026.

(*Annexed to the demurrer this affidavit:*)

District of Columbia, to wit.

This *fifth* day of *June*, in the year of our Lord one thousand eight hundred and *ninety-eight*, before me, the subscriber, a justice of the peace, in and for the district aforesaid, personally appeared *Richard Roe*, the defendant above named, and made oath that the demurrer by him interposed in the above named cause is not interposed for delay. *Richard Roe.*

Sworn and subscribed to before me this *fifth* day of *June*, 1*898*.

Abraham Kent, Justice of the Peace. (SEAL)

DISTRICT OF COLUMBIA — ACCOMPANYING CERTIFICATE.[4]

Form No. 7027.

(*Annexed to the demurrer this certificate :*)

I, *Jeremiah Mason*, do hereby certify that I am the solicitor and of counsel for plaintiff in this cause, and that in my opinion the demurrer above interposed by him is well founded in law.

Jeremiah Mason, Solicitor and of Counsel for Defendant.

1. *District of Columbia.* — Defendant may, at any time before bill is taken for confessed, or afterwards, with leave of court, demur to the whole bill or to part of it, and he may demur to part, plead to part, and answer as to the residue. Dist. of Col. Eq. Rules (1898), No. 29.

For forms of demurrers to bill for particular causes see *infra*, Forms Nos. 7057 to 7083.

2. **Demurrer should not be sustained to an entire bill** if the bill states one sufficient ground of relief. Sanche *v.* Electrolebration Co., 4 App. Cas. (D. C.) 453.

3. **Accompanying affidavit** of the defendant that demurrer is not interposed for delay is necessary. Dist. of Col. Eq. Rules (1898), No. 28.

4. **Accompanying Certificate.** — No demurrer shall be filed unless upon a certificate of counsel that in his opinion it is well founded in law. Dist. of Col. Eq. Rules (1898), No. 28.

FLORIDA.[1]

Form No. 7028.

In the *Circuit* Court of the *Second* Judicial Circuit of the State of *Florida*, in and for *Leon* County, in Chancery sitting.

John Doe
against
Richard Roe.

The demurrer of *Richard Roe*, defendant, to the bill of complaint of *John Doe*, the above named plaintiff.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill of complaint (*continuing as in Form No. 7022, down to* †).

Richard Roe.

Jeremiah Mason, of Counsel for Defendant.

FLORIDA — ACCOMPANYING CERTIFICATE.[2]

Form No. 7029.

(*Annexed to the demurrer this certificate:*)

I, *Jeremiah Mason*, do hereby certify that I am the solicitor and of counsel for the defendant in the above cause who interposes this demurrer, and that in my opinion the said demurrer is well founded in point of law.

Jeremiah Mason, Solicitor and of Counsel for Defendant.

FLORIDA — ACCOMPANYING AFFIDAVIT.[3]

Form No. 7030.

State of *Florida*,
County of *Leon*.

Before me personally appeared *Richard Roe*, who being first duly sworn on his oath says that the above and foregoing demurrer by

1. *Florida.* — Defendant may, at any time before bill is taken as confessed, or otherwise, with leave of the court, demur or plead to the bill or to a part of it, and he may demur to part, plead to part, and answer as to the residue. Fla. Cir. Ct. Eq. Rules (1892), No. 49.

For forms of demurrers to bill for particular causes see *infra*, Forms Nos. 7057 to 7083.

No demurrer shall be overruled upon argument only because the demurrer shall not cover so much of the bill as it might by law have expanded to. Fla. Cir. Ct. Eq. Rules (1892), No. 53.

General demurrer in equity raises only questions of substance. McCoy *v.* Boley, 21 Fla. 803.

Special demurrer in equity points out the particular defects in the bill and raises objections to the form of the bill. McCoy *v.* Boley, 21 Fla. 803.

2. **Accompanying Certificate.** — Demurrer to a bill cannot be allowed unless upon certificate of counsel that in his opinion it is well founded in point of law. Fla. Cir. Ct. Eq. Rules (1892), No. 48; Taylor *v.* Brown, 32 Fla. 334.

3. **Accompanying Affidavit.**—No demurrer shall be allowed unless supported by the affidavit of the defendant, or, in case of his absence from the state, of his agent or attorney, that it is not interposed for delay. Fla. Cir. Ct. Eq. Rules (1892), No. 48; Taylor *v.* Brown, 32 Fla. 334.

him interposed to the bill of complaint of the complainant in this cause is not interposed for delay.

Richard Roe.

Sworn to and subscribed before me this *first* day of *July*, 1898.
Calvin Clark, Clerk of the *Circuit* Court.

GEORGIA.[1]

ILLINOIS.[2]

Form No. 7031.

In the *Circuit* Court of *Gerenee* County, *June* Term, A. D. 1898

Richard Roe ats. *John Doe.* } In Chancery.

State of *Illinois*, *Gerenee* County. } ss. The demurrer of *Richard Roe*, defendant, to the bill of complaint of *John Doe*, the above named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill of complaint (*continuing and concluding as in Form No. 7022, down to* †).

By *Jeremiah Mason*, Solicitor for Defendant.

MAINE.[3]

1. *Georgia.* — Demurrers in chancery cases do not differ in form from demurrers in law cases. 2 Ga. Code (1895), §§ 4960, 5048. For form of demurrer in this state see *infra*, Form No. 7089.

Old Precedent. — In Sheppard *v.* Sheppard, 22 Ga. 429, defendant filed the following general demurrer: "The demurrer of *David B. M. Sheppard, administrator, etc.*, of *Mary J. Sheppard, deceased*, defendant, to the bill of complaint of *William A. Sheppard, Rose E. Sheppard*, and *David W. Sheppard, infants*, by their next friend, *Simon A. Fraser*, complanants:

This defendant by protestation not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur in law to the said bill, and for cause of demurrer showeth, that the said complainants have not, by their said bill, made such a case as entitles them in a court of equity to any discovery or relief from or against this defendant, touching the matters contained in the said bill, or any of such matters. Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant doth demur to the said bill, and to all the matters and things therein contained, and prays judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

Harden & Lawton,
Defendant's Solicitors.

Filed this *21st April*, 1856.
S. A. Fraser, Clerk."

This demurrer was overruled, the court holding that the bill had equity; but the demurrer as a pleading is unobjectionable in form as a general demurrer for want of equity.

2. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 22, par. 16.

For forms of demurrers to bills for particular causes see *infra*, Forms Nos. 7057 to 7083.

Demurrer in chancery is always to the merits, and in bar of the relief sought. Harris *v.* Cornell, 80 Ill. 54.

3. *Maine.* — Supreme Jud. Ct. Ch Rules (1890), Nos. 9, 10, 14 (82 Me. 596, 597); also Supreme Jud. Ct. Ch. Rules 1880), Nos. 15, 20, 22 (72 Me. 584 *et seq.*).

For forms of demurrers to bills for

Form No. 7032.[1]

State of *Maine.*

Kennebec, ss.

Supreme Judicial Court, in Equity, *May* Term, 1*898*. No. *103*.

John Doe against *Richard Roe.*

And now the respondent comes and defends, etc., when, etc.,[2] and says that the complainant's bill and the matters therein alleged are insufficient for the relief prayed for, or for any relief.

Wherefore he prays judgment.

By *Jeremiah Mason*, his Attorney.[3]

MAINE — ACCOMPANYING CERTIFICATE.[4]

Form No. 7033.

(*Annexed to the demurrer this certificate:*)

I, *Jeremiah Mason*, certify that I am the attorney for the defendant in the above cause, and that the above and foregoing demurrer interposed on behalf of the defendant is interposed in good faith, and that the said demurrer is not intended for delay.

Jeremiah Mason, Attorney for Defendant.

MARYLAND.[5]

particular causes see *infra*, Forms Nos. 7057 to 7083.

Usual protestation clause may be omitted. Me. Supreme Jud. Ct. Ch. Rules (1880), No. 15 (72 Me. 588); see also Me. Supreme Jud. Ct. Ch. Rules (1890), No. 9 (82 Me. 596).

Demurrer and Answer. — By the rules in chancery the defendants may severally demur and answer at the same time. Notes to Me. Supreme Jud. Ct. Ch. Rules (1891), No. 14 (82 Me. 597); see also Me. Supreme Jud. Ct. Ch. Rules (1880), No. 21 (72 Me. 590).

Inserted in Answer. — Defense by demurrer may be inserted in the answer. Me. Supreme Jud. Ct. Ch. Rules (1890), No. 14 (82 Me 597).

1. Precedent. — In Cowan *v.* Wheeler, 25 Me. 267, the following demurrer was sustained:

"To this bill defendant demurs, and for cause of demurrer shows, that the writing, purporting to have been signed by this defendant, under date of the *third* of *October*, 18*41*, as set forth in the plaintiff's bill, is not in law a declaration of trust; and so the plaintiff has not by his bill made out any case to entitle him to a decree, with the usual formal averments and allegations."

2. Significance of "etc." is explained in vol. 1, p. 24, note 1, p. 184, note 3; vol. 2, p. 109, note 2.

3. Counsel shall sign all pleadings as a guarantee of good faith. Me. Supreme Jud. Ct. Ch. Rules (1891), No. 18 (82 Me. 598).

Joinder in Demurrer. — In *Maine*, annexed to the demurrer should be the following joinder: "And the complainant says, that the said bill is sufficient. Wherefore he prays judgment.

By *Oliver Ellsworth*, his Attorney.

Dated *first* day of *June*, 1*898*."

4. Certificate of Counsel. — Demurrers shall not be filed until certified by counsel to be in good faith, and that they are not intended for delay. Me. Supreme Jud. Ct. Ch. Rules (1891), No. 15.

Affidavit and Certificate. — Under the *Maine* Court Rules (1881), No. 22 (72 Me. 590), no demurrer could be filed to any bill unless upon certificate of counsel that in his opinion it was well founded in point of law and supported by affidavit of defendant that it was not interposed for delay. This rule has, however, been changed by Me. Supreme Jud. Ct. Ch. Rules (1891), No. 15.

5. *Maryland.* — Pub. Gen. Laws (1888), art. 16, § 135 *et seq.* (Eq. Rules, No. 17 *et seq.*).

Defect must appear upon face of bill in order that demurrer may lie. Defects not apparent on the face of bill must be taken advantage of by answer or plea. Carroll *v.* Waring, 3 Gill & J. (Md.) 491.

Form No. 7034.

(Md. Pub. Gen. Laws (1888), art. 16, § 136; Md. Eq. Rules, No. 18.)

In the *Circuit* Court for *Allegany* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

The defendant demurs to the whole bill (or *to so much of the bill* or *discovery* or *relief*, stating the particular part or parts demurred to),[1] and for cause of demurrer says:

I. (*Stating the special grounds of demurrer in particular paragraphs, if more than one.*)[2]

Jeremiah Mason, Solicitor for Defendant.

MARYLAND — ACCOMPANYING AFFIDAVIT.[3]

Form No. 7035.

(*Annexed to the demurrer this affidavit:*)

State of *Maryland*,
County of *Allegany*. } To wit.

I hereby certify that on the *fourth* day of *June*, in the year of our Lord one thousand eight hundred and *ninety-eight*, before me, the subscriber, a justice of the peace of the state of *Maryland*, in and for the county of *Allegany*, personally appeared *John Doe*, defendant in the above entitled cause, and made oath upon the Holy Evangely of Almighty God that the demurrer filed by him therein is not intended for delay.

Abraham Kent, Justice of the Peace.

MASSACHUSETTS.[4]

1. Demurrer, Plea and Answer. — The defendant may demur to all or part of the bill, or may demur to part, plead to part, and answer as to the residue. Md. Pub. Laws (1888), Gen. art. 16, § 135.

2. Specification. — The particular grounds of demurrer to the bill must be stated. Md. Pub. Gen. Laws (1888), art. 16, § 136.

For forms of demurrers to bill for particular causes see *infra*, Forms Nos. 7057 to 7083.

Amendment. — For provisions as to amendment after demurrer in equity see Md. Pub. Gen. Laws (1888), art. 16, §§ 139, 140.

3. Affidavit. — Demurrer to the bill must be supported by affidavit that it is not intended for delay. Md. Pub. Gen. Laws (1888), art. 16, § 136.

4. *Massachusetts.* — Pub. Stat. (Supp. 1888), c. 223; Pub. Stat. (1882), c. 151, § 10 *et seq.*

Defendant may, at any time before bill is taken for confession, or afterwards, by leave of court, demur, and he may demur to part, plead to part, and answer as to the residue. Mass. Super. Ct. Ch. Rules (1884), No. 9; Supreme Jud. Ct. Ch. Rules (1886), No. 9.

General demurrer in equity raises only questions of substance. Billings *v.* Mann, 156 Mass. 203.

Special demurrer in equity points out the particular defects in the bill and raises objections to the form of the bill. Billings *v.* Mann, 156 Mass. 203.

Demurrers may be Printed or Written. — If printed, they shall be on paper of the usual quarto size, and the reasonable expense of printing the same may, at the discretion of the court, be taxed in the bill of costs. Mass. Supreme Jud. Ct. Ch. Rules (1886), No. 6; Super. Ct. Ch. Rules (1884), No. 6.

No other demurrer shall be received if demurrer be overruled. Mass. Supreme Jud. Ct. Ch. Rules (1886), No. 11; Super. Ct. Ch. Rules (1884), No. 11.

Form No. 7036.

(Mass. Pub. Stat. (1883), c. 223, § 17, No. 3.)

In the *Superior* Court.

Suffolk, ss.

John Doe against *Richard Roe* and others.

Demurrer (or *demurrer of Richard Roe and Samuel Short, two of the defendants*).

The defendants (or *these defendants*) demur to the plaintiff's bill, and for causes of demurrer show:[1]

1. That plaintiff has not stated such a cause as entitles him to any relief in equity against these defendants, or either of them.

2. That (*stating other grounds of demurrer*).

Jeremiah Mason,
Solicitor for the (or *the said two*) Defendants.[2]

MASSACHUSETTS — ACCOMPANYING CERTIFICATE.[3]

Form No. 7037.

(Mass. Pub. Stat. (1883), c. 223, § 17, No. 3.)

(*Annexed to the demurrer this certificate:*)

I certify that this demurrer is not intended for delay.

Jeremiah Mason.

MICHIGAN.[4]

Form No. 7038.

In the *Circuit* Court for the County of *Lenawee*, State of *Michigan*. In Chancery.

1. **Need not contain protestation** or concluding prayer. Mass. Pub. Stat. (1883), c. 223, § 10.

Specific defects must be distinctly pointed out in the demurrer if it is intended to argue them. Billings *v.* Mann, 156 Mass. 203.

For forms of demurrers to bill for particular causes see *infra*, Forms Nos. 7057 to 7083.

2. **Must be signed** by the party or his attorney. Mass. Pub. Stat. (1883), c. 223, § 10.

Amendment. — If the defendant shall demur to the bill for want of parties, or other defects which do not go to the equity of the whole bill, the plaintiff may amend at any time before demurrer is set down for argument, or within fourteen days after the demurrer is filed, and notice thereof given to him upon the payment of a term fee. Mass. Supreme Jud. Ct. Ch. Rules (1886), No. 20; Super. Ct. Ch. Rules (1884), No. 20.

Plaintiff may, of course, without payment of costs, amend his bill before demurrer filed. Mass. Super. Ct. Ch. Rules (1884), No. 19; Supreme Jud. Ct. Ch. Rules (1886), No. 19.

3. **Certificate that demurrer is not filed for delay** is necessary, unless the demurrer is incorporated in the answer. Mill River Loan Fund Assoc. *v.* Claflin, 9 Allen (Mass.) 101.

The objection that a bill is not accompanied by such a certificate cannot be availed of after case reserved on demurrer. Nelson *v.* Ferdinand, 111 Mass. 300.

4. *Michigan.* — Rev. Ch. Rules, No. 9; How. Anno. Stat. (1882), §§ 6635, 6737.

For forms of demurrers to bills for particular causes see *infra*, Forms Nos. 7057 to 7083.

For form of demurrer to bill seeking to forfeit franchises of plank road company, in *Michigan*, see vol. 5, p. 726, Form No. 6453.

General demurrer in equity, under the former *Michigan* practice, raises only the question as to whether there is any equity whatever in the bill. Cochrane *v.* Adams, 50 Mich. 16.

John Doe, complainant,
against
Richard Roe, defendant.

The demurrer of *Richard Roe*, defendant to the bill of complaint of *John Doe*, the above complainant.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's said bill of complaint (*continuing as in Form No. 7022, down to* †).

By *Jeremiah Mason*, Solicitor for Defendant.[1]

MICHIGAN — ACCOMPANYING CERTIFICATE.[2]

Form No. 7039.

I, *Jeremiah Mason*, hereby certify that I am the solicitor and of counsel for *Richard Roe*, the defendant in this cause; that I, as such solicitor and counsel, have principal charge of the said cause in behalf of the said *Richard Roe* who files the above demurrer to the bill of complaint of *John Doe*, the complainant in this cause; that the said demurrer is not interposed for delay, and that in my opinion said demurrer is well founded.

Jeremiah Mason, Solicitor for *Richard Roe*.

MISSISSIPPI.[3]

Form No. 7040.

(Miss. Anno. Code (1892), § 530.)

[The State of *Mississippi*, *Lafayette* County. In the *Chancery* Court, *May* Term, 1897.

John Doe, complainant,
against
Richard Roe, defendant.][4]

The demurrer of *Richard Roe* to the bill exhibited against him by *John Doe*: The said defendant demurs to said bill, and prays the

1. **Demurrer should be signed** by counsel. Graham *v.* Elmore, Harr. (Mich.) 265.

Signed by solicitors who have not appeared in the cause is not sufficient. Graham *v.* Elmore, Harr. (Mich.) 265.

Need not be signed by defendant himself. Graham *v.* Elmore, Harr. (Mich.) 265.

Incorporated in Answer. — Demurrers may often be incorporated in answers. Zabel *v.* Harshman, 68 Mich. 270.

2. **Individual certificate of counsel** having principal charge of the cause for defendant, to the effect that demurrer is not interposed for delay and is in his opinion well founded, is necessary to accompany the demurrer. Mich. Rev. Ch. Rules (1896), No. 9.

3. *Mississippi.* — Anno. Code (1892), §§ 530 *et seq.*, 524

For forms of demurrers to bills for particular causes see *infra*, Forms Nos. 7057 to 7083.

When an answer is not necessary, a demurrer may be filed. Miss. Anno, Code (1892), § 524.

General demurrer in equity raises only questions of substance. Fearn *v.* Shirley, 31 Miss. 301.

Special demurrer in equity points out the particular defects in the bill and raises objections to the form of the bill. Fearn *v.* Shirley, 31 Miss. 301.

4. The words and figures in [ ] are not found in the form as outlined in the statute, but have been added to make the form complete.

judgment of the court if he shall make any further answer thereto, and shows the following causes of demurrer to said bill, to wit:

First. (*Stating first cause of demurrer.*)

Second. (*Stating second cause of demurrer.*)

Third. (*Stating third cause of demurrer.*) (*Etc., setting out each cause separately.*)

Jeremiah Mason, Solicitor for said Defendant.[1]

MISSISSIPPI — CERTIFICATE ATTACHED.[2]

Form No. 7041.

(*Annexed to the demurrer the following certificate :*)

I, *Jeremiah Mason*, hereby certify that I am the solicitor who interposes the above demurrer on behalf of the defendant to the bill exhibited against him by plaintiff in this cause, and that I believe the said demurrer should be sustained.

Jeremiah Mason, Solicitor for Defendant.

NEW HAMPSHIRE.[3]

Form No. 7042.

(N. H. Ch. Rules, No. 10; 56 N. H. 606, 614.)[4]

In the *Circuit* (or *Supreme*) Court.

Merrimac, ss.

John Doe against *Richard Roe and Another.*

The Demurrer of *Richard Roe.*[5]

The said defendant, *Richard Roe*, says that the plaintiff is not entitled upon said bill to the relief he prays for, because [he had a plain and adequate remedy at law, and because (*pointing out particularly the other ground, or grounds, of demurrer*).][6]

Richard Roe, by
Jeremiah Mason, his Solicitor.

1. **Signature.** — All pleadings must be subscribed by the party or his solicitor. Miss. Anno. Code (1892), § 525.

2. **Certificate of solicitor** that he believes the demurrer ought to be sustained is necessary. Miss. Anno. Code (1892), § 531.

3. **Defects not apparent on face of bill** must be taken advantage of by answer or plea. Tappan *v.* Evans, 11 N. H. 311.

4. This form complies with the requirements of the N. H. Ch. Rules, Nos. 5, 10 (56 N. H. 605, 606), relating to the formal parts of answers and demurrers. The form is substantially that given in 56 N. H. 614.

5. **Title.** — A demurrer shall be entitled like an answer. N. H. Ch. Rules, No. 10 (56 N. H. 606).

Protestation clause may be omitted. N. H. Ch. Rules, No. 6 (38 N. H. 606, 56 N. H. 605).

6. **The grounds of demurrer** assigned to the bill in Rice *v.* Hosiery Co., 56 N. H. 114, were as follows:

"1. No equity on the part of the plaintiff is disclosed in the bill.

2. The plaintiff has a plain and adequate remedy at law.

3. Upon the allegations in the bill, the plaintiff is not entitled to the relief prayed for.

4. The assignee of the said hosiery company, in bankruptcy, should be made a party.

5. The bill is, in all respects, uncertain, informal, and insufficient.

6. The plaintiff's only remedy is to be had in the proceedings in bank-

NEW JERSEY.[1]

Form No. 7043.

In *Chancery of New Jersey.*
Between *John Doe*, complainant, and *Richard Roe*, defendant. } Demurrer.

The demurrer of *Richard Roe*, the defendant, to the bill of complaint of *John Doe*, the plaintiff.

This defendant, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint (*continuing as in Form No. 7022, down to* †).[2]

NEW JERSEY — ACCOMPANYING AFFIDAVIT.[3]

Form No. 7044.

(*Annexed to the demurrer this affidavit:*)
State of *New Jersey*, County of *Bergen*. } ss.

Richard Roe, of lawful age, being duly sworn according to law, on his oath says, that the above and foregoing demurrer by him interposed to the deponent's bill of complaint in this cause is not interposed for delay, but in good faith, for the causes therein mentioned.

Richard Roe.

ruptcy, mentioned in the bill." This demurrer was mainly sustained on the ground of uncertainty in the bill. The bill adjudged insufficient for this reason is set out at large in the reported case.

For forms of demurrers to bills for particular causes see *infra*, Forms Nos. 7057 to 7083.

1. *New Jersey.* — Gen. Stat. (1895), p. 377, § 26 *et seq.*, p. 406, §§ 174, 175, 176.

Defect must appear upon face of bill in order that demurrer may lie. Ludington *v.* Elizabeth, 32 N. J. Eq. 159.

Demurrer, Plea and Answer. — Defendant may demur, plead and answer as to the different parts of the bill in the absence of statute or rule of court to the contrary. Veghte *v.* Raritan Water Power Co., 19 N. J. Eq. 145.

Must be in Writing.—All bills, answers, and other proceedings intended to be filed, shall be fairly and legibly written, and every bill shall be signed by counsel. N. J. Ch. Rules, No. X, § 48. But signature of counsel is not necessary in the case of an answer. Freehold Mut. Loan Assoc. *v.* Brown, 28 N. J. Eq. 42.

General demurrer in equity raises only questions of substance. Wilson *v.* Hill, 46 N. J. Eq. 367; Drummond *v.* Westervelt, 24 N. J. Eq. 30.

A motion to strike out a bill in equity "on the ground that it shows no ground for the interposition of a court of equity, and states nothing which requires the defendant to answer," is, in effect, a general demurrer. Meyers *v.* Schuman, (N. J. 1895) 31 Atl. Rep. 460.

Special demurrer in equity points out the particular defects in the bill and raises objections to the form of the bill. Wilson *v.* Hill, 46 N. J. Eq. 367.

2. **Should Specify Some Cause of Demurrer.** — Marsh *v.* Marsh, 16 N. J. Eq. 391; German Reformed Church *v.* Von Puechelstein, 27 N. J. Eq. 30.

For forms of demurrers to bill for particular causes see *infra*, Forms Nos. 7057 to 7083.

Misjoinder may be assigned as a cause of demurrer *ore tenus*. Barrett *v.* Doughty, 25 N. J. Eq. 380.

3. **Necessity for Affidavit.** — Every demurrer filed without this affidavit may be treated as a nullity. N. J. Gen. Stat. (1895), p. 377, § 27.

Sworn and subscribed before me, at *Hackensack*, this *first* day of *July*, A. D. 1*898*.

(SEAL) *Norton Porter*, Notary Public,
within and for the County and State aforesaid.

NEW JERSEY — ACCOMPANYING CERTIFICATE.[1]

Form No. 7045.

(*Annexed to the demurrer the following certificate:*)

I, *Jeremiah Mason*, of counsel for defendant in this cause, hereby certify that I have perused the complainant's bill of complaint herein, and that the above demurrer interposed by the defendant is well founded in point of law.

Jeremiah Mason.

PENNSYLVANIA.[2]

Form No. 7046.

John Doe against *Richard Roe.* } In the Court *of Common Pleas* No. *2*, for the *City and* County of *Philadelphia*, *December* Term, 1*898*, No. *332*. Sitting in Chancery.

The demurrer of *Richard Roe*, defendant, to the bill of complaint of *John Doe*, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill (*continuing as in Form No. 7022, down to* †).

Jeremiah Mason, Solicitor for Defendant.

(*Affidavit.*)[3]

1. Necessity for Certificate. — Every demurrer filed without such certificate may be treated as a nullity. N. J. Gen. Stat. (1895), p. 377, § 27.

2. All defenses in equity cases shall be made by answer or demurrer. Pa. Eq. Ct. Rules (1894) (28 Atl. Rep. p. vi).

For forms of demurrers to bills for particular causes see *infra*, Forms Nos. 7057 to 7083.

Demurrer and Answer. — Defendant may, at any time before bill is taken or confessed, or afterwards, with leave of the court, demur to the whole bill or to part of it, and he may demur to part and answer as to the residue. Pa. Supreme Ct. Rules, No. 31 (2 Brews. Pr., § 2569).

Filing a plea or answer to some part or to the whole f a bill, when a demurrer has been interposed to that part or to the whole bill, has the effect of overruling the demurrer. Barbey's Appeal, 119 Pa. St. 413.

Pleadings in equity must be printed on white paper of a convenient size. Brews. Pr., § 2558.

For form of demurrer to a bill praying for an injunction see vol. 5, p. 567, Form No. 6401, being a precedent taken from Gyger *v.* Philadelphia, etc., R. Co., 136 Pa. St. 99.

Form Prescribed by Rule of Court. — Demurrers shall be substantially in the following form: "The defendant demurs to the whole bill" or "to so much of the bill, or discovery, or relief," stating the particulars and showing the reasons, or grounds, in detail. Pa. Supreme Ct. Rules, No. 32 (2 Brewst. Pr., p. 1008).

3. The accompanying affidavit to a demurrer to a bill in equity is like the affidavit accompanying a demurrer to the statement. For form of this affidavit see *supra*, Form No. 7014.

No demurrer shall be allowed to be filed to any bill unless supported by affidavit that it is not interposed for delay. Pa. Supreme Ct. Rules, No. 32 (2 Brewst. Pr., p. 1008).

The affidavit may be sworn to before any person authorized to administer oaths under the laws or statutes of the

RHODE ISLAND.[1]

Form No. 7047.

Providence, SC. Supreme Court. Appellate Division.

John Doe against *Richard Roe.* } Demurrer to Bill in Equity.

The demurrer of *Richard Roe*, the defendant, to the bill of complaint of *John Doe*, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's bill of complaint (*continuing and concluding as in Form No. 7022*).[2]

(*Affidavit and certificate.*)[3]

TENNESSEE.[4]

Form No. 7048.

John Doe, complainant, against *Richard Roe*, defendant. } In the Chancery Court of *Chattanooga.*

The defendant, *Richard Roe*, demurs to the complainant's bill in this cause, for the following reasons:[5]

I. (*Pointing out particularly the ground, or grounds, of demurrer relied on, in numbered paragraphs if more than one ground.*)[6]

commonwealth of Pennsylvania, or of any other state, territory or county where the oath is taken. Pa. Supreme Ct. Rules, No. 42 (2 Brewst. Pr., p. 1008).

1. *Rhode Island.*— Defendant may, at any time before the bill is taken for confession, or afterwards, with leave of the court, demur to the whole bill or to a part of it, and he may demur to part, plead to part, and answer as to the residue. R. I. Eq. Ct. Rules (1886), No. 22.

For forms of demurrers to bills for particular causes see *infra*, Forms Nos. 7057 to 7083.

2. **No demurrer shall be held bad** only because the answer of defendant may extend to some part of the same matter as may be covered by such demurrer. R. I. Eq. Ct. Rules (1886), No. 24.

3. **Accompanying Affidavit and Certificate.**— No demurrer shall be allowed to be filed to any bill unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay. R. I. Eq. Ct. Rules (1886), No. 12. For forms of similar certificates in affidavits see *infra*, Forms Nos. 7050, 7051.

4. *Tennessee.*— Code (1896), § 6198.

Demurrer is one of the modes of defense to a bill in equity. Tenn. Code (1896), § 6194. And it may raise the question of want of equity, or misjoinder or nonjoinder of parties, where the fact appears upon the face of the bill, or multifariousness. Tenn. Code (1896), § 6198.

Demurrer, Plea and Answer.— Defendant may demur, plead and answer as to the different parts of the bill in the absence of statute or rule of court to the contrary. Saunders *v.* Gregory, 3 Heisk. (Tenn.) 567.

5. **Protestation clause** is unnecessary. Gibson's Suit in Ch., § 316.

6. **More than one cause** of demurrer may be assigned either to the whole bill or to parts of the same. Brien *v.* Buttorff, 2 Tenn. Ch. 523.

General demurrers in equity have been abolished, and every demurrer must assign the reason wherein the want of equity consists. McCaleb *v.* Crichfield, 5 Heisk. (Tenn). 288; Kirkman *v.* Snodgrass, 3 Head (Tenn.) 370.

Demurrers must state objections relied on. Gibson's Suit in Ch., § 311.

Demurrer must not be Too Broad.— Riddle *v.* Motley, 1 Lea (Tenn.) 468; Allen

Wherefore, this defendant prays the judgment of the court whether he shall be compelled to answer further.[1]

Jeremiah Mason, solicitor for defendant.[2]

VERMONT.[3]

Form No. 7049.[4]

State of *Vermont*, } ss.
Windham County. }

John Doe against *Richard Roe.* } In the Court of *Chancery* in said county.

The demurrer of *Richard Roe*, the defendant, to the bill of complaint of *John Doe*, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint (*continuing as in Form No. 7022, down to* †).

Jeremiah Mason, Solicitor for the Defendant.

v. Lanier, 4 Hayw. (Tenn.) 290; Colville *v.* Colville, 9 Mumph. (Tenn.) 524; Fay *v.* Jones, 1 Head (Tenn.) 443; Hunter *v.* Justices, 7 Coldw. (Tenn.) 49; Crowder *v.* Denny, 3 Head (Tenn.) 359; Saunders *v.* Gregory, 3 Heisk. (Tenn.) 567; Phœnix Ins. Co. *v.* Day, 4 Lea (Tenn.) 247.

Specification. — Setting up as ground of demurrer "that said complainant is not entitled to the discovery prayed by his said bill against this defendant" does not state the objection relied on as required by the code. Finley *v.* McCormick, 6 Heisk. (Tenn.) 392.

For forms of demurrers to bills for particular causes see *infra*, Forms Nos. 7057 to 7083.

1. **Conclusion.** — The old long form of conclusion in the words "Wherefore and for divers other good causes of demurrer, appearing in said bill, these defendants do demur thereto," etc., is not necessary. Gibson's Suit in Ch., § 315.

2. **Must be signed by defendant** in person, or by his solicitor, but need not be sworn to. Gibson's Suit in Ch., § 316, *citing* 1 Daniell's Ch. Pr., p. 590.

Amendment. — For provisions as to amendments and new pleadings, after the demurrer is ruled on, see Tenn. Code (1896), §§ 4656, 4657.

3. *Vermont.* — Ch. Ct. Rules (1893), Nos. 14, 15 *et seq.*

For forms of demurrers to bills for particular causes see *infra*, Forms Nos. 7057 to 7083.

General demurrer in equity raises only questions of substance. Stewart *v.* Flint, 57 Vt. 216.

Special demurrer in equity points out the particular defects in the bill and raises objections to the form of the bill. Stewart *v.* Flint, 57 Vt. 216.

Demurrer and Answer. — Defendant may demur to the whole bill or to a part of it, or may plead to a part, demur to a part, and answer as to the residue. Vt. Ch. Ct. Rules (1893), No. 14.

No demurrer shall be held bad only because it does not cover so much of the bill as might, by law, have been covered, nor because the answer extends to some part of the matter that is covered by the demurrer. Vt. Ch. Ct. Rules (1893), No. 19.

Demurrer Incorporated in Answer. — Instead of filing a formal demurrer, defendant may insist, in his answer, on any special matter that goes to the merits of the bill, and have the same benefit thereof as if he had demurred to the bill. Vt. Ch. Ct. Rules (1893), No. 15. Demurrers may often be incorporated in answers. McLane *v.* Johnson, 59 Vt. 237; Murphy *v.* Lincoln, 63 Vt. 278; Holt *v.* Daniels, 61 Vt. 94.

4. **Pleadings must be in the English Language.** — Vt. Stat. (1894), § 900.

VERMONT — ACCOMPANYING AFFIDAVIT.[1]

Form No. 7050.

Windham County, ss.

At *Bellows Falls*, in said county, on the *first* day of *July*, 1*898*, personally appeared *Richard Roe*, the defendant in the above cause, and made oath that the above demurrer interposed by him is not interposed for delay.

Before me, *Abraham Kent*, Justice of the Peace.

VERMONT — ACCOMPANYING AFFIDAVIT.[1]

Form No. 7051.

I, *Jeremiah Mason*, do hereby certify that I am the solicitor and of counsel for *Richard Roe*, the defendant in this cause, and that in my opinion the demurrer above interposed is well founded in point of law.

Jeremiah Mason, Solicitor for the Defendant.

VIRGINIA.[2]

Form No. 7052.[3]

(Va. Code (1887), § 3271.)

[*Circuit* Court of *Albemarle* County, to wit.

John Doe
against
Richard Roe.][4]

The defendant says that the bill is not sufficient in law.

[*Jeremiah Mason*, p. d.][4]

WEST VIRGINIA.[5]

Form No. 7053.[6]

1. **Accompanying Affidavit and Certificate.** — No demurrer shall be allowed to be filed to a bill without a certificate of counsel that in his opinion it is well founded in point of law, nor unless it is supported by the affidavit of the defendant that it is not interposed for delay. Vt. Ch. Ct. Rules (1893), No. 13.

2. **Defects not apparent on face** of bill must be taken advantage of by answer or plea. Harris *v.* Thomas, 1 Hen. & M. (Va.) 18.

Defendant may answer and demur at the same time to the same matter in the bill. Bassett *v.* Cunningham, 7 Leigh (Va.) 402; Rosset *v.* Greer, 3 W. Va. 1.

3. **The rules of pleading in equity** are governed by the same statutory provisions as pleadings at law. Va. Code (1887), c. 159. See also *supra*, Form No. 7019, and notes thereto.

For forms of demurrers to bill for particular causes see *infra*, Forms Nos. 7057 to 7083.

4. The matter within [ ] is not in the statutory form, but is added to complete the form.

5. **Defects not apparent on face of bill** must be taken advantage of by answer or plea. Barr *v.* Clayton, 29 W. Va. 256.

6. **The rules of pleading in equity** cases are governed by the same statutory provisions as pleadings at law. W. Va. Code (1891), c. 125; see also *supra*, Form No. 7020, and notes thereto.

(W. Va. Code (1891), c. 125, § 28.)

[State of *West Virginia*, *Preston* County. } In the *Circuit* Court

John Doe against *Richard Roe.*][1]

Defendant says the bill is not sufficient in law.

[*Jeremiah Mason*, p. d.][1]

FEDERAL COURTS.[2]

Form No. 7054.

Circuit Court of the United States in and for the *Southern* District of *New York*.

John Doe against *Richard Roe.* } In Equity. No. *102.*

The demurrer of *Richard Roe*, defendant, to the bill of complaint of *John Doe*, the complainant.

This defendant, by protestation,[3] not confessing any or all of the

For forms of demurrer to bill for particular causes see *infra*, Forms Nos. 7057 to 7083.

For form of demurrer to plea that corporation had ceased to act, in *West Virginia*, see vol. 5, p. 728, Form No. 6455.

For form of demurrer to bill charging unlawful preferences, in *West Virginia*, see vol. 5, p. 725, Form No. 6452.

1. The words within [ ] are not found in the statutory form, but have been added to render the form complete.

2. *Federal Courts.* — U. S. Eq. Ct. Rules, No. 31 *et seq.*

For forms of demurrers to bills for particular causes see *infra*, Forms Nos. 7057 to 7083.

The office of a demurrer to a bill is to present the question of the right to maintain it, admitting all its allegations to be true. The court will not, therefore, examine *aliunde* facts which might or might not defeat it. Ocean Ins. Co. *v.* Fields, 2 Story (U. S.) 59.

Demurrer, Plea and Answer. — Defendant may demur to part, plead to part, and answer as to the residue of the bill. U. S. Eq. Ct. Rules, No. 32; U. S. *v.* American Bell Telephone Co., 30 Fed. Rep. 523.

Defendant may demur, plead and answer as to the different parts of the bill in the absence of statute or rule of court to the contrary. Livingston *v.* Story, 9 Pet. (U. S.) 632.

No demurrer shall be held bad and be overruled upon argument only because such demurrer shall not cover so much of the bill as it might by law be expanded to. U. S. Eq. Ct. Rules, No. 36.

General demurrer raises only questions of substance. Puetz *v.* Bransford, 31 Fed. Rep. 458.

Special demurrer in equity points out the particular defects in the bill and raises objections to the form of the bill. Puetz *v.* Bransford, 31 Fed. Rep. 458; Hanlon *v.* Primrose, 56 Fed. Rep. 600.

3. **Protestation clause** does not limit admissions as to facts properly alleged in the pending suit. Taylor *v.* Holmes, 14 Fed. Rep. 498.

Demurrer too broad is not cured by the protestation clause. It does not avoid the force of the rule that a general demurrer to the whole bill must be overruled if any independent part of the bill is sufficient. Atwill *v.* Ferrett, 2 Blatchf. (U. S.) 39.

Office of the protestation clause is explained in Taylor *v.* Holmes, 14 Fed. Rep. 498.

Demurrer to whole bill will not be sustained if any part of the bill is good to such an extent as to entitle the plaintiff to relief. Livingstone *v.* Story, 9 Pet. (U. S.) 632; Heath *v.* Erie R. Co., 8 Blatchf. (U. S.) 347; Drexel *v.* Berney, 122 U. S. 241; Stewart *v.* Masterson, 131 U. S. 151.

matters or things in said complainant's said bill of complaint (*continuing and concluding as in Form No. 7022, down to* †).

Jeremiah Mason, Solicitor of Counsel
for the Defendant.

FEDERAL COURTS — ACCOMPANYING AFFIDAVIT AND CERTIFICATE.[1]

Form No. 7055.[2]

(*Annexed to the demurrer this affidavit and certificate:*)

State of *New York*,
Southern District of *New York*, } ss.
City and County of *New York*.

Henry G. Allen, being duly sworn, deposes and says: I am president of the *Henry G. Allen Company*, a corporation, and which is the defendant in the above entitled suit, and I further depose and say that the above demurrer is not interposed for delay.

Henry G. Allen.

Subscribed and sworn to before me this *19th* day of *March*, A. D. 1*890*. *Albert C. Aubery*, Notary Public, Kings Co.

Certificate filed in *N. Y.* Co.

I, *Jeremiah Mason*, hereby certify that I am the solicitor and of counsel for the *Henry G. Allen Company*, a corporation, the defendant above named, and that in my opinion the demurrer of the said *Richard Roe*, by him interposed to the bill of complaint of *John Doe*, the complainant in the above cause, is well founded in point of law, and proper to be filed in the above cause.

Jeremiah Mason, Solicitor and of Counsel
for Defendant.

b. To Part of Bill.

(1) GENERALLY.[3]

1. Affidavit of Defendant. — No demurrer shall be allowed to be filed to a bill in equity unless supported by the affidavit of the defendant that it is not interposed for delay. U. S. Eq. Ct. Rules, No. 31; Preston *v.* Finley, 72 Fed. Rep. 850; Sheffield Furnace Co. *v.* Witherow, 149 U. S. 574; Central Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 57.

Certificate of Counsel. — No demurrer or plea shall be allowed to be filed to any bill unless upon a certificate of counsel that in his opinion it is well founded in point of law. U. S. Equity Ct. Rules, No. 31; Secor *v.* Singleton, 9 Fed. Rep. 809; Sheffield Furnace Co. *v.* Witherow, 149 U. S. 574; Central Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 57.

Waiver of certificate of counsel to demurrer to a plea, see Goodyear *v.* Toby, 6 Blatchf. (U. S.) 130.

2. This was the affidavit to the demurrer filed in the case of Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618. Such an affidavit is required under the thirty-first equity rule.

3. For forms of demurrers to bills for particular causes see *infra*, Forms Nos. 7057 to 7083.

Form No. 7056.

(Curt. Eq. Prec., pp. 139, 140.)

(*Commencing as in Form No. 7022, and continuing down to* *)[1] as to so much and such part of the said bill as seeks that this defendant may answer, or set forth, whether (*indicating part of bill demurred to*); and whether (*indicating part of bill demurred to*); and prays (*if relief be prayed*); doth demur, and for cause of demurrer saith that (*pointing out particularly the special defects relied on by demurrant*). Wherefore, and for divers other errors and imperfections appearing in the said bill, this defendant humbly prays the judgment of this honorable court whether he shall be compelled to make any answer to such part of the said bill as is so demurred unto as aforesaid.*[2] And this defendant humbly prays to be hence dismissed as to such part of said bill with his costs in this behalf wrongfully sustained.

(2) Coupled with Other Pleading.[3]

(*a*) *With Answer.*[4]

1. Commencement of demurrer as to part of bill only, instead of as in the text, may be and often is as follows:

"The defendant, *Richard Roe*, demurs to so much of the bill in said cause as" (*specifying the part of the bill demurred to*).

2. Conclusion of demurrer to part only of bill, instead of as in the text, may be as follows: "And therefore, and for other good causes of demurrer in the said bill contained as to so much of said complainant's bill as is demurred unto, as aforesaid, this defendant doth demand the judgment of this honorable court, whether he shall be compelled to make any answer to such part of said bill as is so demurred unto as aforesaid," etc. Curt. Eq. Prec., p. 140.

A demurrer to part of a bill may be framed for any jurisdiction by using Form No. 7056, *supra*, as a model and referring to Forms Nos. 7023 to 7054 for the formal parts of the demurrer in the particular jurisdiction desired.

3. Demurrer may be coupled with an answer or plea, or both, in the same pleading. Jones *v.* Strafford, 3 P. Wms. 81; 1 Daniell's Ch. Pr (Am. ed.), p. 583.

District of Columbia. — Eq. Ct. Rules (1898), No. 29.

Florida. — Cir. Ct. Rules (1892), No. 49.

Maine. — Supreme Jud. Ct. Ch. Rules (1890), No. 14; 82 Me. 597.

Maryland. — Pub. Gen. Laws (1888), art. 16, § 135.

Massachusetts. — Supreme Jud. Ct. Ch. Rules (1886), No. 9. Super. Ct. Ch. Rules (1884), No. 9.

Mississippi. — Anno. Code (1892), § 524.

New Jersey. — Veghte *v.* Raritan Water Power Co., 19 N. J. Eq. 145.

Pennsylvania. — Supreme Ct. Rules, No. 31; 2 Brewst. Pr. 2569.

Rhode Island. — Eq. Ct. Rules, No. 22.

Tennessee. — Saunders *v.* Gregory, 3 Heisk. (Tenn.) 567.

Vermont. — Ch. Ct. Rules (1893), No. 14.

Virginia. — Bassett *v.* Cunningham, 7 Leigh (Va.) 402.

West Virginia. — Rosset *v.* Greer, 3 W. Va. 1.

Federal Courts. — U. S. Eq. Ct. Rules, No. 32; Livingston *v.* Story, 9 Pet. (U. S.) 632.

4. A demurrer coupled with an answer must be distinguished from a demurrer incorporated in an answer. Harding *v.* Egin, 2 Tenn. Ch. 39.

Demurrer coupled with an answer may easily be framed for any jurisdiction by using Form No. 7057, *infra*, as a model and referring to Forms Nos. 7023 to 7054, *supra*, for the formal parts peculiar to the particular jurisdiction.

Form No. 7057.

The demurrer of defendant *Richard Roe* to part and his answer to the other part of the bill of complaint of *John Doe*, complainant.[1]

This defendant (*continuing as in Form No. 7056, down to* *).

And this defendant, not waiving his said demurrer, but relying thereon and saving and reserving unto himself all benefit and advantage of exception to the many errors, uncertainties and imperfections in the residue of the said bill contained, for answer says: (*setting out answer in the usual form.*)[2]

(*b*) *With Plea and Answer.*

TO BILL SEEKING RELIEF AGAINST A WILL WHEREBY A PERSONAL ESTATE IS DEVISED, ETC.

Form No. 7058.

(2 Harr. Ch. Pr., p. 417.)

The general and several demurrer of *Richard Roe* and *Ann Roe*, his wife, to part, and the plea of said *Richard Roe* to part, and the joint and several answers of the said *Richard Roe* and *Ann Roe*, his wife, to other part of the bill of complaint of *John Doe* and *Samuel Short*, and *Sarah Short*, his wife, complainants.

These defendants, *Richard Roe* and *Ann Roe*, his wife, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true, in such sort and manner as the same are therein expressed and contained as to so much of the said bill as seeks (*indicating part of bill demurred to*); these defendants do demur thereunto, and for cause of demurrer show (*pointing out particularly the special defects relied on by demurrants*): and for further cause of demurrer these defendants show (*pointing out particularly other defects relied on by demurrants*), for which reason, and for divers other causes, these defendants do demur to so

1. **Other headings of such demurrers** are given in the precedents substantially as follows:

"The joint and several demurrer of *Richard Roe* and *Samuel Short* to part, and the joint and several answer of the same defendants to the residue, of the original bill of complaint of *John Doe*, plaintiff."

Or, "The demurrer of *Richard Roe* and *Robert Roe* to part, and their answer to the other part, of the bill of complaint of *John Doe*, complainant."

Or, "The demurrer of the defendants, *Richard Roe*, *Robert Roe* and *Ann Roe*, his wife, to part, and their answer to other part, of the bill of complaint of *John Doe*, complainant."

Demurrer accompanied by plea or answer should be called "the demurrer and plea" or "the demurrer and answer." Daniell's Ch. Pr. (6th Am. ed.), p. 585.

In Bruen *v.* Bruen, 4 Edw. Ch. (N. Y.) 640, the caption of a demurrer put in with an answer which read: "The demurrer and answer of *George W. Bruen* and *John B. Beck*, defendants to the bill of complaint of *Mary Ann D. Bruen*, complainant," was held bad in form because it did not specify that it was the demurrer to a part and answer to the residue of the bill, and because it might be construed to be a demurrer as well as an answer to the whole bill.

2. **For forms of answers in equity,** in general, consult the title ANSWERS IN EQUITY, vol. 1, p. 854.

much of said bill as aforesaid, and humbly pray judgment of this honorable court whether they shall make any further or other answer thereto.

And as to so much of said bill as seeks (*indicating part of bill to which plea is interposed*), this defendant, *Richard Roe*, doth plead thereunto, and for plea this defendant saith that (*setting out plea to part of the bill, in the usual manner*).[1] All which said matters and things this defendant doth aver, and is ready to prove as this honorable court shall direct, and doth plead the same in bar to so much of the said bill as for that purpose is hereinbefore mentioned, and humbly prays the judgment of this honorable court whether he shall make any other or further answer thereto.

And as to so much of said bill as these defendants have not before respectively demurred or pleaded unto, these defendants in no sort waiving the benefit of their said demurrer and plea, or either of them, but wholly relying and insisting thereon, these defendants, for answer to the residue of the complainant's said bill, or to so much thereof as these defendants are advised is material or necessary for them, or either of them, to make answer unto, these defendants, each speaking for him or herself and not the one for the other, though these defendants do severally answer and say as follows, that (*setting out answer to residue of the bill in the usual manner*).[2]

c. Incorporated in Answer.[3]

Form No. 7059.[4]

1. For forms of pleas in equity, in general, consult the title PLEAS.

2. For forms of answers in equity, in general, consult the title ANSWERS IN EQUITY, vol. 1, p. 854.

A demurrer coupled with answer or plea, or both, may be framed by using Forms Nos. 7057 and 7058 in the text as models and referring to Forms Nos. 7023 to 7054 for the formal parts of the demurrer in the particular jurisdiction desired.

3. Demurrer Incorporated in Answer. — In many jurisdictions the demurrer may be incorporated in the answer to the bill.

Alabama. — Civ. Code (1886), § 3442; Craft *v.* Russell, 67 Ala. 9; Shaw *v.* Lindsey, 60 Ala. 344.

Maine. — Supreme Jud. Ct. Ch. Rules (1890), No. 14; Smith *v.* Kelley, 56 Me. 64.

Massachusetts. — Fogg *v.* Price, 145 Mass. 513; Super. Ct. Ch. Rules (1884), No. 13; Supreme Jud. Ct. Ch. Rules (1886), No. 13.

Michigan. — Smith *v.* Blake, 96 Mich. 542, Zabel *v.* Harshman, 68 Mich. 270; Williams *v.* Detroit, 2 Mich. 586.

New Hampshire. — Ch. Ct. Rules (1877), No. 10; Spafford *v.* Smith, 59 N. H. 366.

New Jersey. — Dick. Forms Ch. Pl., p. 177.

Rhode Island. — Eq. Ct. Rules, No. 24.

Tennessee. — Code (1896), § 6129; Harding *v.* Egin, 2 Tenn. Ch. 42; Kyle *v.* Riley, 11 Heisk. (Tenn.) 230.

Vermont. — Ch. Ct. Rules (1893). Nos. 15, 19; Murphy *v.* Lincoln, 63 Vt. 278; Holt *v.* Daniels, 61 Vt. 89; McLean *v.* Johnson, 59 Vt. 237.

Virginia. — Bassett *v.* Cunningham, 7 Leigh (Va.) 402.

West Virginia. — Rosset *v.* Greer, 3 W. Va. 1.

Federal Courts. — U. S. Eq. Ct. Rules. Nos. 36, 37; Hayes *v.* Dayton, 8 Fed. Rep. 702; *contra*, Crescent City Live Stock, etc., Co. *v.* Butchers' Union Live Stock, etc., Co., 12 Fed. Rep. 225; Adams *v.* Howard, 9 Fed. Rep. 347.

A defendant in chancery, by a reservation in his answer, may have the same benefit of matters that he would have been entitled to by a demurrer. Meux *v.* Anthony, 11 Ark. 411; Lovette *v.* Longmire, 14 Ark. 339.

4. This form is taken from the one outlined in Gibson's Suit in Ch., § 317.

(*Title of court and cause as in Form No. 7048.*)[1]

The demurrer and answer of the defendant, *Richard Roe*, to the bill filed against him and others in the above entitled cause.

This defendant, *Richard Roe*, demurs to the bill filed in this cause, and for cause of demurrer shows (*pointing out particularly the ground, or grounds, of demurrers, in numbered paragraphs if more than one ground*).

And this defendant, not waiving his said demurrer, but relying thereon for answer to his said bill, says: (*Here set out the answer to the whole bill as though no demurrer had been made to the same.*)

Jeremiah Mason,
Solicitor for Defendant, *Richard Roe*.[2]

d. To Supplemental or Amended Bill.[3]

Form No. 7060.

(*Title of court and cause.*)[4]

The demurrer of *Richard Roe*, the defendant, to the supplemental (or *amended*) bill of complaint of *John Doe*, plaintiff (or *complainant*).

1. Title of court and cause in the particular jurisdiction desired may be found by reference to Forms Nos. 7023 to 7054, *supra*.

2. Proper signature of counsel, solicitor or attorney may be found for the particular jurisdiction desired by reference to Forms Nos. 7023 to 7054, *supra*.

Precedents.—An answer setting up the following clause was held to submit a demurrer: "And these defendants submit to this honorable court that all and every of the matters in said complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainants are not entitled to any relief from a court of equity, and these defendants hope that they shall have the same benefit of this defense as if they had demurred to the complainant's bill." Shalley *v.* Spillman, 19 Fla. 513.

To a bill to abate a mill-dam as a nuisance defendant answered and in his answer demurred as follows: "And the defendant further says that the complainants have not in and by their said bill of complaint made or stated such a case as entitles them in equity to any of the relief therein prayed against defendant." No benefit was prayed of the demurrer and the cause was tried on its merits. It was held that the demurrer in the answer must be regarded as waived, the defendant having put in his proofs and submitted the cause upon the merits. Ronayne *v.* Loranger, 66 Mich. 383, *citing* Story Eq. Pl. 284; Wales *v.* Newbould, 9 Mich. 81; Payne *v.* Avery, 21 Mich. 537; Abbot *v.* Johnson, 32 N. H. 9.

3. Demurrer will lie to an amended bill in like manner as to the original bill. Moore *v.* Armstrong, 9 Port. (Ala.) 697; Horton *v.* Thompson, 3 Tenn. (Ch.) 575.

Matter inconsistent or repugnant to the substantive allegations of the original bill appearing in the amended bill affords good ground of demurrer. Ogden *v.* Moore, 95 Mich. 290.

Demurrer to a supplemental, or amended, bill in equity may be easily framed by using Form No. 7060, *supra*, as a model and referring to Forms Nos. 7023 to 7054, *supra*, for the formal parts of the demurrer in the particular jurisdiction desired.

4. Title of court and cause in any particular jurisdiction may be found by referring to Forms Nos. 7023 to 7054, *supra*.

Demurrer to amended bill need not be entitled as a demurrer to the original and amended bill, but simply as a demurrer to the amended bill. Smith *v.* Bryon, 3 Madd. 428.

Or, if such be the case, the heading may be as follows: "The demurrer, plea and answer of *Richard Roe*, one of the above named defendants, to the supplemental (or *amended*) bill of complaint of *John Doe*, the above named plaintiff (or *complainant*)."

Precedents. — In Planters, etc., Mut.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said supplemental (or *amended*) bill of complaint (*continuing and concluding as in Forms Nos. 7023 to 7059, as the case may be, always referring to the bill as "the supplemental* (or *amended*) *bill"*).

2. Particular Grounds.

a. In General.

Form No. 7061.

(Precedent in Dutton *v.* Thomas, 97 Mich. 94.)[1]

[(*Title of court and cause as in Form No. 7038.*)][2]

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's bill of complaint contained to be true in the manner and form as the same are therein and thereby set forth and alleged to warrant the prayer therein for the appointment of a receiver, etc., demur thereto, and for cause of demurrer aver:

a—That there is no proper or sufficient statement in said bill of any property or property interests in jeopardy from loss or otherwise to warrant action by a receiver in the premises.

b—That the allegations of complainant's bill are too general, vague, and uncertain to justify the prayer therein for a receiver, and the appointment thereof before discovery of property, or interests therein, has been made on said bill as a bill of discovery.

Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 589, defendant demurred to an amended bill assigning substantially the following causes of demurrer: "1st. That if the complainant was not entitled to relief when the original bill was filed, complainant cannot become entitled to relief by events occurring after the bill was filed; 2d. Because the complainant is not entitled to relief against this defendant on account of payments made after the commencement of this suit; 3d. Because the complainant cannot maintain the equity of its bill by events occurring after the original bill was filed." The chancellor overruled the demurrer, but, on final hearing of pleadings and proof, he held the demurrer to be well taken and dismissed both the amended and original bills.

In Winter *v.* Quarles, 43 Ala. 695, to a second amended bill to charge a wife's separate estate, the wife and her husband and trustee filed a joint and separate answer, accompanied by a demurrer to said amended bill, assigning among other causes that "said second amended bill is repugnant to the original bill and first amendment and makes a new case;' and that 'neither said original bill nor the second amendment thereto requires any answer to be made to the same, either by prayer, notice, note, or memorandum attached thereto.'" This demurrer was sustained, the court construing the original bill to allege a statutory separate estate in the wife; the second amended bill showed that the wife's title to her separate estate was by deed making the legal title to her trustee. This was inconsistent with the title set in the orignal and first amended bill. Winter *v.* Quarles, 43 Ala. 695.

See also Larkins *v.* Biddle, 21 Ala. 252, for demurrer sustained to an amended bill for making a new and different case from the original bill.

In Taylor *v.* Taylor, 87 Mich. 66, is set out a demurrer to a supplemental bill to reform and foreclose a mortgage.

1. No objection was made to the form of this demurrer, though the order appointing a receiver was affirmed. Dutton *v* Thomas, 97 Mich. 94.

2. The matter enclosed by [ ] is not found in the reported case, but should be added to complete the form.

c—That on the face of said bill, and the notice given in that behalf to defendants, the court is without jurisdiction to appoint a receiver.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint as to so much thereof as before is referred to, these defendants demur, and pray the judgment of this court whether they shall be compelled to make any further answer to such parts of said bill so demurred to as aforesaid. [(*Signature of solicitor as in Form No. 7038.*)][1]

1. The matter enclosed by [ ] is not found in the reported case, but should be added to complete the form.

Form of demurrer to bill for uncertainty, etc., is set out in McKinney *v.* Curtiss, 60 Mich. 617. Also in Dunston *v.* Hoptonic Co., 83 Mich. 381, is set out a demurrer to a bill in equity.

Other Precedents. — In State *v.* Black River Phosphate Co., 27 Fla. 320, demurrer assigned as grounds the following:

"(1) The allegations of said bill are too uncertain, vague and indefinite. (2) The bill does not set out with sufficient certainty the claim of complainant in the subject matter of the suit. (3) The bill does not sufficiently set out title of complainant in the subject matter of suit. (4) The bill does not set out with sufficient certainty to what portion of the stream mentioned, or bed thereof, complainant's claim extends. (5) Complainant does not allege that said stream, or portions thereof, from which phosphate is alleged to be taken, or on account of which relief or discovery is sought, is within tidewater. (6) And for other grounds appearing on the face of bill." The order sustaining this demurrer was affirmed on appeal.

In Cowan *v.* Wheeler, 25 Me. 267, the abstract of the demurrer was as follows: "To this bill, the defendant demurs, and for cause of demurrer shows, that the writing, purporting to have been signed by this defendant, under the date of the *third* of *October*, 18*41*, as set forth in the plaintiff's bill, is not in law a declaration of trust; and so the plaintiff has not by his bill made out any case, to entitle him to a decree, with the usual formal averments and allegations." Upon argument to this demurrer, the court dismissed the bill with costs of the defendant.

In Woodgate *v.* Fleet, 9 Abb. Pr. (N. Y. Supreme Ct.) 234, the title of the demurrer to the complaint was as follows: "The said defendants, *James Herriman* and *Benjamin Rushmore*, commissioners aforesaid, demur to so much of the plaintiff's complaint herein as seeks to inquire into, controvert, and have determined in this action the respective priorities, equities, and rights of the plaintiff, and of these defendants, as such commissioners, as to the title the plaintiff acquired under the sheriff's deed, in the complaint mentioned, to the premises in question in the complaint set forth, and as to the rights and liens of the said two mortgages in the complaint mentioned, to the commissioners for loaning certain moneys of the United States, of the county of *Queens*, upon said premises, at the time the decree was made in the complaint mentioned, before the *assistant vice-chancellor* of the *first* circuit in the chancery suit therein also mentioned, and as seeks to contest and question the validity and priority of said liens over the plaintiff's claims and interests therein, and as to so much of said complaint as seeks to impeach and set aside the deed of trust, and to establish the deed of release in the complaint mentioned, and as seeks to open said decree as to those matters.

I. Because it appears upon the face of the complaint, that in said chancery suit, the said *Martha E. Fleet*, wife of the said *Abraham Fleet*, *John K. Fleet* and the infant children of the said *Abraham* and *Martha E. Fleet*, viz., *Melancthon Fleet*, *Samuel Fleet* and *Ann E. Fleet*, by *Michael P. Holland*, their next friend, were complainants, and the said *John Woodgate*, *Abraham Fleet*, *James H. Hackett*, *Sarah Van Lew*, and *James Herriman* and *George D. Coles*, then commissioners as aforesaid, were defendants. That said chancery suit was commenced and determined long before the plaintiff's action herein, and that all those matters above demurred to were in said chancery suit comprehended and questioned, and

ought to be determined in said former suits; and that a decree was made in said chancery suit before the *assistant vice-chancellor*, on or about the *22d* of *March*, 1843, establishing and decreeing the rights and equities of all the parties to said suit, as to all those matters, and wherein all those matters ought to be passed upon and determined.

II. Because, if this action is allowed to proceed as to those matters, the defendants will be liable to answer again concerning the same matters, which are comprehended and ought to be determined in said former suits.

III. Because said chancery suit and said decree appearing on the face of the complaint, and it nowhere appearing thereon that said decree has in any manner been modified, altered, vacated, or reversed, the plaintiff is not entitled to bring an original suit to try again those same matters.

IV. Because it appears, on the face of the complaint, that there are other persons having an interest in the questions proposed to be inquired into, who ought to be made parties to this action, viz., *Melancthon Fleet*, *Samuel Fleet*, and *Ann E. Fleet*, wherefore the defendants insist that the complaint as to all those matters, should be dismissed with costs."

In Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618, defendant corporation filed a demurrer as follows: "The demurrer of *The Henry G. Allen Company*, a corporation organized under and by virtue of the laws of the State of *New York*, defendant to the amended bill of complaint filed by the complainants, *James T. Black*, *Francis Black*, *Adam W. Black*, and *Alexander B. McGlashen*, impleaded with *Francis W. Walker*.

The defendant by protestation, not confessing or acknowledging all or any of the matter and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainants have not by this said bill made such a case as entitles them in a court of equity to any relief from or against this defendant touching the matters contained in the said bill of complaint. And for cause of demurrer saith:

I. That said bill of complaint shows no substantial right or equity in or on behalf of said complainants nor any of them.

II. That the alleged verification of said bill of complaint is evasive and deceitful, and insufficient to support a bill praying for the extraordinary remedy of injunction.

III. That the acts of defendant alleged in said bill of complaint are not contrary to law.

IV. That said bill of complaint is uncertain and contradictory, and its allegations of the alleged rights of *James T. Black*, *Francis Black*, *Adam W. Black* and *Alexander B. McGlashen*, it not appearing whether the said complainants claim as co-owners in the alleged copyright or that they are mere licensees thereunder.

V. That it does not appear that the alleged agreement between *Walker* and the complainants *James T. Black*, *Francis Black*, *Adam W. Black* and *Alexander B. McGlashen*, and under which the said complainants claim title, was in writing or embodied in any instrument in writing.

VI. That it is not averred in said bill of complaint that any right of the alleged authors to copyright the alleged copyright work hath ever been assigned in writing to the complainants, or any of them.

VII. That the charge of infringement and of invasion of the alleged rights of complainants in the bill of complaint contained is not made upon the knowledge of any person whatever.

VIII. That the said bill of complaint contains no allegations, as of matters of facts, which, if true, would show that the ownership of any copyright, real or alleged, upon the work entitled "*United States*, *Part III.*, *Political Geography and Statistics*," is vested in the complainants, *James T. Black*, *Francis Black*, *Adam W. Black* and *Alexander B. McGlashen*, or any of them.

IX. That the bill of complaint does not aver that any substantial or material injury hath occurred to the complainants or any of them by reason of the alleged acts of defendant.

X. That it does not appear from the bill of complaint that any profit hath accrued to the defendant from the alleged acts of defendant in said bill complained of.

XI. That for the matters and things complained of complainants have a full, adequate and complete remedy at law.

Form No. 7062.

(Precedent in Newman *v.* Schwerin, 61 Fed. Rep. 867.)[1]

Lena Newman
vs.
Morris Schwerin.
} In the *chancery* court, at *Crossville*, *Tennessee.*

The defendant, *Morris Schwerin*, comes and demurs to the bill filed against him in the above-styled cause, and assigns the following grounds of demurrer: (1) This court has no jurisdiction of the cause, the defendant being a nonresident of the state of *Tennessee*, and there being no attachment of property against him. (2) The suit is brought to recover a debt alleged to be due *Samuel Newman* from the defendant, *Morris Schwerin*, and should have been brought by said *Newman's* administrator or personal representative. His widow or heir has no right of action. (3) The bill alleges that the defendant holds the lands described in the bill in trust for *Samuel Newman*; and, if that be true, then the right of action would descend to said *Newman's* heirs at law, and complainant could only maintain her suit if her husband had died, leaving no heirs at law capable of inheriting, which the bill does not charge. Wherefore, the defendant prays the judgment of the court whether he shall make any other or further defense to complainant's bill.

[*Jeremiah Mason*, Solicitor.][2]

b. Multifariousness.[3]

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this defendant doth demur to the said bill and to all the matters and things therein contained, and humbly prays the judgment of this honorable Court whether it shall be compelled to make any other or further answer to said bill, and it prays to be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

I certify that in my opinion the foregoing demurrer is well founded in point of law.

James A. Whitney,
Of Counsel.

Office and Post-office address,
140 Nassau Street, *N. Y.* City."

(*Accompanied by affidavit as shown in Form No. 7055, supra.*)

1. Before this demurrer was finally disposed of, the complainant, by leave, amended her bill. On appeal, the decree of the circuit court was modified so as to dismiss the bill. Newman *v.* Schwerin, 61 Fed. Rep. 867.

2. The matter enclosed by [ ] is not found in the reported case, but is added to complete the form.

3. Multifariousness as a ground of demurrer, see 1 Daniell's Ch. Pr. (6th Am. ed.), p. 557; statutes cited to Forms Nos. 7023 to 7054, *supra*, respectively; also Yarboroughs *v.* Avant, 66 Ala. 526; Adams *v.* Jones, 68 Ala. 117; Jones *v.* Reese, 65 Ala. 134; Marsh *v.* Richardson, 49 Ala. 430; Wellborn *v.* Tiller, 10 Ala. 305; Torrent *v.* Hamilton, 95 Mich. 159; Georgia Pac. R. Co. *v.* Brooks, 66 Miss. 583; Brownlee *v.* Lockwood, 20 N. J. Eq. 239; Emans *v.* Emans, 13 N. J. Eq. 205; Johnson *v.* Vail, 14 N. J. Eq. 423.

A demurrer to a bill for this cause may be framed by using Form No. 7063, *supra*, as a model and referring to Forms Nos. 7023 to 7054 for the formal parts in the particular jurisdiction desired.

Only those defendants as to whom a bill is multifarious can avail themselves of an objection to it on that ground. Knickerbocker L. Ins. Co. *v.* Stone, 52 Ala. 589.

Form No. 7063.

(Curt. Eq. Prec., p. 148.)

(*Commencing as in Form No. 7022, and continuing down to* ‡) that it appears by the said bill, that the same is exhibited by the said complainant against this defendant and *Alexander Brown*, *Banks Belk*, and *Keever Hughes*, as defendants thereto for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is in no way interested; and, by reason of such distinct matters, the said bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof; and by joining distinct matters together, which do not depend on each other, the proceedings in the progress of the said suit will be intricate and prolix, and this defendant put to unnecessary charges and expenses, in matters which in no way relate to or concern him. Wherefore (*continuing and concluding as in Form No. 7022*).

Form No. 7064.

(Precedent in Jenness *v.* Smith, 64 Mich. 91.)[1]

[(*Title of court and cause, and commencement as in Form No. 7038.*)][2] That it appears by the said bill that the same is exhibited by the complainant *Isaac N. Jenness*, and the several other persons therein named as complainants thereto, for distinct matters and causes, in several whereof, as appears by the said bill, the said complainants are not in any manner in common or jointly interested or concerned, and that the bill is multifarious, and that the said complainants have not, in and by their said bill, made or stated such a case as entitles them in a court of equity to any relief from or against this defendant touching the matters contained in said bill, or any of such matters.

[Wherefore (*concluding as in Form No. 7038*).][2]

c. Splitting Cause.[3]

Form No. 7065.

(Curt. Eq. Prec., p. 148.)

(*Commencing as in Form No. 7022, and continuing down to* ‡) that the said complainant, by his said bill, in order to split the cause, and create a multiplicity of suits, seeks only to recover a part of an entire debt, thereby stated to be due to him from this defendant;

1. This demurrer was sustained in Jenness *v.* Smith, 64 Mich. 91. See also Winslow *v.* Jenness, 64 Mich. 84; Burnham *v.* Haskins, 72 Mich. 239; Dunston *v.* Hoptonic Co., 83 Mich. 381, for precedents of similar demurrers.

Multifariousness, in *Michigan*, is an objection that should properly be raised by demurrer. Snook *v.* Pearsall, 95 Mich. 534. The substance of the rules on the subject as to what constitutes multifariousness appears to be that each case is to be governed by its own circumstances, and must be left in a great measure to the sound discretion of the court. Torrent *v.* Hamilton, 95 Mich. 159.

2. The matter enclosed by [ ] is not in the reported case, but should be added to complete the form.

3. **Splitting Cause.** — A demurrer to a bill for this cause may be framed by using Form No. 7065, *supra*, as a model and referring to Forms Nos. 7023 to 7054 for the formal parts in the particular jurisdiction desired.

and in respect to the other parts of the said debt, has, as appears by his said bill, filed two several other bills of complaint in this honorable court against the defendant. Wherefore (*continuing and concluding as in Form No. 7022*).

d. Want of Complainant's Interest in Subject of Suit.[1]

Form No. 7066.

(Curt. Eq. Prec., p. 145.)

(*Commencing as in Form No. 7022, and continuing down to* ‡) that the said complainant hath not, as appears by his said bill, made out any title to the relief thereby prayed. Wherefore (*continuing and concluding as in Form No. 7022*).

Form No. 7067.

(2 Harr. Ch. Pr., p. 415.)

(*Commencing as in Form No. 7022, and continuing down to* ‡) that the scope and end of the complainant's bill is to be relieved touching several sums of money by the said bill supposed to be due from these defendants to one *Edward Frost*, deceased, in the said bill named, which the complainants would, or seek by their said bill to claim as executors to the said *Edward Frost*, and yet have not alleged in or by their said bill, that they have proved the will of the said *Edward Frost*, if any such was made, or otherwise taken upon them the burden or execution thereof, or any ways entitled themselves unto his personal estate, and to sue for the same. Wherefore, and forasmuch,

1. **That plaintiff has no interest** in the subject of controversy as a ground of demurrer, see Daniell's Ch. Pr. (6th Am. ed.), p. 557. See also Vaughn *v.* Lovejoy, 34 Ala. 437; Merrifield *v.* Ingersoll, 61 Mich. 4; Bailey *v.* Smith, 10 R. I. 29; Barr *v.* Clayton, 29 W. Va. 256; Hodge *v.* North Missouri R. Co., 1 Dill. (U. S.) 104.

A demurrer to a bill for this cause may be framed by using Form No. 7066, *supra*, as a model and referring to Forms Nos. 7023 to 7054 for the formal parts in the particular jurisdiction desired.

Incapacity of plaintiff to sue as a ground of demurrer, see Chicago *v.* Cameron, 22 Ill. App. 91; German Reformed Church *v.* Von Peuchelstein, 27 N. J. Eq. 30; Duchesse d'Auxy *v.* Porter, 41 Fed. Rep. 68; Tourton *v.* Flower, 3 P. Wms. 369.

As to the statute of limitations, raised by demurrer to bill, see Underhill *v.* Mobile F. Dept. Ins. Co., 67 Ala. 45; Bell *v.* Johnson, 111 Ill. 374; Mooers *v.* Kennebec, etc., R. Co., 58 Me. 279; Fogg *v.* Price, 145 Mass. 513; McLean *v.* Burton, Harr. (Mich.) 279; Nevitt *v.* Bacon, 32 Miss. 212; Conover *v.* Wright, 6 N. J. Eq. 613; Olden *v.* Hubbard, 34 N. J. Eq. 85; Wilhelm's Appeal, 79 Pa. St. 120; Wyatt *v.* Luton, 10 Heisk. (Tenn.) 461; Sherman *v.* Windsor, Mfg. Co., 57 Vt. 57; Jackson *v.* Hull, 21 W. Va. 601; Bacon *v.* Rives, 106 U. S. 99.

Laches raised by demurrer to bill, see Furlong *v.* Riley, 103 Ill. 628; Groenendyke *v.* Coffeen, 109 Ill. 329; Williams *v.* Hart, 116 Mass. 513; Fogg *v.* Price, 145 Mass. 513; Partridge *v.* Wells, 30 N. J. Eq. 176; Olden *v.* Hubbard, 34 N. J. Eq. 85; Bryan *v.* Kales, 134 U. S. 126.

Statute of frauds as a ground of demurrer to bill, see Beadle *v.* Seat, 102 Ala. 532; Eveland *v.* Stephenson, 45 Mich. 394; Ahrend *v.* Odiorne, 118 Mass. 261; Somerby *v.* Buntin, 118 Mass. 279; Campbell *v.* Brown, 129 Mass. 23; Van Dyne *v.* Vreeland, 11 N. J. Eq. 370; Cranston *v.* Smith, 6 R. I. 231; Macey *v.* Childress, 2 Tenn. Ch. 443; Meach *v.* Stone, 1 D. Chip. (Vt.) 182; Young *v.* Wheeler, 34 Fed. Rep. 98.

as the said complainants have not well and sufficiently entitled themselves in and by their said bill to the said moneys, if they had been due from these defendants or either of them, to the said *Edward Frost*, as is thereby supposed, and for that, should these defendants pay the money demanded by the said bill to the complainants before they have either proved the will or sued out administration, they cannot sufficiently, as these defendants are advised and insist, discharge these defendants, nor give these defendants any proper receipt or receipts for the same, but that they shall or may be liable to be questioned again by such person as may sue out administration to the said *Edward Frost* with the said will annexed, or otherwise. Wherefore (*continuing and concluding as in Form No. 7022*).

e. Want of Defendant's Interest in Subject of Suit.[1]

BY ARBITRATOR TO BILL IMPEACHING AWARD.

Form No. 7068.

(Curt. Eq. Prec., p. 147.)

(*Commencing as in Form No. 7022, and continuing down to* ‡.) For that the said complainant hath not, by his said bill, which seeks to set aside the award therein set forth, and to which this defendant is made a party in his character of an arbitrator, shown that he can have any decree against this defendant, whose answer could not be read as evidence against the other defendants to the said bill, or any of them; and the said complainant, for anything that appears in the said bill to the contrary, might examine this defendant as a witness in this suit. Wherefore (*continuing and concluding as in Form No. 7022*).

BY HEIR OF OBLIGOR TO BILL BROUGHT BY OBLIGEE ON BOND.

Form No. 7069.

(Curt. Eq. Prec., p. 147.)

(*Commencing as in Form No. 7022, and continuing down to* ‡) that said complainant, by his said bill, seeks to charge this defendant with the payment of the sum of *five hundred* dollars, as the heir of *Edward Frost*, deceased, in the said bill named, by whom the same was secured by bond to the said complainant, but it does not appear by said bill, that this defendant, as such heir, is bound in and by the bond, in the said bill set forth as the foundation of the said complainant's debt. Wherefore (*continuing and concluding as in Form No. 7022*).

1. **That defendant has no interest** in the subject as a ground of demurrer, see Daniell's Ch. Pr. (6th Am. ed.), p. 557.

A demurrer to a bill for this cause may be framed by using Form No. 7068, *supra*, as a model and referring to Forms Nos. 7023 to 7054 for the formal parts in the particular jurisdiction desired.

TO BILL EXHIBITED AGAINST THREE DEFENDANTS AND OTHERS FOR SEVERAL AND DISTINCT MATTERS THAT HAVE NO RELATION TO EACH OTHER, AND WHEREIN THEY ARE NOT INTERESTED.

Form No. 7070.

(2 Harr. Ch. Pr., p. 417.)

(*Commencing as in Form No. 7022, and continuing down to* ‡) that it appears by the said bill that the same is exhibited against these defendants and *Banks Belk* and *Keever Hughes* for several and distinct matters and causes that have no relation to or dependence upon each other, and wherein, as it appears by the bill, neither of these defendants are in any manner interested or concerned, by reason of which matters the complainant's bill is spun out to great length, and these defendants forced to make a copy of the whole, and by the mingling defendants and causes together in one bill now in progress of the suit, the pleadings, orders and proceedings will be indirect and prolix, and these defendants put to unreasonable and unnecessary charges in taking copies thereof. (*Continuing and concluding as in Form No. 7022.*)

f. Want of Equity.[1]

Form No. 7071.

(2 Harr. Ch. Pr., p. 411; Curt. Eq. Prec., p. 147.)

(*Commencing as in Form No. 7022, and continuing down to* ‡) that the complainant's said bill, in case the allegations therein contained were true, which this defendant doth in no sort admit, contains not any matter of equity wherein this court can grant any decree, or give the complainant any relief or assistance, as against him, this defendant.

Wherefore (*continuing and concluding as in Form No. 7022*).

1. **Want of equity** as a ground of demurrer, see Daniell's Ch. Pr. (6th Am. ed.), pp. 549, 586; Story Eq. Pl., § 467.

Alabama. — A demurrer to a bill that "there is no equity in the bill" is insufficient under Ala. Civ. Code (1886), § 3443; Pate *v.* Hinson, 104 Ala. 599; Chambers *v.* Wright, 52 Ala. 444; Tubb *v.* Fort, 58 Ala. 278; Hart *v.* Clark, 54 Ala. 490; Erwin *v.* Reese, 54 Ala. 589. *Compare* also Wellborn *v.* Tiller, 10 Ala. 305.

Maine. — Brown *v.* Lawton, 87 Me. 86.

Massachusetts. — Billings *v.* Mann, 156 Mass. 203.

Michigan. — Cochrane *v.* Adams, 50 Mich. 16; McKinney *v.* Curtiss, 60 Mich. 617; Burnham *v.* Haskins, 72 Mich. 239; Dunston *v.* Hoptonic Co., 83 Mich. 381; Dutton *v.* Thomas, 97 Mich. 94.

New Jersey. — General demurrer for want of equity will not raise an objection for want of form. Miller *v.* Jamison, 24 N. J. Eq. 41.

Tennessee. — Code (1896), § 6198; McCaleb *v.* Crichfield, 5 Heisk. (Tenn.) 290.

Virginia. — Virginia Min. Co. *v.* Wilkinson, 92 W. Va. 98, *citing* Story Eq. Pl., p. 473.

Federal Courts. — Marshall *v.* Beall, 6 How. (U.S.) 75. A demurrer setting up in effect that the bill does not state facts sufficient to constitute a cause of action has been construed to be equivalent to a general demurrer for want of equity. Nicholas *v.* Murray, 5 Sawy. (U. S.) 320.

Demurrer to a bill for this cause may be framed by using Form No. 7071, *supra*, as a model and referring to Forms Nos. 7022 to 7054 for the formal parts in the particular jurisdiction desired.

Form No. 7072.

(*Title of court and cause as in Form No. 7031.*)

The demurrer of *Richard Roe*, the above named defendant, to the bill of complaint of *John Doe*, the above named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things, in said plaintiff's bill of complaint contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and, for cause of demurrer, showeth that the said complainant hath not, in and by his said bill, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought, and prayed for, from or against this defendant. Wherefore (*concluding as in Form No. 7031*).

Form No. 7073.

(Precedent in Tripp *v.* Pontiac, etc., Plank Road Co., 66 Mich. 6.)[1]

[(*Title of court and cause as in Form No. 7038.*)][2]

This defendant demurs to the said bill, and for cause of demurrer shows that the complainant has not in and by his said bill made or stated such a case as entitles him, in a court of equity, to any discovery or relief from or against this defendant touching the matters contained in the said bill, or any of such matters.

And, for a further cause of demurrer, this defendant shows that the said *Circuit* Court in *Chancery* is not the proper tribunal to hear, try, and determine the matters stated and charged in the complainant's bill, viz., that said defendant had not constructed its said road according to the charter, and statutes forming a part thereof, under which said road was constructed, as is alleged in said bill; but that the *Supreme* Court of the State of *Michigan* has jurisdiction, and is the proper tribunal, by information in the nature of a quo warranto, to hear, try, and determine the said matters.

And, for a further cause of demurrer, this defendant shows that said *Circuit* Court in *Chancery* is not the proper tribunal to hear, try, and determine the matters stated in said bill as to whether or not the defendant had, after having constructed its road, suffered the same to get out of repair so as to be inconvenient and dangerous for the passage over it of teams and vehicles, or as to whether the defendant, for the space of *one* year or more last past, had ceased entirely to keep up its said road, or any part thereof, and more than *one* year ago removed all of its gates from its said road, and abandoned the same without the consent of the Legislature of the State of *Michigan*, and has ever since that time continued to keep said gates so removed, and to abandon its said road without the consent of the Legislature; but that, by the charter and statutes forming a part thereof named in said bill, fines and penalties are amply provided to protect the public in all their rights pertaining to the dan-

1. The bill to which this demurrer was sustained was a bill to declare default of Plank Road Company under Act No. 232, Mich. Laws of 1875.

2. The matter to be supplied within [ ] will not be found in the reported case, but should be added to complete the form.

gerous condition of said road or otherwise, and that such fines and penalties are to be recovered, and the right to take toll in certain cases forfeited, by such corporations in actions at law, and not by proceedings in chancery.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant demurs to the said bill, and to all the matters therein contained, and prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill; and it prays to be dismissed, with its reasonable costs in this behalf sustained.

[By *Jeremiah Mason*, Solicitor for Defendant.][1]

1. The matter in [ ] will not be found in the reported case, but has been added to render the form complete.

Other Precedents. — Another form of demurrer to bill, where it appears by plaintiff's own showing that he has no equity, is given in 2 Harr. Ch. Pr., p. 412. Precedents may also be found in Brown *v.* Lawton, 87 Me. 86; Billings *v.* Mann, 156 Mass. 203; McKinney *v.* Curtiss, 60 Mich. 617; Dunston *v.* Hoptonic Co., 83 Mich. 381; Marshall *v.* Beall, 6 How. (U. S.) 75.

In McKinney *v.* Curtis, 60 Mich. 617, the demurrer to the bill assigned the following grounds: "First. That all and every of the matters in the said complainant's bill mentioned and complained of were matters which might be tried and determined at law, and with respect to which the said complainant is not entitled to any relief in a court of equity. Second. That the said right of action, if any ever existed, is barred by the proceedings at law brought to enforce the same. Third. That the complainant by his said bill has not shown himself entitled to any relief in a court of equity. Fourth. That the statements, charges, and allegations, in said bill of complaint whereby this defendant is sought to be charged as party defendant thereto are too vague, uncertain, indefinite, to demand or require answer thereto." This demurrer was overruled on the facts, but it is formally good and properly presents the objections it sought to present.

To Bill to Avoid Payment of Purchase Money. — In McGehee *v.* Jones, 10 Ga. 127, it was held that a demurrer for want of equity would reach a bill by purchasers of land to avoid payment of the purchase money upon the mere ground of defect of title before conviction. The grounds of demurrer in that case were as follows: "1st. That the original bill, before amended, did not make a case authorizing relief. 2d. That plaintiff had no right to amend, because there was no case made in the original bill to be amended, and the amendment made a different case from the original. 3d. That the bill, as amended, did not make a case authorizing the interposition of a Court of Equity."

To Bill to Set Aside a Chattel Mortgage. — In Burnham *v.* Haskins, 72 Mich. 239, to a bill to set aside a chattel mortgage, the demurrer was as follows: "1. Because in no way or form is it alleged in complainant's bill that an order of said court was obtained to file and bring said bill of complaint into court without the aid of the assignee. 2. That no bill of complaint can be filed and brought into court without the aid of the assignee or receiver. 3. Because the court has no jurisdiction to entertain said bill of complaint, or grant the relief prayed for, or any part thereof. 4. Because said complainants have, and had, a full, complete, and adequate remedy at law. 5. Because said complainants had not, prior to filing their said bill of complaint, and the issuing of the injunction in this cause, and have not since, obtained any order, of this court requiring the assignee to institute such contest. 6. Because the bill of complaint in this case is multifarious."

To Creditor's Bill. — In Dutton *v.* Thomas, 97 Mich. 94, a judgment creditor's bill was demurred to as follows: "These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's bill of complaint contained to be true in the manner and form as the same are therein and thereby set forth and alleged to warrant the prayer therein for the appointment of a receiver, etc., demur thereto, and for

g. Want of Jurisdiction.[1]

(1) In General.

Form No. 7074.

(Curt. Eq. Prec., p. 140.)

(*Commencing as in Form No. 7022, and continuing down to* ‡) that the said complainant, by his said bill, as this defendant is advised, endeavors to entitle himself to a sum of money due upon bond therein stated to have been entered into by this defendant to the said complainant, and suggests for equity that the said bond hath been burned, lost, or destroyed, and the said complainant hath not, by affidavit annexed to and filed with said bill, made oath that the said bond is burned, lost or destroyed. Wherefore (*continuing and concluding as in Form No. 7022*).

FOR WANT OF SUGGESTION THAT EVIDENCE OF PLAINTIFF'S DEMAND IS NOT IN HIS PRAYER.

Form No. 7075.

(Curt. Eq. Prec., p. 141.)

(*Commencing as in Form No. 7022, and continuing down to* *) as to so much and such part of said plaintiff's bill as prays relief in respect

cause of demurrer aver: a.—That there is no proper or sufficient statement in said bill of any property or property interests in jeopardy from loss or otherwise to warrant action by a receiver in the premises. b.—That the allegations of complainant's bill are too general, vague, and uncertain to justify the prayer therein for a receiver, and the appointment thereof before discovery of property, or interests therein, has been made on said bill as a bill of discovery. c.—That on the face of said bill, and the notice given in that behalf to defendants, the court is without jurisdiction to appoint a receiver. Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint as to so much thereof as before is referred to, these defendants demur, and pray the judgment of this court whether they shall be compelled to make any further answer to such parts of said bill so demurred to as aforesaid."

1. **Want of jurisdiction,** as a ground of demurrer, see Daniell's Ch. Pr. (6th Am. ed.), p. 549 *et seq.*; Story Eq. Pl., § 467 *et seq.*; Harwell *v* Lehman, 72 Ala. 344; Wangelin *v.* Goe, 50 Ill. 459; Stephenson *v.* Davis, 56 Me. 73; Coombs *v.* Warren, 17 Me. 404; Drury *v.* Conner, 1 Har. & G. (Md.) 221; Boston Water Power Co. *v.* Boston, etc., R. Corp., 16 Pick. (Mass.) 516; Williams *v.* Detroit, 2 Mich. 560; Burham *v.* Haskins, 72 Mich. 239; Bellows *v.* Wilson, 32 N. J. Eq. 481; Frey *v.* Demarest, 16 N. J. Eq. 236; Chesney *v.* Rodgers, 1 Heisk. (Tenn.) 239; Surber *v.* McClintic, 10 W. Va. 236; Stevens *v.* Appleton, 4 Cliff. (U. S.) 265; Nebraska City Nat. Bank *v.* Nebraska City Hydraulic Gas-Light, etc., Co., 14 Fed. Rep. 763.

Demurrer for want of jurisdiction brings before the court the question of the right to maintain the suit, admitting the allegations to be true, and the court will not inquire, *aliunde*, what facts might or might not defeat it. Griffing *v.* Gibb, 2 Black (U. S.) 519; Foot *v.* Linck, 5 McLean (U. S.) 616; Ocean Ins. Co. *v.* Fields, 2 Story (U. S.) 59; Woodworth *v.* Edwards, 3 Woodb. & M. (U. S.) 120; Bayerque *v.* Cohen, 1 McAll. (U. S.) 113.

A demurrer to a bill for this cause may be framed by using Form No. 7074, *supra*, as a model and referring to Forms Nos. 7023 to 7054 for the formal parts in the particular jurisdiction desired.

Demurrer to bill for this cause is set out in Burnham *v.* Haskins, 72 Mich. 239.

of the bond bearing date the *second* day of *January*, A. D. 1895, for the sum of *twenty thousand* dollars, in said bill stated to have been made and entered into for the payment of *ten thousand* dollars, and interest, on the *second* day of *January*, 1897, last, by this defendant, or the money alleged by the said bill to be now due to the said complainant from this defendant thereon. This defendant, for cause of demurrer, doth demur, and for cause of demurrer showeth that the said bond appears by said bill to have been taken by the said complainant, in his own name, and to be now in the possession, custody, or power of the said complainant, who therefore has a remedy for his demand at law. Wherefore (*continuing and concluding as in Form No. 7056*).

(2) Where Other Equity Court Has Jurisdiction.

Form No. 7076.

(Curt. Eq. Prec., p. 144.)

(*Commencing as in Form No. 7022, and continuing down to* ‡) that the said complainant's bill, filed in this honorable court, appears to be a bill of appeal to this honorable court to review the decree therein particularly mentioned and set forth, and thereby stated to have been made by and in the court of the chancellor of the duchy and county palatine of *Lancaster*, which by the said bill appears to have been a court of competent and exclusive jurisdiction for that purpose; and this defendant is advised that no appeal lies therefrom to this honorable court, and that this court has not, as appears by the said bill, any jurisdiction to enable it to entertain the said bill of appeal and review. Wherefore (*continuing and concluding as in Form No. 7022*).

(3) Where Court of Law Has Jurisdiction.

Form No. 7077.

(Curt. Eq. Prec., p. 144.)

(*Commencing as in Form No. 7022, and continuing down to* ‡) that the said complainant, in and by his said bill, claims to be entitled to lands, tenements, and hereditaments therein particularly mentioned, described and thereby stated to be now in the possession of this defendant, and the said complainant, by his said bill, prays that he may be at liberty to examine, perpetuate and preserve the testimony of certain persons therein named as to his title thereto; yet the said complainant has not stated, nor does it appear in and by his said bill, that no action at law has hitherto been brought to establish his right, or that there was, or is any impediment in any such action being brought by the said complainant, or that the said several persons so to be examined as witnesses, or any or either of them, are, or is, resident abroad, or now absent, or about to go from England, nor hath the said complainant, by affidavit annexed to the said bill, made oath that the said several persons so to be examined, or any or either

of them are, or is, sick, old, infirm, or any other circumstance which renders such testimony in danger of being lost. Wherefore (*continuing and concluding as in Form No. 7022*).

WHERE RIGHT OF ACTION AT LAW WAS IN TRUSTEE, SUGGESTING REFUSAL BY TRUSTEE TO SUFFER ACTION TO BE BROUGHT IN HIS NAME.

Form No. 7078.

(Curt. Eq. Prec., p. 141.)

(*Commencing as in Form No. 7022, and continuing down to* *) as to so much and such part of the said bill as seeks to compel these defendants to pay the sum of *five thousand* dollars, or to make the said complainant's satisfaction for any loss that has happened to the said ship, these defendants respectfully demur; and for cause of demurrer show that if the policy of insurance in the said bill mentioned was forfeited, a proper action at law did and would lie to recover the money due thereon, and if the said complainants be entitled to any such relief as aforesaid as prayed in and by their said bill, they might have a complete and adequate remedy by an action at law where they ought and would be put to prove their interest in and the loss of the said ship. Wherefore (*continuing and concluding as in Form No. 7056*).

(4) Where Transaction is Against Public Policy.

DEMURRER TO BILL BROUGHT TO OBTAIN BENEFIT OF SECURITY GIVEN FOR TRANSACTION AGAINST PUBLIC POLICY.

Form No. 7079.

(Curt. Eq. Prec., p. 142.)

(*Commencing as in Form No. 7022, and continuing down to* ‡) that the mortgaged security in said bill particularly mentioned and set forth for securing the payment of this defendant to the said complainant of the sum of *one thousand* pounds, and interest, on the day and in the manner therein mentioned, was given by this defendant to the said complainant as appears in and by the said bill, and for any money actually advanced by the said complainant to this defendant, in consideration the said complainant should, within three months next ensuing the date of the said indenture, resign and procure for this defendant the office of under-sheriff of the county of *York*, which said agreement and transaction as it appears on the face of the said bill, was and is, as this defendant is advised, contrary to public policy, and contrary to the statute in that case made and provided, and therefor void; and the said complainant is not therefor entitled to such relief as prayed by his said bill in respect of the said security, or any other relief whatsoever, touching the same. Wherefore (*continuing and concluding as in Form No. 7022*).

h. Want of Parties.[1]

Form No. 7080.

(Curt. Eq. Prec., p. 148.)[2]

(*Commencing as in Form No. 7022, and continuing down to* ‡) that it appears by the said complainant's said bill that *Alexander Brown*, therein named, is a necessary party to the said bill inasmuch as it is

1. Want of parties as a ground of demurrer, see Daniell's Ch. Pr. (6th Am. ed.), p. 557; Sawyers *v.* Baker, 66 Ala. 292; Conwell *v.* Watkins, 71 Ill. 488; Swedish Evangelical Lutheran Church *v.* Shivers, 16 N. J. Eq. 453; Melick *v.* Melick, 17 N. J. Eq. 156; Seymour *v.* Long Dock Co., 17 N. J. Eq. 169; Tenn. Code (1896), § 6198; Jessup *v.* Illinois Cent., etc., R. Co., 36 Fed. Rep. 735.

When the bill is demurrable on its face for want of proper parties defendant, and the defendant, instead of demurring alone, answers, and shows by his answer that there is no other necessary party, the court may proceed to final decree without regard to such formal defect in the bill. Chapman *v.* Hamilton, 19 Ala. 121.

Demurrer must show who the proper parties are in such a manner as to point out the defect in the bill and enable the complainant to amend. Chapman *v.* Hamilton, 19 Ala. 121.

Bill by Heirs Involving Personal Estate. — In Caleb *v.* Hearn, 72 Me. 231, is set out a bill in equity by the only heir at law charging defendant with wrongfully appropriating the goods, chattels and money of deceased. The court held the following grounds of demurrer good:

"1. That the bill is not brought by a proper party plaintiff, in that it is brought by the heir and not by the executor or administrator of deceased. 2. That such legal representative could not maintain a bill in that there is an adequate remedy at law."

Misjoinder of parties as a ground of demurrer, see Toulmin *v.* Hamilton, 7 Ala. 362; Chapman *v.* Hamilton, 19 Ala. 121; Craddock *v.* American Freehold Land Mortg. Co., 88 Ala. 281; Stookey *v.* Carter, 92 Ill. 129; Miller *v.* Jamison, 24 N. J. Eq. 41; Swedish Evangelical Lutheran Church *v.* Shivers, 16 N. J. Eq. 453; Tenn. Code (1896), § 6198; Payne *v.* Berry, 3 Tenn. Ch. 154; Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. Rep. 156.

Demurrer to bill for want of proper parties may be framed by using Form No. 7080, *supra*, as a model and referring to Forms Nos. 7023 to 7054 for the formal parts in the particular jurisdiction desired.

2. Another form of demurrer for want of parties is given in 2 Harr. Ch. Pr., p. 412, as follows:

"As to so much of the complainant's bill whereby the complainant doth entitle himself to, and demands from this defendant as executrix of *Edward Frost*, in the bill named, the sum of *five hundred* pounds, and interest, under a letter of appointment, pretended to be directed to *George Hawley*, in the bill named, by *James Kent*, also in the said bill named, and another defendant thereto; whereby the said other defendant, *Kent*, did direct the said *Hawley* to pay *five hundred* pounds, in the manner in the bill mentioned, and for that the said *Hawley*, as is pretended, had notice of an assignment in the bill mentioned of the *five hundred* pounds, to the complainant, and promised to pay the same: this defendant, by protestation, not confessing or acknowledging the plaintiff's bill to be true, in such sort, manner, or form as the same matters are therein set forth, this defendant doth demur thereto, and for cause of demurrer showeth that by the complainant's own showing, in his bill, the said *George Hawley* is dead, and neither his executor or administrator is made a party to said bill; and therefore, and for other good cause, or causes, of demurrer in the bill contained, as to so much of the complainant's bill as is demurred unto as aforesaid, this defendant doth demand the judgment of this honorable court whether this defendant shall be compelled to make any answer thereunto otherwise than as aforesaid. And this defendant hereby prays to be hence dismissed with her costs in this behalf wrongfully sustained."

In Clason *v.* Lawrence, 3 Edw. Ch. (N. Y.) 48, it was held that although,

therein stated that *Charles Doe*, the testator in the said bill named, in his lifetime, by certain conveyances made to the said *Alexander Brown*, in consideration of *one thousand* dollars, conveyed to him

on the death of an only brother, his sister and mother were entitled equally to his rights in personalty, still they could not file a bill for an account of it. His administrator should do so. Where such a bill was filed, it was held to be demurrable and not amendable, because the right to administration would be in the sister only. The demurrer in this case, omitting formal parts, was as follows:

"That the said complainants have not in and by their said bill, made or stated such a case as entitled them to any such discovery or relief, as is thereby sought and prayed for. That the complainants have not, as appears by their bill, made out or stated any right or title in them, or either of them, as against the defendants, to the annuity of *one hundred* dollars in the bill mentioned, the avails or proceeds thereof, or any part of the same, so as to entitle the complainants to the discovery accounting or relief or any part thereof sought and prayed for by the bill. That it appears by the bill, that *Peter Conrey*, therein named, is a necessary party to the bill, inasmuch as it appears by said bill, that *Richard P. Lawrence* deceased, and said *Peter Conrey* were constituted and appointed the executors of the last will and testament of *Jonathan Conrey*, deceased, and that in and by the said last will and testament (which is recited and set out at length in the bill) the two houses and lots upon which the complainants seek to charge the annuity. were subjected to and charged with the payment of such annuity annually, to the said executors, to be received, disposed of and applied by them for the support, education, benefit and use of *John Conrey*, deceased, in said bill mentioned, and of the complainant, *Sarah Ann Clason*, as particularly appears in said bill. And, also, inasmuch as it appears by the bill that the annuity of *one hundred* dollars, claimed by the complainants, and another annuity of *two hundred* dollars, set forth in the bill, were respectively, by said last will, to be paid to and received and made one fund by the executors, and to be by them disposed of and applied for the support, education. use and benefit of the said *John Conrey*, and the complainant, *Sarah Ann Clason*, as contained in the bill. But the complainants have not made the said *Peter Conrey* a party to said bill, or assigned any reason why they have not. That it appears by the complainant's own showing that the administrator of *John Conrey* is a necessary party to the bill, inasmuch as it is alleged by the bill that *John Conrey* died in the year 1829, intestate, and without leaving a wife or issue; and that thereby the complainant, *Sarah Ann Clason*, and *Sarah Quick* (the mother of the said *John*), each became entitled to the one half part of the personal estate of the said *John Conrey*; and that, pursuant thereto, in such right, the said bill claims that the complainants are entitled to the one half part of the said annuity of *one hundred* dollars and interest; and the said bill also claims that *Sarah Ann Clason* is entitled to the other part of said annuity. But the complainants have not made the representative or administrator of the said *John Conrey* a party to the said bill or assigned any reason why they have not. And that the said complainants have not, in and by their said bill, as to so much and such portion thereof as seeks a discovery and accounting or relief or as to such part or amount of said annuity of *one hundred* dollars as by said bill appears to have become due, payable or chargeable, during the lifetime of the said *Sarah Lawrence*, deceased, in said bill mentioned, made or stated such a case as entitles them to any discovery or relief in reference thereto, as is sought and prayed for by the complainant's bill. And that as to all the rest of the said bill, it appears by the said bill that the administrator of *John Conrey* is a necessary party thereto, inasmuch as it appears by the said bill that the said *John Conrey* died intestate, as aforesaid, and that thereby the complainants, *Sarah Ann Clason* and *Sarah Quick*, became entitled to the personal estate of *John Conrey*, as aforesaid, and that, in such right, the complainants claim the one half part of the said annuity of *one hundred* dollars, and interest, as aforesaid; but that the said complainants have not made such administrator a party to said bill, nor assigned any reason why they have not."

by way of mortgage certain estates in the said bill particularly mentioned and described, for the purpose of paying the said testator's debts and legacies; he, the said complainant, has not made the said *Alexander Brown* a party to said bill. Wherefore (*continuing and concluding as in Form No. 7022*).

TO BILL EXHIBITED BY INFANT WHERE NO NEXT FRIEND IS NAMED.

Form No. 7081.

(Curt. Eq. Prec., p. 145.)

(*Commencing as in Form No. 7022, and continuing down to* ‡) that the said complainant, who appears by the said bill to be an infant, under the age of twenty-one years, hath exhibited his said bill, without any person being therein named as his next friend. Wherefore (*continuing and concluding as in Form No. 7022*).

TO JUDGMENT CREDITOR'S BILL AGAINST CORPORATION AND SOME OF ITS STOCKHOLDERS.

Form No. 7082.

(Precedent in Dunston *v.* Hoptonic Co., 83 Mich. 381.)

[(*Title of court and cause, and commencement as in Form No. 7038*).][1]

1. That it appears by said bill that the same is exhibited against this defendant, and the several other persons therein named as defendants thereto, for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that the said bill is altogether multifarious.

2. That it doth not appear by said bill that all the solvent stockholders of said *Hoptonic Company* who are within the jurisdiction of this court are made parties thereto.

3. That it doth appear by said complainant's bill that there are stockholders in said *Hoptonic Company* other than those made parties

1. The matter to be supplied in [ ] is not in the reported case, but should be added to complete the form.

The third assignment was the essential point of demurrer. The entire bill is set out in this reported case. The court held as follows:

A judgment creditor's bill was filed against a corporation and five of thirty-four stockholders, one of whom was not brought in by the service of subpœna or otherwise. The remaining stockholders were alleged to own 1,020 of the 12,000 shares of stock issued by the corporation, and were sought to be charged with all of the corporate debts that the corporate assets would not meet, on the ground that they purchased their stock at 25 cents on the dollar. The bill alleged on information and belief that many of the stockholders were minors, insolvent, or nonresidents of the state, but no claim was made that all of those not joined as defendants fell within these classes. Such general allegation fails to show that all of the stockholders were made parties who should contribute to the payment of the corporate debts, and that the bill was properly dismissed as to the stockholder defendants for want of necessary parties, they having interposed such defense by way of demurrer

Where no interest in the subject matter is shown, defect of parties is a ground of demurrer which cannot be sustained. Alger *v.* Slaght, 64 Mich. 589.

to this suit, and it doth not appear from said bill that such stockholders are insolvent or beyond the jurisdiction of this court, nor doth it in any manner sufficiently appear therefrom why such other stockholders are not made parties to said bill; yet the said complainant hath not made them parties thereto.

4. That it doth appear by said complainant's bill that *Walter S. Hicks* and *Charles F. Cobb*, residents of the State of *Michigan*, and within the jurisdiction of this court, were stockholders of said *Hoptonic Company*, and it doth not in any manner sufficiently appear from said bill why the said *Walter S. Hicks* and *Charles F. Cobb* are not made parties to said bill; yet the said complainant hath not made them parties thereto.

5. That the said complainant hath not in and by his said bill made or stated such a cause as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

[(*Prayer and signature as in Form No. 7038.*)][1]

i. Want of Privity.[2]

TO BILL BY AN UNSATISFIED LEGATEE AGAINST CREDITOR OF TESTATOR.

Form No. 7083.

(Curt. Eq. Prec., p. 146.)

(*Commencing as in Form No. 7022, and continuing down to* ‡.) That it appears by the complainant's said bill that there is no privity between the said complainant and this defendant, to enable the said complainant to call on this defendant for payment of any debt due to the estate of the said testator, from this defendant.

Wherefore (*continuing and concluding as in Form No. 7022*).

3. Cross-bill.

Form No. 7084.

(Precedent in Dunham *v.* Dunham, 57 Ill. App. 475.)[3]

[(*Title of court and cause, and commencement as in Form No. 7031.*)][1]

1st. The matters set forth in the cross-bill were not germane to the subject-matter of the original bill.

2d. That matters set forth in the cross-bill are simply matters of defense.

3d. The cross-bill does not pray for affirmative relief against the appellee.

[(*Concluding as in Form No. 7031.*)][1]

1. The matter to be supplied in [ ] is not in the reported case, but should be inserted to render precedent complete.

2. **Demurrer to bill for this cause** may be framed by using Form No. 7083, *supra*, as a model and referring to Forms Nos. 7022 to 7054 for the formal parts in the particular jurisdiction desired.

3. This demurrer was sustained to a cross bill, the substance of which is set out in the reported case.

III. To Complaint or Petition.[1]

1. In General.

1. Statutory provisions relating to demurrers in general are similar, and in many respects identical, in the following code states:

Arkansas. — Sand. & H. Dig. (1894), §§ 5717-5721.

California. — Code Civ. Proc. (1897), §§ 430-434, 441.

Colorado. — Mills' Anno. Code (1896), §§ 50-55.

Idaho. — Rev. Stat. (1887), §§ 4174-4178.

Indiana. — Horner's Stat. (1896), § 339 *et seq.*

Iowa. — Code (1897), §§ 3561-3565.

Kansas. — Gen. Stat. (1897), c. 95, §§ 89-93.

Kentucky. — Bullitt's Civ.Code (1895), §§ 91-94, 113.

Minnesota. — Stat. (1894), §§ 5232-5235, 5239.

Missouri. — Rev. Stat. (1889), § 2041 *et seq.*

Montana. — Code Civ. Proc. (1895), §§ 680-685.

Nebraska. — Comp. Stat. (1897), §§ 5688-5692.

Nevada. — Gen. Stat. (1885), §§ 3062-3067.

New Mexico. — Comp. Laws (1897), § 2685, subs. 34-39.

New York. — Code Civ. Proc., §§ 487-499 (Birds. Rev. Stat. (1896), p. 2272, § 13 *et seq.*).

North Carolina. — Clark's Code Civ. Proc. (1891), §§ 238-246.

North Dakota. — Rev. Codes (1895), §§ 5267-5272.

Ohio. — Bates' Anno. Stat. (1897), §§ 5062-5069.

Oklahoma. — Stat. (1893), §§ 3967-3971.

Oregon. — Hill's Anno. Laws (1892), §§ 67 *et seq.*

South Carolina. — Code Civ. Proc. (1893), §§ 164-169, 172.

South Dakota. — Dak. Comp. Laws (1887), §§ 4908-4913, 4916.

Utah. — Rev. Stat. (1898), §§ 2962-2967.

Washington. — Ballinger's Anno. Codes & Stat. (1897), §§ 4907-4911, 4914.

Wisconsin. — Sanb. & B Anno. Stat. (1889), §§ 2649-2654.

Wyoming. — Rev. Stat. (1887), §§ 2449-2456.

The office of the demurrer under the code practice is not to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to.

California. — Cook *v.* De LaGuerra, 24 Cal. 239; Brennan *v* Ford, 46 Cal. 13.

New York. — Kelly *v.* Downing, 42 N. Y. 77.

Oregon. — Rice *v.* Rice, 13 Orgon 340.

South Carolina. — Bradley *v.* Rodelsperger, 17 S. Car. 11.

Washington. — Chambers *v.* Hoover, 3 Wash. Ter. 110.

It is no part of the office of a demurrer to contain an argument or anything other than just such matters as shall call the attention of the opposite party clearly to the specific points made by it. Davenport Gas Light, etc., Co. *v.* Davenport, 15 Iowa 6.

No particular form of pleading is necessary to constitute a valid demurrer. Silvers *v.* Junction R. Co., 43 Ind. 435; Meyer *v.* Bohlfing, 44 Ind. 238.

In Barnard *v.* Morrison, 29 Hun (N.Y.) 411, to a complaint in an action to recover money lost by playing poker with the defendant, defendant denied certain of the allegations, and set up two defenses. The answer then read as follows: "Fourth, and, as a further and distinct defense to the matters set forth in the amended complaint, the defendant avers: that it does not state facts sufficient to constitute a cause of action; that no cause of action has accrued to the plaintiff against the defendant, as alleged in the amended complaint, or of any kind or nature whatever. Wherefore the defendant demands judgment against the plaintiff, dismissing the amended complaint in this action, with costs." Macomber, J., in this case said: "It was a mistake for the learned judge * * * to regard the pleading as served by the defendant as both an answer and a demurrer. The clause therein, 'that the complaint does not state facts sufficient to constitute a cause of action,' though a ground of demurrer, may or may not be a demurrer, according to the connection in which it is used with other matters * * * In this case, however, the clause does not profess to be a demurrer, but professes to be an answer only; it has none of the formal parts of a demurrer, but only a statement of a cause for which a demurrer might have been interposed.'"

See Clark *v.* Van Deusen, 3 Code

Rep. (N. Y.) 219, for a statement held not to be a demurrer.

A demurrer for any of the causes enumerated in the statutes above cited may be drawn by using Form No. 7085, *infra*, as a model.

The terms "general" and "special" cannot be accurately applied to demurrers under the code practice, the code demurrer being regarded more in the nature of a general demurrer in which the particular defects are specified and pointed out. 8 Encycl. of Pl. and Pr. 309.

Special demurrers are abolished under the code practice, and only for the grounds enumerated in the statute can demurrer lie. Graham *v.* Martin, 64 Ind. 567; Main *v.* Ginthert, 92 Ind. 187; Mayberry *v.* Kelley, 1 Kan. 116; Marie *v.* Garrison, 83 N. Y. 14; Renton *v.* St. Louis, 1 Wash. Ter. 215. *Compare* Stone *v.* Bennett, 4 Ark. 71.

A special demurrer in *Kentucky* is an objection to a pleading which shows certain defects enumerated in the statute. Bullitt's Civ. Code Ky. (1895), § 91.

A general demurrer in *Kentucky* is an objection to the pleading because it does not state facts sufficient to constitute a cause of action or defense, or because it does not state facts sufficient to support a cause of action or defense. Bullitt's Civ. Code Ky. (1895), § 93.

Grounds for demurrer are particularly enumerated in the statutes relating to demurrers. See list of statutes cited *supra*, note 1, p. 365.

The prayer of the complaint or petition is not subject to demurrer. Althof *v.* Conheim, 38 Cal. 234; Poett *v.* Stearns, 28 Cal. 228; Baker *v.* Armstrong, 57 Ind. 189; Lowry *v.* Dutton, 28 Ind. 473; Lucas *v.* Hendrix, 92 Ind. 58; Missouri Valley Land Co. *v.* Bushnell, 11 Neb. 194; Walker *v.* Spencer, 45 N. Y. Super. Ct. 71; Garner *v.* Harmony Mills, 6 Abb. N. Cas. (N. Y. Super. Ct.) 212; State *v.* Smith, 14 Wis. 564; Tewksbury *v.* Schulenberg, 41 Wis. 592.

Surplusage cannot be reached by, and is not a ground of, demurrer. Campbell *v.* Taylor, 3 Utah 325.

Argumentative Pleading, in *Iowa*, cannot be taken advantage of by demurrer; it is not one of the grounds of demurrer specified by the code. Davis *v.* Bonar, 15 Iowa 171.

Defect of form is not a ground of demurrer in *Iowa*. Only matter of substance can be so reached. Iowa Anno. Stat. (1897), § 3561. See also Hayden *v.* Anderson, 17 Iowa 158; Davenport Gas Light, etc., Co. *v.* Davenport, 15 Iowa 6.

Specification of Grounds. — The demurrer must distinctly specify the ground or grounds upon which petition and the complaint of petition is made. See list of statutes cited *supra*, note 1, p. 365. See also on this point:

Arkansas. — Kelly *v.* Ware, 22 Ark. 449.

California. — Faymonville *v.* McCollough, 59 Cal. 285; People *v.* Haggin, 57 Cal. 579.

Colorado. — Carpenter *v.* Smith, 20 Colo. 39; Irwine *v.* Wood, 7 Colo. 477.

Idaho. — Palmer *v.* Utah, etc., R. Co., 2 Idaho 293.

Indiana. — Nesbit *v.* Miller, 125 Ind. 106; Williams *v.* Lewis, 124 Ind. 344.

Iowa. — District Tp. *v.* Independent Dist., 72 Iowa 687; Jones *v.* Brunskill, 18 Iowa 129; Traders' Bank *v.* Alsop, 64 Iowa 97.

Kansas. — Tootle *v.* Berkley, 57 Kan. 111.

Missouri. — Cockerill *v.* Stafford, 102 Mo. 57; McClurg *v.* Phillips, 49 Mo. 316; Roberts *v.* Bartlett, 26 Mo. App. 611.

Montana. — Jacobs Sulton Co. *v.* Union Mercantile Co., 17 Mont. 61; People *v.* McIntyre, 10 Mont. 166.

Nebraska. — Turner *v.* Althaus, 6 Neb. 54.

New York. — Bradley *v.* Aldrich, 40 N. Y. 512; Fulton F. Ins. Co. *v.* Baldwin, 37 N. Y. 648; Getty *v.* Hudson River R. Co., 8 How. Pr. (N. Y. Supreme Ct.) 177; Isear *v.* McMahon, 16 Misc. Rep. (N. Y. Supreme Ct.) 95; People *v.* Crooks, 53 N. Y. 648.

North Carolina. — Love *v.* Chatham County, 64 N. Car. 706.

Wisconsin. — Kneeland *v.* Milwaukee, 18 Wis. 411.

Federal Courts. — Ormsby *v.* Union Pac. R. Co., 4 Fed. Rep. 170.

Demurrer must specifically state the defects of form which are not necessarily fatal, the pleading otherwise stating a cause of action. Freeman *v.* Reagan, 26 Ark. 373; Henderson *v.* Johns, 13 Colo. 280; Davis *v.* Binford, 58 Ind. 457; Minnesota, etc., R. Co. *v.* Hiams, 53 Iowa 501; Morgan *v.* Bouse, 53 Mo. 219; Collier *v.* Irvin, 2 Mont. 335; Getty *v.* Hudson River R. Co., 8 How. Pr. (N. Y. Supreme Ct.) 177; Conley *v.* Richmond, etc., R. Co., 109 N. Car. 692, Vore *v.* Woodford, 29 Ohio

Form No. 7085.

(*Title of court and cause as in complaint or petition.*)[1] } Demurrer to complaint (or *petition*).

Richard Roe,[2] the defendant in the above entitled cause, demurs to the [*first* cause of action in the][3] complaint (or *petition*) of *John Doe*,

St. 245; Renton *v.* St. Louis, 1 Wash. Ter. 215; Howland *v.* Kenosha County, 19 Wis. 247; Ormsby *v.* Union Pac. R. Co., 2 McCrary (U. S.) 48.

To be effective, demurrer must state substantially at least one of the statutory causes for demurrer. Boldt *v.* Budwig, 19 Neb. 741.

Demurrer will not be sustained for a ground other than one named in the statute. Porter *v.* Wilson, 35 Ind. 349; Davis *v.* Bonar, 15 Iowa 171; Harper *v.* Chamberlain, 11 Abb. Pr. (N. Y. Super. Ct.) 234.

Demurrer should comply with the statute in assigning causes of demurrer. Vaughn *v.* Ferrall, 57 Ind. 182; Campbell *v.* Routt, 42 Ind. 410; Lane *v.* State, 7 Ind. 426; Kenworthy *v.* Williams, 5 Ind. 375; Tenbrook *v.* Brown, 17 Ind. 410.

Demurrer need not follow the exact language of the statute if equivalent language is used. Pace *v.* Oppenheim, 12 Ind. 533, Stanley *v.* Peeples, 13 Ind. 232; Petty *v.* Church of Christ, 70 Ind. 290; Ross *v.* Menefee, 125 Ind. 432; Hanna *v.* Hawes, 45 Iowa 437; Howland *v.* Kenosha County 19 Wis. 247

But it is usually sufficient to specify the objection in the language of the statute. Henderson *v.* Johns, 13 Colo. 280; Haire *v.* Baker; 5 N. Y. 357; Getty *v.* Hudson River R. Co., 8 How. Pr. (N. Y. Supreme Ct.) 177.

The meaning of the rule that demurrant should "briefly but plainly specify the grounds upon which he intends to rely on the argument" is explained in Getty *v.* Hudson River R. Co., 8 How. Pr. (N. Y. Supreme Ct.) 177.

Numbering, etc., grounds of objection — *Indiana.* — Demurrer should number the grounds of objection to a pleading; but where there is only one ground of objection it need not be numbered. Stribling *v.* Brougher, 79 Ind. 328; Wolf *v.* Schofield, 38 Ind. 175; Petty *v.* Church of Christ, 70 Ind. 290.

Montana. — All pleadings, before being filed or served, shall be paged and the lines numbered, and in all cases of more than one distinct cause of action, defense, or counterclaim, the same shall be separately stated and plainly numbered. Dist. Ct. Rules (4th Jud. Dist.), No. 7.

South Carolina. — All pleading shall be written on legal-cap paper, or printed, in accordance with the requirements of Supreme Ct. Rules, No. 6. Typewriting will be permitted only when black indelible ink is used, with ordinary spacing, upon linen paper, weighing not less than four pounds to five hundred single-copy sheets, eight by thirteen inches in size, and each page of typewriting shall be numbered and initialed by the attorney, officer, or person signing such paper. Papers in handwriting or in typewriting must have a blank margin of an inch and a half at the left, and, if more than two pages, shall be fastened at the top so as to read continuously. Papers in handwriting or in typewriting shall be folded from the bottom in four equal folds, and indorsed with the style of the court, the venue, the name of the party, the nature and the name of the attorney, or officer. Cir. Ct. Rules, No. 12.

1. Title of court and cause in the complaint, or petition, for the states enumerated in the last preceding note are given in the title COMPLAINTS, vol. 4, p. 1019, and Forms Nos. 7095 to 7115, *infra.*

For the necessity of entitling a demurrer see Eigenman *v.* Rockport Bldg., etc., Assoc., 79 Ind. 41.

2. If there are more defendants than join in the demurrer, they should be named: "The defendants, *Thomas Young* and *Harvey Fleming*, demur," etc.

3. If the demurrer is not to the whole complaint, say: "demurs to the *first* (or *second* or *fifth*, as the case may be) cause of action stated in the complaint herein."

Demurrer and Answer. — Defendant may demur to one or more of the several causes of action in a complaint or petition and answer as to the residue. See list of statutes cited *supra*, note 1, p. 365. But the demurrer should be filed as a separate pleading. Brooks *v.* Douglass, 32 Cal. 208. See also on

the plaintiff in the above entitled cause, and for cause of demurrer alleges, that it appears upon the face of said complaint (or *petition*).[1]

I. That the court has no jurisdiction of the person of the defendant,[2] [because said complaint (or *petition*) alleges (*Here set out the allegation or allegations showing such want of jurisdiction*).][3]

this point Greenfield *v.* Carlton, 30 Ark. 547; Jones *v.* Minogue, 29 Ark. 637; People *v.* McClellan, 31 Cal. 103; Fisher *v.* Scholte, 30 Iowa 221; Bridges *v.* Reed, 9 Bush (Ky.) 329; Long *v.* Towle, 41 Mo. 398; Allison Bros. Co. *v.* Hart, 56 Hun (N. Y.) 282; Webb *v.* Vanderbilt, 39 N. Y. Super. Ct. 4; Speight *v.* Jenkins, 99 N. Car. 143; Stocking *v.* Burnett, 10 Ohio 137.

1. Defects must appear on face of pleading in order that demurrer may be interposed therefor. See list of statutes cited *supra*, note 1, p. 368; Nordman *v.* Craighead, 27 Ark. 369; Thames L. & T. Co. *v.* Beville, 100 Ind. 309; Collins *v.* Davis, 57 Iowa 256; Polk County *v.* Hierb, 37 Iowa 361; Ruddick *v.* Marshall, 23 Iowa 243; Lane *v.* Krekle, 22 Iowa 399; Miller *v.* Miller, 63 Iowa 387; Mosher *v.* Independent School Dist., 42 Iowa 632; Childs *v.* Limback, 30 Iowa 398; State *v.* Sherwood, 42 Mo. 179; Foster *v.* Wilson, 5 Mont. 53; Parker *v.* Bond, 5 Mont. 1; Snowden *v.* Tyler, 21 Neb. 215; Hardy *v.* Miller, 11 Neb. 395; Irving Nat. Bank *v.* Corbett, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 85; Getty *v.* Hudson River R. Co., 8 How. Pr. (N. Y. Supreme Ct.) 177; Wilson *v.* New York, 6 Abb. Pr. (N. Y. C. Pl.) 6; Coe *v.* Beckwith, 31 Barb. (N. Y.) 339.

2. Want of jurisdiction of the person of defendant as a ground of demurrer is authorized by the statutes of all the states, enumerated in note 1, p. 365, *supra*. See list of statutes there cited; also Doll *v.* Feller, 16 Cal. 432; Davis *v.* Wannamaker, 2 Colo. 637, Greenwood Cemetery Land Co. *v.* Routt, 17 Colo. 156. Childs *v.* Limback, 30 Iowa 398; Cole *v.* Conner, 10 Iowa 299; Orcutt *v.* Hanson, 71 Iowa 514; Nininger *v.* Carver County, 10 Minn. 133; Gill *v.* Bradley, 21 Minn. 15; Powers *v.* Ames, 9 Minn. 178; Nomes *v.* Hope Mut. L. Ins. Co., 5 How. Pr. (N. Y. Supreme Ct.) 96, 8 Barb. (N. Y.) 541; Gervais *v.* Chicago, etc., R. Co., 18 Civ. Proc. Rep. (N. Y. Supreme Ct.) 404.

For precedents of demurrer for this cause see *infra*, Form No. 7097.

3. Specification. — Ordinarily, this ground of demurrer may be specified in the language of the statute. Henderson *v.* Johns, 13 Colo. 280; Higgins *v.* People, 2 Colo. App. 567; Mont. Code Civ. Proc. (1895), § 681. But in some states the reason of the want of jurisdiction must be explicitly stated. See list of statutes cited *supra*, note 1, p. 365.

The question of jurisdiction is not raised by a demurrer objecting that the complaint does not state facts sufficient to constitute a cause of action. Woods *v.* Sheldon, (S. Dak. 1896) 69 N. W. Rep. 602.

Whether jurisdiction relates to the person of plaintiff or of defendant must be stated. Getty *v.* Hudson River R. Co., 8 How. Pr. (N. Y. Supreme Ct.) 177; Dayton *v.* Connah, 18 How. Pr. (N. Y. Supreme Ct.) 326; Hulbert *v.* Young, 13 How. Pr. (N. Y. Supreme Ct.) 413.

Illustrations of Statement.—That "the court has no jurisdiction, either of the persons of the defendants or of the subject of the action," was held to be sufficient. Kent *v.* Snyder, 30 Cal. 667; Ellisen *v.* Halleck, 6 Cal. 387.

That "the court has no jurisdiction of the person" raises only the question as to whether the defendant is such a person as is subject to the court's jurisdiction. Ogdensburgh, etc., R. Co. *v.* Vermont, etc., R. Co., 4 Hun (N. Y.) 712; Nomes *v.* Hope Mut. L. Ins. Co., 8 Barb. (N. Y.) 541.

Nonresidence must appear on the face of the complaint to support a demurrer to jurisdiction on the ground of nonresidence of the plaintiff. Nash *v.* Hall Signal Co., 90 Hun (N. Y.) 354.

When service of process is defective, a demurrer on the ground that the court has not jurisdiction of the person of the defendant would not lie, as such a defect is waived by filing the demurrer. Miller's Anno. Code Iowa (1888), § 2626.

Ambassadors and consuls are not within the jurisdiction of the state courts. U. S. *v.* Ortega, 11 Wheat. (U. S.) 467; Const. of the U. S., § 2, art. 3.

II. That the court has no jurisdiction of the subject matter of the action.[1]

III. That the plaintiff has no legal capacity to sue, because the complaint (or *petition*) alleges (*pointing out the particular incapacity relied on*).[2]

1. Want of jurisdiction over the subject matter of the action as a ground of demurrer is authorized by the statutes of all the states, enumerated in note 1, p. 365, *supra*. See list of statutes there cited; also Blodgett *v.* Polasi Gold, etc., Min. Co., 34 Cal. 227; State *v.* Brown, 35 Kan 168; Beedy *v.* State, 4 Kan. App. 578; Stowe *v.* Stowe, 140 Mo. 599; Mullen *v.* Hewitt, 103 Mo. 645; Cook *v.* Chase, 3 Duer (N. Y.) 643; Ogdensburgh, etc., R. Co. *v.* Vermont, etc., R. Co., 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 249; Berford *v.* New York Iron Mine, 56 N. Y. Super. Ct. 236; Dodge *v.* Colby, 108 N. Y. 445; Fisher *v.* Charter Oak L. Ins. Co., 52 N. Y. Super. Ct. 179; Oliver *v.* Wiley, 75 N. Car. 323.

For precedents of demurrer for this cause see *infra*, Forms Nos. 7098, 7099.

Want of jurisdiction of subject matter must affirmatively appear on the face of the pleading in order that the demurrer may be sustained. Doll *v.* Feller, 16 Cal. 432, in which case is distinguished the rule relating to courts of general jurisdiction and that relating to courts of limited, or special, jurisdiction.

Exclusive jurisdiction of certain matters is given to certain courts; as, to the federal courts or to courts of probate in the various states; and if the actions or proceedings relating to these matters are brought in other courts, demurrer on the ground specified in the text is the proper pleading. See Dodson *v.* Scroggs, 47 Mo. 285; Cones *v.* Ward, 47 Mo. 289.

Action in Wrong County. — All the states, by statute, provide for local trial of certain actions which must be brought in certain counties. Demurrer is the proper remedy where the action is brought in the wrong county. But in *Iowa* and *Minnesota* motion to change the place of trial to the proper county, and not demurrer, is the remedy. Cole *v.* Conner, 10 Iowa 299; Nininger *v.* Carver County, 10 Minn. 133; Gill *v.* Bradley, 21 Minn. 15.

Specification. — This ground of demurrer may be specified in the language of the statute. Sanb. & B. Anno. Stat. Wis. (1889), § 2651; also list of statutes cited *supra*, note 1, p. 365.

2. Plaintiff's incapacity to sue as a ground of demurrer is authorized by the statutes of all the states enumerated in note 1, p. 365, *supra*. See list of statutes there cited; also Swamp, etc., Dist. No. 110 *v.* Feck, 60 Cal. 403; Jackson *v.* Dines, 13 Colo. 90; Butler *v.* Rockwell, 14 Colo. 125; Back *v.* Sierra Nevada Consol. Min. Co., 2 Idaho 386; Debolt *v.* Carter, 31 Ind. 355; Pence *v.* Aughe, 101 Ind. 317; Dale *v.* Thomas, 67 Ind. 570; Hanna *v.* Hawes, 45 Iowa 437; State *v.* Minton, 49 Iowa 591; Winfield Town Co. *v.* Maris, 11 Kan. 128; Wyandotte, etc., Bridge Co. *v.* Wyandotte County, 10 Kan. 326; Warfield *v.* Gardner, 79 Ky. 583; Leuthold *v.* Young, 32 Minn. 122; Minneapolis Harvester Works *v.* Libby, 24 Minn. 327; State *v.* Torinus, 22 Minn. 272; Walsh *v.* Byrnes, 39 Minn. 527; Irvine *v.* Irvine, 5 Minn. 61; Jones *v.* Steele, 36 Mo. 325; Bulkley *v.* Big Muddy Iron Co., 77 Mo. 105; Hoskins *v.* White, 13 Mont. 70; Farrell *v.* Cook, 16 Neb. 483; Phœnix Bank *v.* Donnell, 40 N. Y. 410; People *v.* Crooks, 53 N. Y. 648; Stone *v.* Groton Bridge, etc., Co., 77 Hun (N. Y.) 99; Neil *v.* Ohio Agricultural, etc., College, 31 Ohio St. 15, 21; American Button Hole, etc., Co., *v.* Moore, 2 Dak. 280; Gage *v.* Wayland, 67 Wis. 566.

For precedents of demurrer for this cause see *infra*, Forms Nos. 7100, 7101.

The incapacity must appear affirmatively on the face of the pleading in order that demurrer may lie. Rogers *v.* La Fayette Agricultural Works, 52 Ind. 296; Brown *v.* Critchell, 110 Ind. 31; Pence *v.* Aughe, 101 Ind. 317; Dale *v.* Thomas, 67 Ind. 570; Hanna *v.* Hawes, 45 Iowa 437; Winfield Town Co. *v.* Maris, 11 Kan. 128; Minneapolis Harvester Works *v.* Libby, 24 Minn. 327; Hammons *v.* Renfrow, 84 Mo. 332; Young Men's Christian Assoc. *v.* Dubach, 82 Mo. 475; Bulkley *v.* Big Muddy Iron Co., 77 Mo. 105; State *v.* Berning, 74 Mo. 87; Knight *v.* Le Beau, 19 Mont. 223; Farrell *v.* Cook, 16 Neb. 483; Phœnix Bank *v.* Donnell, 40 N. Y. 410. See also *supra*, note 1, p. 368.

In American Button Hole, etc., Co. *v.* Moore, 2 Dak. 280, it was held that

IV. That there is another action pending between the same parties for the same cause[1]

incapacity must appear from the allegations in the complaint, not from a want of allegations therein.

Objection must be taken by answer when the incapacity does not appear on face of pleading. Phœnix Bank *v.* Donnell, 40 N. Y. 410; Minneapolis Harvester Works *v.* Libby, 24 Minn. 327; State *v.* Torinus, 22 Minn. 272.

Disability of some legal character, as infancy, idocy, or the like, is the defect that is sought to be reached by the demurrer of legal incapacity to sue, and not that the facts alleged show that the plaintiff has no right to sue a particular action. Brown *v.* Critchell, 110 Ind. 31; Winfield Town Co. *v.* Maris, 11 Kan. 128.

Persons suing in representative capacities must show their authority to sue in such capacities or demurrer on the ground specified in the text will be sustained. Beach *v.* King, 17 Wend. (N. Y.) 197; Scrantom *v.* Farmers, etc., Bank, 33 Barb. (N. Y.) 527.

Facts appearing only in verification will not render complaint demurrable; as, for example, where it appears from such affidavit of verification that the plaintiffs have not legal capacity to sue. Gage *v.* Wayland, 67 Wis. 566.

Specification. — This ground of demurrer must be particularly specified (see list of statutes cited *supra*, note 1, p. 365), and the particular reasons of the legal incapacity should be set out in the demurrer. From the facts set out in Moir *v.* Dodson, 14 Wis. 279, it seems that this ground of demurrer was specified somewhat as follows: "That plaintiffs have not legal capacity to sue, for the reason that the complaint shows plaintiffs to be foreign executors, and they cannot sue as such in the courts of this state."

General demurrer for insufficiency will not raise the question of legal capacity to sue. Rogers *v.* La Fayette Agricultural Works, 52 Ind. 296; Brown *v.* Critchell, 110 Ind. 31; Hanna *v.* Hawes, 45 Iowa 437; Knight *v* Le Beau, 19 Mont. 223; Farrell *v.* Cook, 16 Neb. 483.

Capacity of foreign corporation to sue cannot be raised by demurrer alleging insufficiency of facts to constitute a cause of action. O'Reilly *v.* Greene, 18 Misc. Rep. (N. Y. Supreme Ct.) 423.

1. Another action pending as a ground of demurrer is authorized by the statutes of all the states, enumerated in note 1, p. 365, *supra*. See list of statutes there cited; also Thompson *v.* Lyon, 14 Cal. 42; Vance *v.* Olinger, 27 Cal. 358; Larco *v.* Clements, 36 Cal. 132; O'Connor *v.* Blake, 29 Cal. 314; Ayres *v.* Bensley, 32 Cal. 628; Debolt *v.* Carter, 31 Ind. 360; Mosher *v.* Independent School Dist., 42 Iowa 632; Treanor *v.* Sheldon Bank, 90 Iowa 575; Galbreath *v.* Drought, 29 Kan. 715; Davis *v.* Morton, 4 Bush (Ky.) 442; Julian *v.* Pilcher, 2 Duv. (Ky.) 254; Moore *v.* Sheppard, 1 Metc. (Ky.) 97; Hoard *v.* Clum, 31 Minn. 186; Lewis *v.* Williams, 3 Minn. 151; Nichols *v.* Randall, 5 Minn. 304; Baldwin *v.* Canfield, 26 Minn. 44; McRoberts *v.* Southern Minnesota R. Co., 18 Minn. 108; Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372; Davis *v.* Chouteau, 32 Minn. 548; Graham *v.* Minneapolis, 40 Minn. 436; Arthur *v.* Rickards, 48 Mo. 298; Dambman *v.* Schulting, 4 Hun (N. Y.) 50; Blackwell Durham Tobacco Co. *v.* McElwee, 94 N. Car. 425; Stanton *v.* Embrey, 93 U. S. 548.

For precedents of demurrer for this cause see *infra*, Form No. 7102.

Specification. — This ground of demurrer may be specified in the language of the statute. Mont. Code Civ. Proc. (1895), § 681; N. Y. Code Civ. Proc., § 490 (Birds. Rev. Stat. (1896), p. 2273, § 15), and list of statutes cited *supra*, note 1, p. 365.

To sustain the demurrer, it must appear on the face of the complaint that the other action is one between the same parties (Geery *v.* Webster, 11 Hun (N. Y.) 428), in the same state (Cook *v.* Litchfield, 5 Sandf. (N. Y.) 330), for the same cause of action (Dawley *v.* Brown, 79 N. Y. 390), and for the same relief (Geery *v.* Webster, 11 Hun (N. Y.) 428).

The other action need not be a civil action. Groshon *v.* Lyon, 16 Barb. (N. Y.) 461.

The other action may be one by the defendant against the plaintiff, but it must be between the same parties Geery *v.* Webster, 11 Hun (N. Y.) 428; Dambman *v.* Schulting, 4 Hun (N. Y.) 50.

Assignee of party in former suit is not the "same party" within the meaning

[in this state].[1]

V. That there is a defect of parties plaintiff in this, to wit, that it appears from said complaint (or *petition*) that (*pointing out particularly the defect relied on*).[2]

of the statute specifying as a good cause of demurrer "that there is another action pending between the same parties for the same cause." Blackwell Durham Tobacco Co. *v.* McElwee, 94 N. Car. 425. See also Webster *v.* Laws, 86 N. Car. 178.

In Federal Courts. — Pendency of a prior suit in a state court is not a bar to suit in the federal courts between the same parties for the same cause. Stanton *v.* Embrey, 93 U. S. 548, and cases there cited.

1. The words in [ ] seem to be required upon the wording of the statute in some jurisdictions. See list of statutes cited *supra*, note 1, p. 365.

2. **Defect of parties, either plaintiff or defendant,** as a ground of demurrer, is authorized by the statutes of all the states, enumerated in note 1, p. 365, *supra*. See list of statutes there cited. Consult also Fitzgerald *v.* Burke, 14 Colo. 559; Great Western Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46; Albro *v.* Lawson, 17 B. Mon. (Ky.) 645; Waits *v.* McClure, 10 Bush (Ky.) 763; Hardee *v.* Hall, 12 Bush (Ky.) 327; McCallister *v.* Louisville Sav. Bank, 80 Ky. 687; Rogers *v.* Tucker, 94 Mo. 346; Mueller *v.* Kaessmann, 84 Mo. 318; St. Louis, etc., R. Co. *v.* Anthony, 73 Mo. 431; State *v.* Sappington, 68 Mo. 454; Nicholson *v.* Golden, 27 Mo. App. 132; Hardy *v.* Miller, 11 Neb. 396; N. Y. Code Civ. Proc., § 488; Toucey *v.* Schell, 15 Misc. Rep. (N. Y. Supreme Ct.) 350; Oliver *v.* Wiley, 75 N. Car. 324; Lowry *v.* Jackson, 27 S. Car. 320; Macaulay *v.* Central Nat. Bank, 27 S. Car. 219.

For precedents of demurrer for this cause see *infra*, Forms Nos. 7103, 7104.

This ground of demurrer must be specified, but in some states it may be specified in the language of the statute (Ballinger's Anno. Codes & Stat. Wash. (1897), § 4908; see also list of statutes cited *supra*, note 1, p. 365), while in other states the specification should be fuller, and indicate the party who has been joined.

Colorado. — Demurrer must clearly state wherein the defect of parties consists. Irwine *v.* Wood, 7 Colo. 477.

Indiana. — Demurrer must specify the particular defect, and not merely follow the language of the statute. Dewey *v.* State, 91 Ind. 182. It should not only state that there is a defect of parties plaintiff or defendant, but should point out the person, or persons, who should be made party, or parties. Leedy *v.* Nash, 67 Ind. 311.

If a demurrer for a defect of parties taken in connection with the pleading demurred to sufficiently designates the parties who should be but are not joined, the demurrer will be sufficient. Durham *v.* Bischof, 47 Ind. 211.

In Weaver *v.* Wabash, etc., Canal, 28 Ind. 112, the following demurrer was interposed: "1. There is a defect of parties, in this, that the said Wabash and Erie Canal Company should have been made a party defendant to answer as to its interest in the subject matter of the action. 2. The complaint," etc.

Iowa. — While a nonjoinder of parties may be taken advantage of by a demurrer for defect of parties, a misjoinder, or an excess, of parties cannot be availed of in this manner, and are not, in themselves, ground for demurrer. Turner *v.* Keokuk First Nat. Bank, 26 Iowa 562; Mornan *v.* Carroll, 35 Iowa 22; King *v.* King, 40 Iowa 120; Dubuque County *v.* Reynolds, 41 Iowa 454; District Tp. *v.* District Tp., 44 Iowa 512; Bort *v.* Yaw, 46 Iowa 323; Independent School Dist. *v.* Independent School Dist. No. 2, 50 Iowa 322.

Kansas. — Gilmore *v.* Fox, 10 Kan. 509; Wyandotte, etc., Bridge Co. *v.* Wyandotte County, 10 Kan. 326. Misjoinder, or excess, of parties does not constitute a defect of parties for which demurrer will lie. Hurd *v.* Simpson, 47 Kan. 378; Bowman *v.* Germy, 23 Kan. 309; McKee *v.* Eaton, 26 Kan. 226.

New York. — Demurrer must specify the particular defect and not merely follow the language of the statute. Skinner *v.* Stuart, 13 Abb. Pr. (N. Y. Supreme Ct.) 442. It should not only state that there is a defect of parties plaintiff or defendant, but should point out the person, or persons, who should be made party, or parties. Foley *v.* Mail, etc., Pub. Co., 8 Misc. Rep. (N. Y. Super. Ct.) 91.

VI. That there is a defect of parties defendant in this, to wit, that it appears from said complaint (or *petition*) that (*pointing out particularly the defect relied on*).[1]

VII. That there is a misjoinder of parties plaintiff in this, to wit, that it appears from the complaint (or *petition*) that (*pointing out particularly the defect relied on*).[2]

Oregon. — A demurrer that "there is a defect of parties plaintiff and defendant" is not a sufficient specification within Hill's Anno. Laws Oregon, § 68. State *v.* Metschan, (Oregon, 1896) 46 Pac. Rep. 791.

South Dakota. — Under Dak. Comp. Laws, § 4910, a demurrer for this cause, stating "that there is a defect of parties plaintiff," in the language of the Dak. Comp. Laws, § 3909, was held to be sufficient. Hudson *v.* Archer, 4 S. Dak. 128.

Wisconsin. — Demurrer for defect of parties must specify the particular defect, and not merely follow the language of the statute. Baker *v.* Drury, 29 Wis. 580. It should not only state that there is a defect of parties plaintiff or defendant, but should point out the person, or persons, who should be made party, or parties. Murray *v.* McGarigle, 69 Wis 483. A demurrer for defect of parties in that demurrant should not have been made a party defendant is not the proper mode of objecting that no cause of action is stated against the demurrant. Arzbacher *v.* Meyer, 53 Wis. 380.

1. Defect of Parties Defendant.— See *supra*, note 1, p. 371.

Specification. — This ground of demurrer must be specified (see list of statutes cited *supra*, note 1, p. 365), and the following is an example of such specification based on the facts in Hays *v.* Hill, 17 Kan. 360: "That the petition shows a defect of parties defendant, in that it is an action to enjoin the collection of a tax to pay the interest on a bond of *School District No. 13*, of *Osborn* county, in the state of *Kansas*, and to provide a sinking fund, to redeem such fund, and said *School District* of *Osborn* county, state of *Kansas*, which issued such bond, is not made a party defendant to this petition." In this case the court refused to rule on this ground of demurrer in the absence of the real party defendant, the School District. The court held the treasurer to be a mere nominal party. The demurrer for defect of parties was sustained by the supreme court, *reversing* the decision of the district court overruling the demurrer. The supreme court cited the case of Gilmore *v.* Fox, 10 Kan. 509, where a similar question is discussed.

2. Misjoinder of parties plaintiff as ground of demurrer is authorized by the statutes of the following states:

California. — Code Civ. Proc. (1897), § 430.

Colorado. — Mills' Anno. Code (1896), § 50.

Idaho. — Rev. Stat. (1887), § 4174.

Montana. — Code Civ. Proc. (1895), § 680.

Nevada. — Gen. Stat. (1885), § 3062.

New York. — Code Civ. Proc., § 488 (Birds. Rev. Stat. (1896), p. 2272, § 14).

Ohio. — Bates' Anno. Stat. (1897), § 5062.

Utah. — Rev. Stat. (1898), § 2962.

Wyoming. — Rev. Stat. (1887), § 2449, subd. 4.

California. — Misjoinder of parties as ground of demurrer. Andrews *v.* Mokelumne Hill Co., 7 Cal. 330; Tennant *v.* Pfister, 45 Cal. 270; Revalk *v.* Kraemer, 8 Cal. 74; Tissot *v.* Throckmorton, 6 Cal. 473; Treat *v.* Liddell, 10 Cal. 302; Summers *v.* Farish, 10 Cal. 347; People *v.* Morrill, 26 Cal. 352, Gillam *v.* Sigman, 29 Cal. 639; Frost *v.* Harford, 40 Cal. 165. An objection for misjoinder of parties is properly taken advantage of by a demurrer merely stating that the demurrant was improperly joined with other defendants. Gardner *v.* Samuels, 116 Cal. 84.

Colorado. —Misjoinder of parties as a ground for demurrer. Irwine *v.* Wood, 7 Colo. 477.

Can be raised only by demurrer. Colorado Coal, etc., Co. *v.* Lamb, 6 Colo. App. 255. Misjoinder must appear upon the face of the pleading. Pierson *v.* Fuhrmann, 1 Colo. App. 187. Must specify wherein the misjoinder consists. Stock-Growers' Bank *v.* Newton, 13 Colo. 245; Irwine *v.* Wood, 7 Colo. 477. Joint demurrer cannot raise objections of the misjoinder of two persons Empire Land, etc., Co. *v.* Rio Grande County, 21 Colo. 244.

VIII. That there is a misjoinder of parties defendant, in this, to wit, that it appears from the said complaint (or *petition*) that (*pointing out particularly the defect relied on*).[1]

Indiana. — There is no such reason for demurrer for misjoinder of parties. Cargar *v.* Fee, 140 Ind. 577. "Even, moreover, if there were here two causes of action improperly united against all the defendants, still the error should be reached by motion to separate, and not by demurrer." Cargar *v.* Fee, 140 Ind. 577.

Consult the title DEFINITENESS AND CERTAINTY IN PLEADINGS, *ante*, p. 273; but *compare* Debolt *v.* Carter, 31 Ind. 355.

Iowa. — Misjoinder of parties not a ground of demurrer. Turner *v.* Keokuk First Nat. Bank, 26 Iowa 562; Mornan *v.* Carroll, 35 Iowa 22; King *v.* King, 40 Iowa 120; Dubuque County *v.* Reynolds, 41 Iowa 454; District Tp. *v.* District Tp., 44 Iowa 512; Bort *v.* Yaw, 46 Iowa 323; Independent School Dist. *v.* Independent School Dist. No. 2, 50 Iowa 322; Grayson *v.* Willoughby, 78 Iowa 83.

Kansas. — Demurrer for misjoinder of parties will not lie in any case. Hurd *v.* Simpson, 47 Kan. 372; Bowman *v.* Germy, 23 Kan. 309; McKee *v.* Eaton, 26 Kan. 226.

Kentucky. — A misjoinder of parties is not a defect of parties within the meaning of the statute. Dean *v.* English, 18 B. Mon. (Ky.) 136.

Montana. — Defect or misjoinder of parties as a ground of demurrer. Fultz *v.* Walters, 2 Mont. 165; Territory *v.* Hildebrand, 2 Mont. 426.

Demurrer must show wherein there is a misjoinder. Fultz *v.* Walters, 2 Mont. 165.

Nebraska. — Misjoinder of plaintiffs is not a ground of demurrer. Davey *v.* Dakota County, 19 Neb. 724.

New York. — Misjoinder of parties as a ground of demurrer. Fish *v.* Hose, 59 How. Pr. (N. Y. Supreme Ct.) 238; Barnes *v.* Blake, 59 Hun (N. Y.) 371; Paxton *v.* Patterson, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 389; Wing *v.* Bull, 38 Hun (N. Y.) 291, to the effect that misjoinder of plaintiffs, and not nonjoinder of defendants, constitutes a ground of demurrer. Demurrer must show wherein there is a misjoinder. Berney *v.* Drexel, 33 Hun (N. Y.) 419.

Oklahoma. — Misjoinder of parties is no ground of demurrer to a petition. Stiles *v.* Guthrie, 3 Okla. 26.

Utah. — Misjoinder of parties as a ground of demurrer. Moore *v.* Wilson, 1 Utah 187; Crismon *v.* Reich, 2 Utah 111; Salt Lake County *v.* Golding, 2 Utah 319; Raleigh *v.* Hulett, 2 Utah 122; Garland *v.* McMartin, 8 Utah 150; Ruffatti *v.* Societe, etc., 10 Utah 386; Whitehill *v.* Lowe, 10 Utah 419.

Wisconsin. — Misjoinder of parties plaintiff is not specified as a ground of demurrer, but the objection can nevertheless be reached by demurrer on the ground that several causes of action have been improperly united. Barnes *v.* Beloit, 19 Wis. 93. Thus if two or more persons, each having a right to sue, improperly join in an action when they should bring several actions, a demurrer in the form indicated may be filed.

Specification. — This ground of demurrer must be specified (see list of statutes cited *supra*, note 1, p. 365); and the specification may be as follows: "That there is a misjoinder of parties plaintiff in this, that there is no liability on the part of this defendant to the plaintiff, *Thomas Young*, and the said *Thomas Young* has no interest in the subject matter of this action."

1. Misjoinder of parties defendant is a ground of demurrer authorized by the statutes of *California*, *Colorado*, *Idaho*, *Montana*, *Nevada* and *Utah*. See list of statutes cited *supra*, note 1, p. 365.

Who May Demur for This Cause. — Only the party improperly joined may demur on the ground that a party is improperly joined as defendant. If the objection is taken by the defendants, it cannot be allowed. Ashby *v.* Winston, 26 Mo. 210; Alnutt *v.* Leper, 48 Mo. 319.

Where this ground is not specifically permitted, and a defendant is improperly made a party, he, but not those properly joined, may demur on the ground that the complaint does not state facts sufficient to constitute a cause of action against him; and if the demurrer is sustained, the complaint will be dismissed as against him. Makepeace *v.* Davis, 27 Ind. 352; Goff *v.* May, 38 Ind. 267; Turner *v.* Keokuk First Nat. Bank, 26 Iowa 562.

Specification. — This ground of demurrer must be specified (see list of statutes cited *supra*, note 1, p 365);

IX. That a party plaintiff is not a necessary party to the complete determination of the action, in this, to wit, that it appears from the said complaint (or *petition*) that (*pointing out particularly the defect relied on*).[1]

X. That a party defendant is not a necessary party to the complete determination of the action in this, to wit, that it appears from the said complaint (or *petition*) that (*pointing out particularly the defect relied on*).[1]

XI. That several causes of action have been improperly united (or *joined*) in the complaint (or *petition*), in this, to wit, that it appears from said complaint (or *petition*) that (*pointing out particularly how such causes of action have been improperly joined or united*).[2]

XII. That separate causes of action against several defendants are improperly joined in the petition, in this,* to wit, that it appears

as, for example, "That it appears on the face of the petition that this defendant is not a necessary party to the complete determination of the action, in that the cause or action, if any, stated in the complaint (or *petition*), in favor of the plaintiff, is against the defendant, *John Smith*, and not against this defendant, *Richard Roe*."

1. *Missouri.* — Rev. Stat. (1889), § 2041.

New Mexico. — Comp. Laws (1897), § 2685, subs. 35.

2. Misjoinder of Causes of Actions. — This cause of demurrer is authorized by the statutes of all the states, enumerated in the list of states cited *supra*, note 1, p. 365, except in *Arizona*, *Arkansas*, *Connecticut* and *Iowa*.

For precedents of demurrer for this cause see *infra*, Form No. 7105.

What causes of action may be united is provided for by statutes in the various states. Demurrer on the ground specified lies where causes are united whose union is forbidden, and not for the mere manner of the union or for stating two causes of action in one count. Bass *v.* Comstock, 38 N. Y. 21; Nichol *v.* Alexander, 28 Wis. 118; Otis *v.* Mechanics' Bank, 35 Mo. 128; Mulholland *v.* Rapp, 50 Mo. 42; Akerly *v.* Vilas, 25 Wis. 703; Wiles *v.* Suydam, 64 N Y. 173.

Causes not separately stated must be demurred to if they are improperly united. The omission to state them in separate counts does not deprive the defendant of his right to demur. Goldberg *v.* Utley, 60 N. Y. 427; Wiles *v.* Suydam, 64 N. Y. 173.

Specification. — This particular ground of demurrer must be distinctly specified. See list of statutes cited *supra*, note 1, p. 365. See also Healy *v.* Visalia, etc., R. Co., 101 Cal. 585; Haverstick *v.* Trudel, 51 Cal. 431, to the effect that the demurrer must specify the several causes of action improperly joined; Stock-Growers' Bank *v.* Newton, 13 Colo. 245; Gilpin *v.* Adams, 14 Colo. 512; Burrows *v.* Holderman, 31 Ind. 412; Smith *v.* Jordan, 13 Minn. 264; Armstrong *v.* Hinds, 8 Minn. 254; James *v.* Wilder, 25 Minn. 305; Blair *v.* Chicago, etc., R. Co. 89 Mo. 383; Mulholland *v.* Rapp, 50 Mo. 42; Fadley *v.* Smith, 23 Mo. App. 87; Brown *v.* Kansas City, etc., R. Co., 20 Mo. App. 427; Moore *v.* Smith, 10 How. Pr. (N. Y. Supreme Ct.) 361; McClure *v.* Wilson, 13 N. Y. App. Div. 274; Dodge *v.* Colby, 108 N. Y. 445; Lovelace *v.* Doran, etc., Co. (Supreme Ct.) 40 N. Y. St. Rep. 53.

General Demurrer will not reach an improper joinder of causes of action. Smith *v.* Jordan, 13 Minn. 264; Isear *v.* McMahon, 16 Misc. Rep. (N. Y. Supreme Ct.) 95.

A demurrer, instead of stating "that causes of action have been improperly united," stated that "causes of action on a contract are joined with a cause of action in tort," and the demurrer was held sufficient. McClure *v.* Wilson, 13 N. Y. App. Div. 274.

Multifariousness is not a ground of demurrer in *Arkansas*; it can be reached only on motion to strike out. Dyer *v.* Jacoway, 42 Ark. 186; Ashley *v.* Little Rock, 56 Ark. 392; Clements *v.* Lampkin, 34 Ark. 598. A demurrer for misjoinder of causes will be treated in *Arkansas* as a motion to strike. Fordyce *v.* Nix, 58 Ark. 136.

from said petition that (*pointing out particularly how separate causes of action have been so improperly joined*).[1]

XIII. That the complaint (or *petition*) does not state facts sufficient to constitute a cause of action.[2]

1. *Ohio.* — Bates' Anno. Stat. (1897), § 5062, subd. 7.

Wyoming. — Rev. Stat. (1887), § 2449, subd. 7.

Iowa. — Joining causes of action against different parties is a ground for demurrer. Cogswell *v.* Murphy, 46 Iowa 44.

Specification.—This particular ground of demurrer must be distinctly specified. See list of statutes cited *supra*, note, p. 365. And often the specification is accomplished by stating the particular actions improperly joined thus, by adding after *, in Form No. 7085, par. XII, the words, "to wit, an action on contract against the defendant *Richard Roe* and an action in tort against the defendant *John Smith*."

2. **Insufficiency of Statement of Facts.**— This ground of demurrer is authorized by the statutes of all the states, enumerated in the list of states cited *supra*, note 1, p. 365, except the state of *Iowa*. For the form of demurrer in *Iowa* corresponding to this see Form No. 7095, par. XIV. Consult also, on the question of this ground of demurrer, the following cases:

Arkansas.— Goodwin *v.* Robinson, 30 Ark. 536.

California. — White *v.* Lyons, 42 Cal. 279; McPherson *v.* Weston, 64 Cal. 275; Green *v.* Palmer, 15 Cal. 414; Joseph *v.* Holt, 37 Cal. 250.

Colorado. — Logan *v.* Clough, 2 Colo. 323; Wilson *v.* Denver, etc., R. Co., 7 Colo. 101; Herfort *v.* Cramer, 7 Colo. 483; Marix *v.* Stevens, 10 Colo. 261; Marriott *v.* Clise, 12 Colo. 561; Bayles *v.* Kansas Pac. R. Co., 13 Colo. 181; Toothaker *v.* Boulder, 13 Colo. 219; McKee *v.* Howe, 17 Colo. 538; Carpenter *v.* Smith, 20 Colo. 39.

Indiana. — Wright *v.* Jordan, 71 Ind. 1; Galvin *v.* Woollen, 66 Ind. 464.

Iowa. — Walker *v.* Pumphrey, 82 Iowa 487; Chicago, etc., R. Co. *v.* Burlington, etc., Elevator Co., 73 Iowa 629.

Kansas. — Leavenworth, etc., R. Co. *v.* Wilkins, 45 Kan. 674.

Minnesota.— Griggs *v.* St. Paul, 9 Minn. 246; Leuthold *v.* Young, 32 Minn. 122.

Missouri. — Howell *v.* Stewart, 54 Mo. 400.

Montana. — Collier *v.* Ervin, 2 Mont. 335.

Nebraska. — Merriam *v.* Miller, 22 Neb. 218.

Nevada. — Gerrens *v.* Huhn, etc., Silver Min. Co., 10 Nev. 137.

New York. — Lewis *v.* Park Bank, 42 N. Y. 463; Noxon *v.* Bentley, 7 How. Pr. (N. Y. Supreme Ct.) 316; Hook *v.* Pratt, 8 Hun (N. Y.) 102; Case *v.* Carroll, 35 N. Y. 385.

Ohio. — Gill *v.* Sells, 17 Ohio St. 195.

Oregon. — Cline *v.* Cline, 3 Oregon 355.

South Carolina. — Felder *v.* Walker, 24 S. Car. 596.

Washington. — Wilkeson Coal, etc., Co. *v.* Driver, 9 Wash. 177.

Wisconsin. — Whitwam *v.* Wisconsin, etc., R. Co., 58 Wis. 408.

For precedents of demurrer for this cause see *infra*, Forms Nos. 7106 to 7114.

General demurrer that complaint or petition does not state facts sufficient to constitute a cause of action must be overruled where one good cause of action is stated therein. Warner *v.* Capps, 37 Ark. 32; Bruce *v.* Benedict, 31 Ark. 301; Blakeney *v.* Ferguson, 18 Ark. 347; Rogers *v.* Schulenburg, 111 Cal. 281; Pfister *v.* Wade, 69 Cal. 133; Fleming *v.* Albeck, 67 Cal. 226; Doss *v.* Craig, 1 Colo. 177; Lewis *v.* San Miguel County, 14 Colo. 371; Campbell *v.* Shiland, 14 Colo. 491; Burk *v.* Simonson, 104 Ind. 173; St. Paul First Nat. Bank *v.* How, 28 Minn. 150; Rathburn *v.* Burlington, etc., R. Co., 16 Neb. 441; Hale *v.* Omaha Nat. Bank, 49 N. Y. 626; Thompson *v.* Fox, 21 Misc. Rep. (N. Y. Supreme Ct.) 298; Seaver *v.* Hodgkin, 63 How. Pr. (N. Y. Supreme Ct.) 128; Mark Paine Lumber Co. *v.* Douglas County Imp. Co., 94 Wis. 322.

Specification — *Sufficient.* — Where the defect relied on is merely the want of a sufficient statement of facts, the ground of demurrer may be specified in the language of the statute, thus: "That the complaint does not contain facts sufficient to constitute a cause of action."

Arkansas. — Sand. & H. Dig. (1894), § 5718.

XIV. That the facts stated in the petition do not entitle the.

California. — Kent *v.* Snyder, 30 Cal. 667.

Colorado. — Henderson *v.* Johns, 13 Colo. 280.

Indiana. — Stanley *v.* Peeples, 13 Ind. 232; Brown *v.* Critchell, 110 Ind. 31.

Minnesota. — Monette *v.* Cratt, 7 Minn. 234.

Missouri. — Jordan *v.* Missouri, etc., R. Co., 61 Mo. 52; Morgan *v.* Bouse, 53 Mo. 219; Darby *v.* Cabanné, 1 Mo. App. 126; State Bank *v.* Haden, 35 Mo. 358.

Montana. — Monette *v.* Cratt, 7 Minn. 234; Howland *v.* Kenosha County, 19 Wis. 247.

New York. — Paine *v.* Smith, 2 Duer (N. Y.) 298; De Witt *v.* Swift, 3 How. Pr. (N. Y. Supreme Ct.) 280.

Washington. — Ballinger's Anno. Stat. and Codes (1897), § 4908.

Wisconsin. — Arzbacher *v.* Mayer, 53 Wis. 380.

That complaint "does not contain and set forth sufficient facts to enable the plaintiff to sustain said action" was held to be sufficient. Stanley *v.* Peeples, 13 Ind. 232.

Demurrer is regarded as objecting only that the complaint does not state facts sufficient to constitute a cause of action, where the ground of objection is not specified. Sand. & H. Dig. Ark. (1894), § 5718.

Insufficient. — The following specifications under this ground of demurrer have been held to be insufficient:

"That petition does not state facts sufficient to constitute a good and sufficient petition." Grubbs *v.* King, 117 Ind. 243.

"That complaint is not sufficient in law to entitle plaintiff to the relief demanded." Kemp *v.* Mitchell, 29 Ind. 163.

"That the several paragraphs are not good and sufficient in law." Porter *v.* Wilson, 35 Ind. 348.

"That the complaint does not state facts sufficient to constitute a ground of complaint." Firestone *v.* Werner, 1 Ind. App. 293.

"That the complaint does not state facts sufficient to constitute a cause of action," in *Iowa.* Childs *v.* Limback, 30 Iowa 398; McGregor, etc., R. Co. *v.* Birdsall, 30 Iowa 255.

"That the allegations of the petition are insufficient to entitle the plaintiff to recover." Davidson *v.* Biggs, 61 Iowa 309.

"That the complaint does not state facts sufficient to constitute a cause of action," in *North Carolina.* Jones *v.* Rowan, 85 N. Car. 278; Elam *v.* Barnes, 110 N. Car. 73; Statesville Bank *v.* Bogle, 85 N. Car. 203; Love *v.* Chatham County, 64 N. Car. 706; George *v.* High, 85 N. Car. 99.

"That complaint states no cause of action whatever." Goss *v.* Waller, 90 N. Car. 149.

The word "complaint" is not equivalent to the words "cause of action" as used in the statute enumerating the grounds for demurrer. Pine Civil Tp. *v.* Huber Mfg. Co., 83 Ind. 121.

Constitutionality of an act is raised by general demurrer to complaint for an injunction against the collection of a special tax, where the complaint alleges that the acts under which the tax was levied and assessed are unconstitutional. It is sufficient on such a demurrer to state that the complaint does not state facts sufficient to constitute a cause of action, following the language of the statute; and the demurrant cannot be required to specify more particularly in the demurrer his objections to the complaint; nor will the demurrer be held bad because of a defective attempt to specify objections therein. Howland *v.* Kenosha County, 19 Wis. 247.

Statute of Frauds, etc., Not Raised. — That complaint does not state facts sufficient to constitute a cause of action as a ground of demurrer will not raise a question of the statute of limitations or the statute of frauds. Jennings *v.* Rickard, 10 Colo. 395; Barnes *v.* Union Pac. R. Co., 54 Fed. Rep. 87.

Where there are several plaintiffs and a cause of action is not stated in favor of all, the proper form of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. Brown *v.* Critchell, 110 Ind. 31.

Where there are Several Defendants. — A general demurrer by one of several defendants that the complaint does not state facts sufficient to constitute a cause of action must be sustained if no cause of action is stated against the demurrant. Arzbacher *v.* Mayer, 53 Wis. 380.

Where demurrant specifies certain grounds of insufficiency in demurring for this cause, he can rely only upon the certain ground specified. Nellis *v.* DeForest, 16 Barb. (N. Y.) 61.

plaintiff to the relief demanded,[1] in this, to wit: (*specifying wherein relief demanded is not proper*).[2]

1. *Iowa.* — Code (1897), § 3561, subd. 5.

That facts stated do not warrant the relief demanded as a ground of demurrer. Watts *v.* Everett, 47 Iowa 270; District Tp. *v.* Independent Dist., 72 Iowa 688; White *v.* Day, 56 Iowa 248; Moore *v.* State Ins. Co., 72 Iowa 414; Burt *v.* Decker, 64 Iowa 106; Clough *v.* Goggins, 40 Iowa 325; Armel *v.* Lendrum, 47 Iowa 536; Harwood, etc., R. Co. *v.* Case, 37 Iowa 692.

Distinguished from "No Cause of Action." — Section of the code just referred to (par. 5, § 3561) differs from the corresponding section of the revision (§ 2876), which provided that a petition could be assailed by demurrer when it does not state "facts sufficient to constitute a cause of action." Watts *v.* Everett, 47 Iowa 270.

"Relief demanded," as used in the code, explained. Watts *v.* Everett, 47 Iowa 269.

2. Sufficient Specifications. — In Watts *v.* Everett, 47 Iowa 270, the demurrer specified, as the ground that the facts stated in plaintiff's petition did not entitle him to the relief demanded, substantially as follows: In that it is not shown that leave of court has been obtained to prosecute said action as is required by section 3439 of the code of *Iowa*, enacted by the twenty-sixth general assembly of the state of Iowa, at its extra session, 1897. The demurrer in that case was overruled, but the supreme court reversed the decision, discussing its ground of demurrer as follows: "The relief demanded in the petition is a judgment upon the record set out by plaintiff. The statute quoted declares that an action to obtain such relief cannot be prosecuted within fifteen years unless leave as prescribed be obtained. In the absence of such leave, plaintiff, of course, is not entitled to the judgment sought in the petition. To show himself entitled to the relief, the leave to prosecute the action must be alleged. As it is not alleged, there are not sufficient facts stated in the petition to entitle plaintiff to recover. The leave to prosecute may not relate to the cause of action; it does relate to the right of plaintiff to prosecute the suit, and without it he is not entitled to the relief he claims, namely, a judgment upon the record. Code, § 2648 (now § 3561) provides that the defendant may demur to the petition when the facts stated therein 'do not entitle the plaintiff to the relief demanded.' Under this section the petition in this case was properly assailed by demurrer for the defect pointed out.'

In Davenport *v.* Whisler, 46 Iowa 287, a surety on a bond sued with his principal demurred on the following grounds: "1. That the said petition does not state facts sufficient to constitute a cause of action, in this, that it does not appear by the said petition that this defendant, *Shields*, has committed any breach of the conditions of the said obligation. 2. The facts stated in the said petition avoid the plaintiff's cause of action, in this, that it appears upon the face of the said petition that the condition of the said obligation has not been broken, but has been fully performed, and that this defendant has by the acts of said *Davenport* and *Whisler* been discharged from his said obligation as surety for the said *Whisler*." The demurrer being overruled the defendant elected to stand upon it and appealed. The supreme court said: "It is urged by appellee that the demurrer is too general and should be disregarded. We believe this position to be correct as to the first division or ground of demurrer. But the second ground or cause, and that which we think raises the real question in the case, is sufficiently specific. * * * It is claimed that the acts of Davenport and Whisler which discharged Shields from his obligation should be set out in the demurrer. * * * We do not think it was necessary that the demurrer should have repeated these acts. It contained an unmistakable reference to them, and this was sufficient." The specification of the demurrer thus sustained would, under Iowa Anno. Stat. (1897), § 3561, be preceded by the statement of the following ground of demurrer: "That the facts stated in the petition do not entitle the plaintiff to the relief demanded."

Insufficient Specification. — "That matters stated in the petition are not sufficient to constitute a cause of action," or "to entitle the plaintiff to recover," have been held not to be sufficiently specific. Crouch *v.* Crouch, 9 Iowa 269; Singer *v.* Cavers, 26 Iowa 178;

XV. That the complaint (or *petition*) is ambiguous, unintelligible, and uncertain[1] in this, to wit, that (*pointing out particularly wherein the ambiguity, unintelligibility and uncertainty consist*).[2]

XVI. That the action has not been commenced within the time limited by law[3] (*specifying the statute of limitation applying to the*

McLaughlin *v.* Bascomb, 36 Iowa 593; Davidson *v.* Biggs, 61 Iowa 309; McGregor, etc., R. Co *v.* Birdsall, 30 Iowa 255; Childs *v.* Limback, 30 Iowa 398.

A demurrer as follows: "The defendants demur to the petition herein filed upon the following ground: The facts stated therein do not entitle the plaintiff to the relief demanded," was held to be not sufficiently specific. District Tp. *v.* Independent Dist., 72 Iowa 688.

General demurrer is abolished in *Iowa.* Davenport Gas Light, etc., Co. *v.* Davenport, 15 Iowa 6.

Demurrer that allegations are contradictory must point out wherein the allegations are contradictory. First M. E. Church *v.* Donnell, 95 Iowa 494.

Note executed on Sunday can afford no ground for relief, and if the petition alleges that it was executed on a given day, which fell upon Sunday, the defendant may demur that the facts stated in the petition do not entitle the plaintiff to the relief demanded. Clough *v.* Goggins, 40 Iowa 325.

Petition in replevin may be properly demurred to as follows: "That the facts stated in such petition do not entitle the plaintiff to the relief demanded, in that the petition does not aver that said property is exempt from execution." See Armel *v.* Lendrum, 47 Iowa 536.

Pleading a legal conclusion may be specified as a good ground of demurrer against a petition for insufficiency. Burt *v.* Decker, 64 Iowa 106.

1. Ambiguity, unintelligibility and uncertainty may be a ground of demurrer in the following states:

California. — Code Civ. Proc. (1897), § 430, subd. 7.

Colorado. — Mills' Anno. Code (1896), § 50, subd. 7.

Idaho. — Rev. Stat. (1887), § 4174, subd

Montana. — Code Civ. Proc. (1895), § 680, subd. 7.

Nevada. — Gen. Stat. (1885), § 3062, subd. 7.

Utah. — Rev. Stat. (1898), § 2962, subd. 7.

See also the following cases: Blanc *v.* Klumpke, 29 Cal. 157; Yolo County *v.* Sacramento, 36 Cal. 195; Lorenzana *v.* Camarillo, 45 Cal. 125; Chase *v.* Evoy, 58 Cal. 348; Slattery *v.* Hall, 43 Cal. 191; Babcock *v.* Goodrich, 47 Cal. 488; Buell *v.* Cory, 50 Cal. 640; Fay *v.* McKeever, 59 Cal. 307; Manning *v.* Haas, 5 Colo. 38; Wilson *v.* Denver, etc., R. Co., 7 Colo. 101; Price *v.* Kramer, 4 Colo. 546; Marix *v.* Stevens, 16 Colo 261, Hunt *v.* Hayt, 10 Colo. 278; Park County *v.* Locke, 2 Colo. App. 508; McMahon *v.* Thornton, 4 Mont. 46; Ducie *v.* Ford, 8 Mont. 233.

For precedents of demurrer for this cause see *infra*, Form No. 7115.

2. Specification. — Demurrer for this cause must point out wherein the complaint is ambiguous or uncertain. Yolo County *v.* Sacramento, 36 Cal. 193; Lorenzana *v.* Camarillo, 45 Cal. 125; Cal. Code Civ. Proc (1897), § 431.

Objection for this cause cannot be taken under a demurrer that the complaint does not state facts sufficient to constitute a cause of action. Slattery *v.* Hall, 43 Cal. 191; Santa Barbara *v.* Eldred, 108 Cal. 294; Bremner *v.* Leavitt, 109 Cal.. 130; Palmer *v.* Utah, etc., R. Co., 2 Idaho 290.

3. *Oregon.* — Hill's Anno. Laws (1892), § 67, subd. 7.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4907, subd. 7.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2649, subd. 7.

In states of the code class, enumerated in note 1, p. 365, other than *Iowa*, *Oregon*, *Washington* and *Wisconsin*, the objection that the complaint, or petition, shows that the action is barred by the statute of limitations can be taken advantage of under the ground of demurrer set out in paragraph XIII in Form No. 7095. See also Boyd *v.* Blankman, 29 Cal. 46; Brennan *v.* Ford, 46 Cal. 8.

Kansas. — Walker *v.* Fleming, 37 Kan. 171.

Minnesota. — Eastman *v.* St. Anthony Falls Water-Power Co., 12 Minn. 137; Davenport *v.* Short, 17 Minn. 24; Kennedy *v.* Williams; 11 Minn. 314; McArdle *v.* McArdle, 12 Minn. 98.

particular case).[1]

XVII. That the petition, on the face thereof, shows that the cause of action is barred by the statute of limitations in this, to wit, (*pointing out particularly wherein the petition shows the action not to have been commenced within the time limited by law*).[2]

XVIII. That the said petition, on the face thereof, fails to show the contract sued upon to be in writing, when it should be so evidenced under the statute of frauds,[3] for the reason that [the facts pleaded show that the defendant assumed thereby to answer for the debt of the plaintiff.][4]

Missouri.— St. Louis Gas Light Co. *v.* St. Louis, 84 Mo. 202; State *v.* Spencer, 79 Mo. 314; Cowdrey *v.* Gilliam, 60 Mo. 86.

Montana. — Howes *v.* Lynde, 7 Mont. 545; Alesina *v.* Stock, 8 Mont. 416

Nebraska. — Peters *v.* Dunnells, 5 Neb. 464; Hurley *v.* Cox, 9 Neb. 232; Mills *v.* Rice, 3 Neb. 78.

Face of complaint or petition must show that action is barred, in order that demurrer may lie. Walker *v.* Fleming, 37 Kan. 171; McArdle *v.* McArdle, 12 Minn. 98; St. Louis Gas Light Co. *v.* St. Louis, 84 Mo. 202; Weiss *v.* Bethel, 8 Oregon 527.

1. Specification. — The grounds of demurrer may be specified in the words of the code. Ballinger's Anno. Codes & Stat. Wash. (1897), § 4908.

In *Colorado*, to take advantage of statute of limitations by demurrer, the objections must be specified. Polk *v.* Butterfield, 9 Colo. 325; Buckingham *v.* Orr, 6 Colo. 587; Brooks *v.* Bates, 7 Colo. 576; Meyer *v.* Binkleman, 5 Colo. 262.

Statute of limitations cannot be taken advantage of under a general demurrer for insufficiency. Hexter *v.* Clifford, 5 Colo. 168.

2. *Iowa.* — Code (1897), § 3561, subd. 6. Consult pars. XIII, XVI, *supra*, and notes thereto.

Statute of limitations in *Iowa*, as ground of demurrer, see Miller *v.* Dawson, 26 Iowa 186; Springer *v.* Clay County, 35 Iowa 241; Shearer *v.* Mills, 35 Iowa 499; Brown *v.* Rockhold, 49 Iowa 282; Moore *v.* State Ins. Co., 72 Iowa 414; Van Patten *v.* Bedow, 75 Iowa 589; Moulton *v.* Walsh, 30 Iowa 361.

In Moore *v.* State Ins. Co., 72 Iowa 415, to a petition in an action upon an insurance policy defendant demurred on the ground that the petition "fails to show a cause of action for the reason that the suit was not commenced within the time prescribed by the conditions of the policy." The demurrer was sustained.

When this ground of demurrer will not lie is pointed out in Newfield *v.* Blawn, 16 Iowa 297.

Unless there is an express statutory provision authorizing demurrer on this ground, it must at law be taken by answer or plea that the plaintiff may plead any possible exception to the statute. At equity the rule is otherwise. Phares *v.* Walters, 6 Iowa 106.

It must affirmatively appear upon face of petition, however, that the action is barred by the statute of limitations in order that demurrer may lie. Shearer *v.* Mills, 35 Iowa 499; Brown *v.* Rockhold, 49 Iowa 282; Moulton *v.* Walsh, 30 Iowa 361.

3. *Iowa.*—Code (1897), § 3561, subd. 6.

Statute of frauds as a ground of demurrer. See Cox *v.* Carrell, 6 Iowa 350; Newfield *v.* Blawn, 16 Iowa 297; Wiseman *v.* Thompson, 94 Iowa 607; Hocker *v.* Gentry, 3 Metc. (Ky.) 474; Linn Boyd Tobacco Warehouse Co. *v.* Terrill, 13 Bush (Ky.) 466.

The agreement or contract sued on must be one that the law requires to be in writing in order to be valid before a demurrer on this ground can be sustained. Cox *v.* Carrell, 6 Iowa 350.

When this ground of demurrer will not lie is pointed out in Babcock *v.* Meek, 45 Iowa 137.

4. Founded on facts in Wiseman *v.* Thompson, 94 Iowa 607.

Or, instead of matter in [ ], allege other reason, as the case may be, why the contract should be evidenced in writing.

Waiver. — The objection that the contract sued upon is not evidenced in writing, when it should be so evidenced under the statute of frauds. should be raised by demurrer, if the objection appears on the face of the petition, and cannot in such case be raised by answer. Wiseman *v.* Thompson, 94 Iowa 607.

XIX. That the petition, on the face thereof, shows that the cause of action is founded on an *account* as evidence of an indebtedness, and neither such *account* nor a copy thereof is incorporated into or attached to said petition, or a sufficient reason stated for not doing so.[1]

[Wherefore defendant prays judgment that the action may be dismissed, and that the defendant go hence without day and recover his costs.][2]

Jeremiah Mason, Attorney for the Defendant.[3]
[(*Office and post-office address.*)][4]

1. *Iowa.*—Code (1897). § 3561, subd. 6.

Failure to set out copy of written instrument sued on as a ground of demurrer in *Iowa*, see Thompson *v.* Cook, 21 Iowa 472; Farwell *v.* Tyler, 5 Iowa 535; Peterson *v.* Allen, 12 Iowa 366; Smith *v.* McLean, 24 Iowa 322; McKinley *v.* Chicago, etc., R. Co., 47 Iowa 76; Coe *v.* Lindley, 32 Iowa 437; O'Brien *v.* Chicago, etc., R. Co., 64 Iowa 411; Winters *v.* Page County, 70 Iowa 300; Christenson *v.* Gorsch, 5 Iowa 375; Barthol *v.* Blakin, 34 Iowa 452; Barney *v.* Buena Vista County, 33 Iowa 261; Harwood, etc., R. Co. *v.* Case, 37 Iowa 692.

New York. — An objection to the pleading of a written instrument stating its effect and not setting forth its contents should be taken advantage of by demurrer. Kellogg *v.* Baker, 15 Abb. Pr. (N. Y. Super. Ct.) 286.

In *Arkansas*, the failure to file the note or other writing required to be filed by Sand. & H. Dig. Ark. (1894), § 5752, is no ground for demurrer. Nordman *v.* Craighead, 27 Ark. 369.

Bill of Particulars. — Objection that a bill of particulars in an action on an account is not set out or attached must be raised by demurrer; it cannot be interposed as ground for the exclusion of evidence. Farwell *v.* Tyler, 5 Iowa 535; Peterson *v.* Allen, 12 Iowa 366; Smith *v.* McLean, 24 Iowa 322.

2. **Prayer for Relief.** — It is not necessary, nor is it usual, to include in the demurrer a prayer for relief, but this is sometimes done. Instead of the prayer set out in the text, the following, or equivalent words, may be used: "Wherefore the said defendant, for the causes aforesaid, asks if the said plaintiff shall have or maintain his aforesaid action thereof against this defendant." See also precedents set out in Forms Nos. 7095 to 7015, *infra*.

3. **Signature.**—The demurrer must be subscribed by the party or his attorney.

Arkansas. — Sand. & H. Dig. (1894), § 5744.

California. — Code Civ. Proc. (1897), § 446.

Colorado. — Mills' Anno. Code (1896), § 61.

Idaho. — Rev. Stat. (1887), § 4199.

Indiana. — Horner's Stat. (1896), § 358.

Iowa. — Code (1897), § 3580.

Kansas. — Gen. Stat. (1897), c. 95. § 107.

Kentucky. —Bullitt's Civ. Code (1895) § 115.

Minnesota. — Stat. (1894), § 5244.

Montana. — Code Civ. Proc. (1895) §§ 730, 731.

Nebraska. — Comp. Stat. (1897), §§ 5705, 5706.

Nevada. — Gen. Stat. (1885), § 3073.

New Mexico.—Code Civ. Proc. (1897), § 2685, subs. 47.

New York. — Code Civ. Proc., § 520 (Birds. Rev. Stat. (1896), p. 2279, § 43).

North Carolina. — Clark's Code Civ. Proc., § 257.

North Dakota. — Rev. Codes (1895), § 5280.

Ohio. — Bates' Anno. Stat. (1897). § 5102.

Oklahoma. — Stat. (1893), § 3985.

Oregon. — Hill's Anno. Laws (1892), § 80.

South Carolina. — Code Civ. Proc. (1893), § 177.

South Dakota. — Dak. Comp. Laws (1887), § 4921.

Utah. — Rev. Stat. (1898), § 2983.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4925.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2664.

Wyoming. — Rev. Stat. (1887). § 2489.

4. **Office and Post-office Address** — *New York.* — See Code Civ. Proc., §§ 421, 520; Gen. Rules of Practice, No. 2. A pleading by which defendant appears, within the meaning of N. Y. Code Civ. Proc., § 421, requiring the giving of

ALABAMA.[1]

Form No. 7086.

The State of *Alabama*, *Dale* County. } In the *Circuit* Court, *October* Term, 1897.

John Doe, plaintiff, against *Richard Roe*, defendant.

the office address of defendant's attorney after the signature, does not include an answer which is given after and upon service of notice of appearance. Feist *v.* New York, 15 N. Y. App. Div. 495.

Verification. — The demurrer need not be verified.

Iowa. — Code (1897), § 3580.

Nebraska.—Comp. Stat. (1897), § 5706.

Nevada. — Gen. Stat. (1885), § 3073.

New Mexico. — Code Civ. Proc. (1897), § 2685, subs. 47, 48.

New York. — Code Civ. Proc., § 523 (Birds. Rev. Stat. (1896), p. 2280, § 46).

North Dakota. — Rev. Codes (1895), § 5280.

Ohio. — Bates' Anno. Stat. (1897), § 5102.

Oklahoma. — Stat. (1893), § 3986.

Oregon. — Hill's Anno. Laws (1892), § 80.

South Carolina. — Code Civ. Proc. (1893), § 177.

South Dakota. — Dak. Comp. Laws (1887), § 4921.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4925.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2665.

Wyoming. — Rev. Stat. (1887), § 2489.

Certificate of Counsel. — In *South Carolina*, a demurrer must, in every case, be accompanied by a certificate of the counsel filing it that it is meritorious and not intended for delay. Cir. Ct. Rules, No. 18. For forms of certificates of a similar nature see *supra*, Forms Nos. 7027 to 7055:

Filing. — For the various provisions relating to the filing of demurrers see lists of statutes cited *supra*, note 1, p. 365.

Objection, When Properly Taken by Answer. — When any of the matters enumerated as grounds of demurrer do not appear upon the face of the complaint, or petition, the objection will be taken advantage of by answer. See list of statutes cited *supra*, p. 365.

Amendment. — For provisions as to amendments of pleadings after demurrer is sustained or overruled see list of statutes cited *supra*, note 1, p. 365.

Waiver. — The defendant waives all objections not presented by demurrer or answer, except that the court has no jurisdiction of the subject of the action and that the petition does not state facts sufficient to constitute a cause of action. See list of statutes cited *supra*, note 1, p. 365. See also on this point:

California. — Richards *v.* Travelers Ins. Co., 80 Cal. 506.

Colorado. — Great Western Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46.

Dakota. — Fraley *v.* Bentley, 1 Dakota 25.

Idaho.— Ballentine *v.* Wiley, 2 Idaho 1209.

Indiana.— Bray *v.* Black. 57 Ind. 417.

Iowa.— Allen *v.* Cerro Gordo County, 34 Iowa 54; Traders Bank *v.* Alsop, 64 Iowa 97.

Kansas. — Hurd *v.* Simpson, 47 Kan. 246.

Kentucky. — Metcalfe *v.* Brand, 86 Ky. 331.

Minnesota. — Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372.

Montana. — Conklin *v.* Fox, 3 Mont. 208.

Nebraska. — Beeler *v.* Larned First Nat. Bank, 34 Neb. 348.

New York.—Burnham *v.* De Bevorse, 8 How. Pr. (N. Y. Supreme Ct.) 159.

North Carolina. — Hawkins *v.* Hughes, 87 N. Car. 115.

Ohio. — Spence *v.* Union Cent. L. Ins. Co., 40 Ohio St. 517.

Oregon. — Spaur *v.* McBee, 19 Oregon 76.

South Carolina. — Ross *v.* Linder, 12 S. Car. 594; State *v.* Corbin, 16 S. Car. 545.

Wisconsin. — Nevil *v.* Clifford, 55 Wis. 161.

1. *Alabama.* — Civ. Code (1886), § 2690.

The defendant demurs to the complaint[1] of the plaintiff herein as bad in substance,[2] and for cause of demurrer states:

1. That it appears from the said complaint that (*pointing out particularly the specific grounds of demurrer*, listing them *in numberea paragraphs, if more than one ground*).[3]

Jeremiah Mason, Attorney for the Defendant

1. Demurrer to entire complaint containing several counts should be overruled entirely if any one of the counts is good. Ward *v.* Neal, 35 Ala. 602; Montgomery County *v.* Barber, 45 Ala. 237; Kansas City, etc., R. Co. *v.* Lackey, 114 Ala. 152; Buchanan *v.* Larkin, (Ala. 1897) 22 So. Rep. 543; Louisville, etc., R. Co. *v.* Morgan, (Ala. 1897) 22 So. Rep. 20.

2. Defect of form is not a ground of demurrer. Only matter of substance can be so reached. Ala. Civ. Code (1886), § 2690.

Who May Demur. — Only party improperly joined can demur for improper joinder of defendants. Tubb *v.* Fort. 58 Ala. 277.

3. Specification of Ground of Demurrer — *Generally.* — Is necessary. Ala. Civ. Code (1886), § 2690; Masterson *v.* Gibson, 56 Ala. 56; Helvenstein *v.* Higgason, 35 Ala. 259; Cook *v.* Rome Brick Co., 98 Ala. 409.

A demurrer which specifies the portion of the complaint to which it is interposed, but does not state or point out any ground of objection to it, is not a compliance with the statute and will be overruled. Burns *v.* Mobile, 34 Ala. 485.

Pleadings defective in other respects, but not obnoxious to any of the specified grounds of demurrer, will be sustained. Daniels *v.* Hamilton. 52 Ala. 105; Eads *v.* Murphy, 52 Ala. 520; Cotten *v.* Rutledge, 33 Ala. 110.

Instances of Sufficient Specification. — In David *v* David, 66 Ala. 141, the demurrer assigned the following grounds: "1. That there is no description or marks of identification of any property claimed in the first count of the complaint. 2. That the description of said personal property in said count is vague, uncertain, general and indefinite in this: That it is not averred that the state of *Tennessee* had any authority to make and issue, or ever made, issued or executed, any bonds at all, or of any kind, character or amount, or of the character, kind and amount in said first count specified; or that any bonds at all, or of the character, kind and amount in said first count specified, were ever made or issued under or in pursuance of any act or law of the State of *Tennessee*; or that the same were ever made or issued under any or either special, particular, or general law; or that the same has or was done in and by the State of *Tennessee*. 3. That the said *Tennessee* bonds, in said first count mentioned are not described by any marks or means of identification showing or specifying the class, series, dates, numbers, or any earmarks or means by which the said bonds are or could be identified and distinguished, either as to itself, or themselves, or from others of like make, issue and value, or the true value ascertained, or a verdict arrived at or returned, or a judgment rendered upon."

In Shields *v.* Sheffield, 79 Ala. 92, the demurrer to a special count in the complaint assigned substantially the following grounds of demurrer· "1st. Because said count fails to give the name or names of any of the parties from whom said collections were made, or with whom said notices were left or sent; 2d. Because it is vague and indefinite, in that it does not show in what year or years the sums claimed by said plaintiff accrued to him, or in what year or years said services were rendered for which this suit is brought; 3d. Because it fails to show that it was made the duty of this defendant to collect any fees for plaintiff, or that there was any agreement by this defendant to perform any services for said plaintiff in the collection of his fees, or otherwise."

Instances of Insufficient Specification. — That complaint "shows no substantial cause of action" and that it "is wholly insufficient in law." Williams *v.* Bowdin, 68 Ala. 126.

That complaint "does not show any ground or cause of action against the defendants." Grimmet *v.* Henderson, 66 Ala. 521.

"That complaint does not contain or set forth any facts which show that the plaintiff has a right to recover the damages claimed by him in this suit." Brewer *v.* Watson, 65 Ala. 88.

ARIZONA.[1]

Form No. 7087.

In the *District* Court, *First* Judicial District, *Territory* of *Arizona*, in and for *Pima* county.

John Doe, plaintiff,
against
Richard Roe, defendant. } Answer.[2]

The defendant answers to the complaint herein, and states:

1. (*Averment of matters denying jurisdiction of the court, if any.*)
2. (*Averment of matters in the abatement of the suit, if any.*)[3]
3. That the complaint does not state facts sufficient to constitute a cause of action, [in this, to wit (*Here state matters denying a sufficiency of the complaint, or any cause of action therein*).][2]
4. (*Averment of matters in bar of the action, if any.*)[4]
5. (*Averment of matters of counterclaim and set-off, if any.*)[5]

Jeremiah Mason, Attorney for the Defendant.[6]

(*Verification.*)[7]

"That complaint does not show such a state of facts as will entitle the plaintiff to recover." Mobile, etc., R. Co. *v.* Crenshaw, 65 Ala. 566.

"That said complaint does not contain a substantial cause of action." Troy *v.* Coleman, 58 Ala. 570.

"Because under two counts in case plaintiffs are not entitled to recover." Courts *v.* Happle, 49 Ala. 254.

"Because the counts are ambiguous and uncertain." Courts *v.* Happle, 49 Ala. 254.

"For the reason that the same (complaint) does not on its face show any sufficient cause of action against the defendants." Robbins *v.* Mendenhall, 35 Ala. 722.

Rule applied to a petition for rehearing, addressed to the circuit judge. State *v.* Gardner, 45 Ala. 46.

"That the alleged accident, fraud, or mistake, is not shown to have occurred without the fault of the petitioner" was held to be a good specification of demurrer to a petition for rehearing. Brock *v.* South, etc. Co., 65 Ala. 79.

Rule applied to proceedings against defaulting witness in a criminal cause. Pomeroy *v.* State, 40 Ala. 63. A demurrer for nonjoinder of parties defendant which does not specify those who should have been joined is rightly overruled. Chambers *v.* Wright, 52 Ala. 444; Thornton *v.* Neal, 49 Ala. 590.

Misjoinder of counts is not available upon demurrer unless specially assigned as a ground. Owsley *v.* Montgomery, etc., R. Co., 37 Ala. 560.

Duplicity in a complaint is not a ground for demurrer, because special demurrers have been abolished, and such objection should be alleged at common law only by special demurrer. Houston *v.* Hilton, 67 Ala. 374; Hall *v.* Brazelton, 46 Ala. 359.

Waiver. — Objection not specified is deemed waived. It will not be considered. Ala. Civ. Code (1886), § 2690.

1. *Arizona.* — Rev. Stat. (1887), §§ 653, 671, 734, etc. See also Dawson *v.* Lail, 1 Ariz. 490; Davis *v.* Breon, 1 Ariz. 240; Lopez *v.* Central Arizona Mining Co., 1 Ariz. 464.

2. **Demurrer Contained in Answer.** — Matters denying the sufficiency of the complaint, or any cause of action therein, by demurrer, general or special, is authorized in an answer under Ariz. Rev. Stat. (1887), § 734. The demurrer as a separate pleading is not in use.

3. Consult the title ABATEMENT, PLEAS IN, vol. 1, p. 21.

4. Consult the various particular titles in this work setting up matters in bar, either by way of answer or plea, such as ACCORD AND SATISFACTION, etc.

5. Consult the title SET-OFF AND COUNTERCLAIM.

6. **Shall be in writing and signed** by the party or his attorney. Ariz. Rev. Stat. (1887), § 654.

7. **For verification** of answer see Ariz. Rev. Stat. (1887), § 735; Laws (1897), p. 61. Consult the title VERIFICATIONS.

CONNECTICUT.[1]

Form No. 7088.

(Conn. Prac. Act, p. 199, No. 352.)

John Doe against *Richard Roe.* } Court *of Common Pleas*, *Fairfield* County, *September* Term, 1*898*.[2]

Demurrer.

The defendant demurs to * the *second* prayer for relief[3] because on the facts stated the plaintiff is not entitled to the relief therein sought.[4]

By *Jeremiah Mason*, his Attorney.

1. *Connecticut.* — Gen. Stat. (1888), § 872 *et seq.*

Demurrers may be to the whole or to a part only of the pleading of the adverse party, but when they apply only to a part thereof it must be so stated, and such part clearly indicated. Rules under Conn. Prac. Act, No. IV, § 10.

Demurrer and denial to the same allegation at the same time is improper. Powers *v.* Mulvey, 51 Conn. 433.

2. **Title of court and cause** here given are substantially as set forth in the Conn. Prac. Act, p. 195, note.

3. **Demurrer to Prayer for Relief.** — Where any relief demanded by the plaintiff cannot properly be demanded upon the allegations of the complaint, although this may be sufficient to call for some other relief, the defendant may demur to the relief so improperly demanded. Rules under Conn. Prac. Act. No. IV, § 11. See Van Epps *v.* Redfield, 68 Conn. 39.

In an action against sureties to recover damages for a breach of the condition of an official bond, the defendant demurred to the claim for damages "because that the facts stated the plaintiff is not entitled to the relief sought." It was held that this was in no legal sense a demurrer to relief, and was in direct contravention of Conn. Gen. Stat. (1888), § 873, in not specifying the reasons why the complaint was insufficient. Norwalk *v.* Ireland, 68 Conn. 1.

4. **Specification.** — All demurrers shall distinctly specify the reasons why the pleading demurred to is insufficient. Conn. Gen. Stat. (1888), § 873; Cook *v.* Morris, 66 Conn. 196; Nash *v.* Smith, 6 Conn. 421.

Special demurrer still exists in *Connecticut.* Andrews *v.* Thayer, 40 Conn. 156, *construing* Conn. Gen. Stat., tit. 1, § 90.

A general demurrer that the complaint is insufficient in law violates the provisions of the Conn. Prac. Act, § 2. Hamden *v.* Merwin, 54 Conn. 418.

Causes of Demurrer. — All defenses other than those to the jurisdiction or in abatement shall be made by an answer or by a demurrer. Conn. Gen. Stat. (1888), § 872.

For duplicity or misjoinder of causes of action in one count the demurrer, in *Connecticut* (Conn. Prac. Act, p. 198, No. 349), may be as follows: (*Commencing as in Form No. 7088, supra, and continuing down to* *) "the complaint, because it sets forth in one count two separate and distinct causes of action; namely, one on a note and one on a bond." (*Signature of attorney.*)

Duplicity as a ground of demurrer requires the demurrer to state wherein the duplicity consists. Havens *v.* Hartford, etc., R. Co., 28 Conn. 86.

Duplicity can be reached only by special demurrer. Havens *v.* Hartford, etc., R. Co., 28 Conn. 86; Havens *v.* Hartford, etc., R. Co., 26 Conn. 224.

In Havens *v.* Hartford, etc., R. Co., 28 Conn. 74, after a general demurrer to a declaration in an action on the case, for damages, caused by negligence, defendants committed the following special demurrer: "And the defendants show to the court, among other causes of demurrer apparent upon said declaration, the following, viz: that the plaintiff improperly alleges, in his said declaration and in the several counts thereof, several and distinct causes of action, and causes of action of different acts, requiring different forms of action, viz: of trespass with force and arms, and trespass on the case, and which cannot be properly joined in the same count, or declaration."

GEORGIA.[1]

Form No. 7089

Georgia — *Bibb* County.

John Doe
against } In the *Superior* Court.
Richard Roe.

And now comes the defendant, by *Jeremiah Mason*, his attorney, and denies the right of petitioner to the discovery (or *relief*) (*in whole or in part, specifying part demurred to if only part is demurred to*)[2] prayed for, [admitting all properly pleaded allegations in the petition to be true,] and for ground of demurrer states that it appears upon the face of said petition that:

I. (*Pointing out particularly the specific grounds of demurrer relied on, listing them in numbered paragraphs, if more than one ground.*)[3]

Jeremiah Mason, Attorney for Defendant.

For misjoinder of causes of action, the demurrer, in *Connecticut* (Conn. Prac. Act, p. 198, No. 348), as set out, may be as follows: (*Commencing as in Form No. 7088, supra, and continuing down to* *) "the complaint for misjoinder of causes of action, because the first count is for breach of contract and the second count is for slander." (*Signature of attorney.*)

For want of an averment of a request, the demurrer, in *Connecticut* (Conn. Prac. Act, p. 198, No. 350), may be as follows: (*Commencing as in Form No. 7088, and continuing down to* *) "the complaint, because it does not aver any request made by the plaintiff of the defendant, as was required by the contract therein alleged." (*Signature of attorney.*)

For want of parties, the demurrer, in *Connecticut* (Conn. Prac. Act, p. 199, No. 351), may be as follows: (*Commencing as in Form No. 7088, and continuing down to* *) "the complaint, because the contract sued on is alleged to have been made by himself and *John Doe* jointly; wherefore said *John Doe* should have been made a defendant." (*Signature of attorney.*)

Demurrer to Reason of Appeal. — In Staub's Appeal, 66 Conn. 133, will be found a demurrer to appellant's reason of appeal.

1. *Georgia.* — 1 Code (1895), § 5047 *et seq.*

No want of form or omission of a formality shall vitiate or delay any proceedings if chapter 2, title 4 of the *Georgia* code of practice is substantially complied with. 2 Ga. Code (1895), § 4971.

Office of demurrer to a bill in equity is to deny the jurisdiction of the court, the equitable right of the complainant, the liability of the respondent, or [aver] that there is a nonjoinder or misjoinder of parties or causes of action, and must arise upon the allegations on the face of the bill. Barnett *v.* People's Bank, 65 Ga. 53.

2. **Demurrer and Plea or Answer.** — Defendant may demur, plead or answer, or may file one or more or all of these defenses at once without waiving the benefit of either. 2 Ga. Code (1895), § 5047.

Admits Only Facts Well Pleaded. — Griffin *v.* Augusta, etc., R. Co., 72 Ga. 423.

3. **Grounds of Demurrer to Petition.** — A demurrer denies the right to the discovery or relief, in whole or in part, admitting all properly pleaded allegations in the petition to be true, and is founded either upon the want of jurisdiction in the court, or of right in the petitioner, or upon the nonjoinder or misjoinder of parties or causes of action, or the absence of liability by the defendant to the petitioner. Special defects or omissions in the petition may always be taken advantage of by demurrer, and unless cured by amendment the petition shall be dismissed. 2 Ga. Code (1895), § 5048.

General demurrer is of no effect where petition is good in substance, though vague in its allegations. Bryan *v.* Macon, 91 Ga. 530; Western Union Tel. Co. *v.* Jenkins, 92 Ga. 398. Or where there is equity in the bill. Hughes *v.* Hughes, 72 Ga. 173.

Demurrer to whole bill should be over-

IOWA — IN EQUITY.[1]

Form No. 7090

In the *District* Court in and for *Calhoun* County, *Iowa.*

John Doe, plaintiff, against *Richard Roe*, defendant. } *October* Term, 1*898*. Demurrer to Petition in Equity.

The defendant, *Richard Roe*, by *Jeremiah Mason*, his attorney, comes and demurs to the petition herein on the ground that it appears upon the face of said petition that the facts therein stated do not entitle the plaintiff to the relief demanded.[2]

Jeremiah Mason, Attorney for Defendant.[3]

ruled if any part of the bill is good. Lowe *v.* Burke, 79 Ga. 164.

Multifariousness as a ground of demurrer. See Mackall *v.* West, 67 Ga. 278; Blaisdell *v.* Bohr, 68 Ga. 56; Morgan *v.* Shepherd, 69 Ga. 308; City Bank *v.* Bartlett, 71 Ga. 797; Jordan *v.* Gaulden, 73 Ga. 191; Atlanta Real Estate Co. *v.* Atlanta Nat. Bank, 75 Ga. 40; Stephens *v.* Whitehead, 75 Ga. 295; Farmer *v.* Rogers, 88 Ga. 162; Langmade *v.* Hamilton, 89 Ga. 442; Price *v.* Price, 90 Ga. 245; Brown *v.* Latham, 92 Ga. 280; Williams *v.* Williams, 94 Ga. 628; Bowden *v.* Achor, 95 Ga. 243. But multifariousness is not named in the code as a ground of demurrer. City Bank *v.* Bartlett, 71 Ga. 806.

To a petition charging fraud, etc., in Bowden *v.* Achor, 95 Ga. 243, the defendants demurred on the grounds: 1. The petition is multifarious, in that it contains separate causes of action, to wit, to recover lot 24 from Bowden and Morris, to recover damages of Connally, Walker and Spence, all or either of them for lots 8 and 9, and because Connally, it is alleged, dismissed the suits against Terner and Wright for said lots and negligently failed to recover the land. 2 and 3. Misjoinder of causes of action and misjoinder of parties. 4. Because plaintiff seeks to recover for several distinct matters against several defendants, who have several distinct interests, and in some cases one or more of defendants have no common interest. The demurrer was overruled.

Want of parties is ground for special demurrer and cannot be reached by general demurrer. Hughes *v.* Hughes, 72. Ga. 173.

Defect of parties is an objection that must be made by special demurrer; a general demurrer for want of equity will not reach such objection. Hughes *v.* Hughes, 72 Ga. 173.

A demurrer to a petition, seeking equitable relief, that the bill "has not the proper parties to it," must state the name of any person who should be made a party to the bill, or be overruled. Parker *v.* Cochran, 97 Ga. 249.

That administrator and not heirs should sue for an accounting of indebtedness due the deceased is not a good ground of demurrer when the bill shows that all of the heirs are parties plaintiff and that there were no creditors of the deceased at the time of his death. Drummond *v.* Hardaway, 21 Ga. 433, setting out the demurrer at large.

1. To an equitable petition a demurrer, for the reason that the facts stated in the petition do not entitle the plaintiff to the relief demanded, may be stated in the terms of the statute. Iowa Code (1897), § 3562. Consult also *Iowa* cases cited in the notes to Form No. 7085, *supra.*

2. A general demurrer may be interposed to a petition in equity, but if the demurrant undertakes to specify the grounds of the demurrer he will be confined to those so specified. Allen *v.* Cerro Gordo County, 34 Iowa 54; Bisson *v.* Curry, 35 Iowa 72.

Only matter of substance is reached by a general demurrer to a petition in equity. Hoskins *v.* Hattenback, 14 Iowa 314.

Specification when made should be as precise as in a law action or the grounds will be disregarded. Hanna *v.* Hawes, 45 Iowa 437. And demurrant will be confined to grounds stated, and cannot raise others which might have been taken advantage of on general demurrer. Allen *v.* Cerro Gordo County, 34 Iowa 54, Bisson *v.* Curry, 35 Iowa 72.

Demurrer in an equitable action may be both special and general. Cowen *v.* Boone, 48 Iowa 350.

3. Signature. — Every pleading must

LOUISIANA — EXCEPTIONS.[1]

Form No. 7091.

John Doe against *Richard Roe.* } No. *212.* *Nineteenth* Judicial *District* Court, Parish of *Iberia.*

In the court now comes *Richard Roe*, the defendant in the above entitled action, who excepts to plaintiff's action herein, and for cause of exception alleges: (*Here specify particularly the ground of exception.*)[2]

Wherefore he prays that this exception may be maintained, and plaintiff's action dismissed, at plaintiff's cost, and for general relief.

Richard Roe.

be subscribed by the party or his attorney. Miller's Iowa Code (1890), § 2669.

1. *Louisiana.* — Garland's Rev. Code (1894), § 330 *et seq.*

Exceptions are means of defense used by defendant to retard, prevent or defeat the demand brought against him. Exceptions are either dilatory or peremptory. Dilatory exceptions are either declinatory or such as are simply called dilatory exceptions. Garland's Rev. Code La. (1894), §§ 330, 331.

Dilatory exceptions are such as tend not to defeat the action, but to retard its progress. Garland's Rev. Stat. La. (1894), § 334.

Declinatory exceptions do not tend to defeat the demand, but only to decline the jurisdiction of the judge. Garland's Rev. Stat. La. (1894), § 332.

2. **Exception must specifically point out defect** relied on. Scott *v.* Jackson, 12 La. Ann. 640.

Failure to state full name and residence of the plaintiff as a ground of exception. See Taylor *v.* Littell, 21 La. Ann. 665.

Lis pendens as a ground of exception. See Mix *v.* Creditors, 39 La. Ann. 626; Succession of Townsend, 37 La. Ann. 409.

Exception of lis pendens as a declinatory exception must show pendency of another suit (Taylor *v.* Hill, 21 La. Ann. 639) before a court of concurrent jurisdiction (Succession of Townsend, 37 La. Ann. 409), between the same parties (State *v.* Kreider, 21 La. Ann. 482), for the same cause of action (Pacific Express Co. *v.* Haven, 41 La. Ann. 811), and that the courts are both in the state of Louisiana (Stone *v.* Vincent, 6 Martin N. S. (La.) 517). Peyroux *v.* Davis, 17 La. 479.

Minority of defendant as a ground of exception. Smith *v.* Braun, 37 La. Ann. 225.

Nonjoinder or misjoinder as a ground of exception. Brewer *v.* Cook, 11 La. Ann. 637.

Prematurity of action as a ground of exception. Meaux *v.* Pittman, 35 La. Ann. 360.

That defendant is not administrator as a ground of exception. See Cheevers *v.* Burke, 19 La. 430.

Vagueness and want of precision in petition as a ground of exception. See Doullut *v.* McManus, 37 La. Ann. 800.

Want of amicable demand as a ground of exception. Marrionneaux *v.* Downs, 19 La. Ann. 208.

Want of capacity of plaintiff to stand in judgment as a ground of exception. Montfort *v.* Schmidt, 36 La. Ann. 750; Carondelet Canal, etc., Co. *v.* Lugger 1st Chevere Tedesco, 37 La. Ann. 100; Dejona *v.* Steamboat Osceola, 17 La. Ann. 277.

Want of jurisdiction of a person as a ground of exception. See Carroll *v.* Bancker, 43 La. Ann. 1197; Gomila *v.* Milliken, 41 La. Ann. 117; Pironi *v.* Riley, 39 La. Ann. 302.

Want of qualification of executors or curators as a ground of exception. Maraist *v.* Caillier, 30 La. Ann. 1089; Silliman *v.* Mills, 23 La. Ann. 206; Wingate *v.* Wheat, 6 La. Ann. 239; Wells *v.* Wells, 23 La. Ann. 224; Robatham *v.* Tete, 8 La. Ann. 73.

Want of resolution of corporation authorizing suit as a ground of exception. See Polar Star Lodge, No. 1, *v.* Polar Star Lodge, No. 1, 16 La. Ann. 53.

TEXAS[1] — ANSWER[2] — GENERAL EXCEPTION.[3]

Form No. 7092.

The State of *Texas*, } *District* Court, *January* Term, A. D. 1*898*.
County of *Freestone*. }

John Doe
against
Richard Roe [and *Samuel Short*].[4]

And now comes the defendant [*Richard Roe*][4] and excepts to the

1. No Distinction Between Law and Equity Pleading. — There is no difference in the mode of proceedings or in the form of legal and equitable remedies, nor are there are any forms of actions adapted to different remedies. The pleadings are the same in both cases, and the application of legal or equitable principles to the decision of the case presented depends upon the facts and not upon the manner of stating those facts. Sayles' Tex. Pl. (1893), §§ 322, 324.

2. In Answer. — The pleadings in all civil suits in the district and county courts shall be by petition and answer. Tex. Rev. Stat. (1895), art. 1181.

3. Exceptions to pleadings are provided for by Tex. Supreme Ct. Rules, Nos. 6, 17.

An Exception may be General or Special. — A general exception is an objection for want of substance; a special exception is an objection for want of form. Pryor *v.* Moore, 8 Tex. 250.

A general exception raises only the question as to whether the pleading discloses the existence of a cause of action or ground of defense. George *v.* Vaughan, 55 Tex. 129; Carson *v.* Cock, 50 Tex. 325; Robinson *v.* Davenport, 40 Tex. 333.

A general exception shall point out the particular instrument in the pleadings, to wit: The original petition, or answer, or the respective supplements to either, and in passing upon such general exception every reasonable intendment arising upon the pleading excepted to shall be indulged in favor of its sufficiency. Tex. Supreme Ct. Rules, No. 17; see also Texas, etc., R. Co. *v.* Bayliss, 62 Tex. 570.

Office of the demurrer is not to state facts, but to raise an issue of law upon the sufficiency of the pleading demurred to. Hudson *v.* Wheeler, 34 Tex. 362.

Defects must appear upon face of pleading in order that demurrer may lie. Southern Cotton Press, etc., Co. *v.* Bradley, 52 Tex. 587; Hudson *v.* Wheeler, 34 Tex. 362.

4. Words in [ ] may be omitted when there is only one defendant.

Precedents.—In Irvin *v.* Ellis, 76 Tex. 166, the following pleading was held to be clearly nothing more than a general demurrer, though referred to as "a special demurrer": "And now in this cause comes *John P. Irvin*, plaintiff in the original suit No. 953, styled *John P. Irvin* v. *J. W. Ellis*, and moves this court to dismiss the pleading and intervenor in this case because that said intervenor does not show by his petition of intervention any cause why he should be permitted to interpose in said suit, and further says, that said petition is insufficient in law, or intervenor to entertain said suit, and of this he asks judgment of the court."

In Williams *v.* Randon, 10 Tex. 76, will be found the material parts of a demurrer as follows, to wit: "to the amendment of plaintiff's petition, filed *May 2d*, 1*849*, because he says that the said amendment sets up a new and different cause of action, and is a departure from that originally sued upon; and 2d, because it appears that the said cause of action, if any, in virtue of the writing mentioned in said amendment, accrued more than four years prior to the filing of said amendment, and the suing upon the same. And should the said demurrer and exception be overruled, defendant for answer," etc. This demurrer was sustained. On appeal, the court held that an amendment may set up a new cause of action, provided that it does not prejudice the other party and that all the costs be paid up to the time of making such amendment and that the amendment shall not relate back to the commencement of the suit. As the amendment in the case under consideration could not relate back to the time of commencement of suit, it showed on its face that it was barred by the statute and the demurrer was properly sustained.

plaintiff's petition * that the same shows no cause, and of this he prays judgment of the court that he be dismissed with his costs, etc.

Jeremiah Mason, Attorney for the Defendant
[*Richard Roe*].[1]

(*Verification.*)[2]

TEXAS — ANSWER — SPECIAL EXCEPTION.[3]

Form No. 7093.

(*Commencing as in Form No. 7092, and continuing down to* *) and says that the same is insufficient in law because it appears therefrom that:

I. (*Pointing out particularly the specific grounds of demurrer relied on, listing them in numbered paragraphs, if more than one.*)[4]

Wherefore, said defendant prays judgment of the insufficiency of the said petition and that he be dismissed, with his costs.

Jeremiah Mason, Attorney for the Defendant
[*Richard Roe*].[5]

(*Verification.*)[6]

FEDERAL COURTS.[7]

Form No. 7094.

In the *Circuit* Court of the United States for the *Southern* District of *New York.*

John Doe, plaintiff, against *Richard Roe*, defendant. } At Law. No. *285.*

Demurrer.

Richard Roe, the defendant in the above entitled cause, demurs to the *complaint* of *John Doe*, plaintiff in the above entitled cause, and

1. **Signature.** — The pleading shall be in writing and signed by the party or by his attorney and filed with the clerk of the court. Tex. Rev. Stat. (1895), arts. 1182, 1604.

2. **Verification.** — Necessity for, see Tex. Rev. Stat. (1895), art. 1265. For form of verification consult the title VERIFICATIONS.

3. **A special exception** is used to take advantage of defects of form, or in the manner of stating facts in pleadings. Prewitt *v.* Farris, 5 Tex. 370.

A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly the obscurity, inconsistency, duplicity, generality, or other insufficiency in the allegations of the pleading objected to. The general expression, that it is vague, uncertain, and the like, alone shall be regarded as no more than a general exception. Tex. Supreme Ct. Rules, No. 18. To the same point, substantially, Weatherford, etc., R. Co. *v.* Granger, 85 Tex. 574.

4. **Defendant in his answer may plead** as many matters, whether of law or fact, as may be necessary for his defense and which may be pertinent to the cause. Tex. Rev. Stat. (1895), art. 1262.

5. **Signature.** — Consult note 3, p. 380, *supra.*

6. **Verification.** — Consult note 4, p. 381, *supra.*

7. *Federal Courts.* — U. S. Rev. Stat., § 914. See also *supra*, Form No. 7021, and notes thereto.

Facts not sufficient to constitute a cause of action as a ground of demurrer, see Simmons *v.* Spencer, 9 Fed. Rep. 583; Miller *v.* Union Pac. R. Co., 12 Fed. Rep. 603.

A demurrer to the whole complaint should not be sustained where the complaint contains one or more good counts. Gaillard *v.* Cantini, 76 Fed. Rep. 699.

for cause of demurrer alleges, that it appears upon the face of the said complaint: (*continuing and concluding as in Form No. 7085*).

2. Precedents.

a. Generally.

Form No. 7095.

(Precedent in Connecticut Bank *v.* Smith, 9 Abb. Pr. (N. Y. Supreme Ct.) 168.)

Supreme Court, *City and* County of *New York.*

The President, Directors, and Company of the Connecticut Bank
a.
A. Freeman Smith, Isaac Van Cleef, and *S. Pettit.*

A. Freeman Smith, Isaac Van Cleef, and *Skidmore Pettit,* the defendants in the above entitled action, demur to the complaint herein, on the ground appearing on the face thereof, that it does not present facts sufficient to constitute a cause of action, in that,

1. It does not state that the said *Connecticut Bank* is a corporate or legally constituted body, and legally entitled to bring an action, either in the name of its president, directors, and company, or in any other manner.

2. It does not state that the plaintiffs are the lawful and bona fide owners and holders of the said notes, or either of them, or that they ever paid value for the same.

3. It does not allege any indebtedness from defendants to the plaintiffs on account of said notes, or any or either of them.

[(*Signature of attorney as in Form No. 7101.*)][1]

1. The matter to be supplied in [ ] has been added to render the form complete.

Other precedents may be found set out in Little Rock *v.* Prather, 46 Ark. 474; Tarabino *v.* Nicoli, 5 Colo. App. 545; Jacobs *v.* Shenon, 2 Idaho 1005; Broadkent *v.* Brumback, 2 Idaho 338; Luby *v.* Chicago, etc., R. Co., 52 Iowa 168; Porter *v.* Wilson, 35 Ind. 349; Frederick *v.* Cooper, 3 Iowa 173; State *v.* Iowa Mut. Aid Assoc., 59 Iowa 129 (being a form of demurrer to petition for injunction, and set out in vol. 5, p. 727, Form No. 6454).

In Houghtaling *v.* Hills, 59 Iowa 287, to a petition in an action of replevin, the following demurrer of defendant was sustained:

"1. The petition admits the sale and delivery of the goods to *Hills,* and fails to allege any facts which in law constitute the said sale fraudulent or voidable.

"2. The failure of *Hills* to disclose his insolvency is not in law sufficient to defeat his title, nor was it fraudulent, nor is the fact that plaintiffs would not have sold him the teas, if they had been so informed, sufficient to defeat *Hills'* title.

"3. The knowledge of *J. H. Merrill & Co.* of *Hills'* insolvency when they took the mortgage, nor their knowledge that *Hills* had not informed plaintiffs thereof, would not avoid the mortgage nor constitute fraud. They therefore ask judgment on this their demurrer."

In F. G. Oxley Stave Co. *v.* Butler County, 121 Mo. 627, the following demurrer is set out in full:

"*County of Butler, State of Missouri,* Plaintiff,
v.
The Cairo & Fulton Railroad Company, John Moore, John Wilson and *Albert G. Waterman,* Defendants.

In the county of *Butler,* at the *March*

Form No. 7096.

(Precedent in Williams *v.* Randon, 10 Tex. 76.)

[(*Title of court and cause, and commencement as in Form No. 7092, down to* *)][1] to the amendment of plaintiff's petition, filed *May 2d, 1849*, because he says that the said amendment sets up a new and different cause of action, and is a departure from that originally sued upon: and 2d, because it appears that the said cause of action, if any, in virtue of the writing mentioned in said amendment, accrued more than four years prior to the filing of said amendment, and the suing upon the same. And should the said demurrer and exception be overruled, defendant, for answer, denies all and singular the allegations contained in plaintiff's original and amended petition. And for further answer he says, that, on the ——— day of ——— the writing described in the plaintiff's amended petition was, for a valuable consideration, delivered up to this defendant, by one *Thomas F. McKinney*, to whom the same was alone addressed and delivered by this defendant, and that all interest and cause of action in and upon the same were thereby released and relinquished to this defendant.

[(*Signature of attorney as in Form No. 7092.*)][1]

b. Want of Jurisdiction of Person.[2]

Form No. 7097.

(Precedent in Blodgett *v.* Potosi Gold, etc., Min. Co., 34 Cal. 227.)

term of the *circuit* court of said county, A. D. 1867, the defendants come and demur to the plaintiff's petition for the following reasons, to wit·

First. There is a misjoinder of parties herein.

Second. There are parties included in this suit who occupy entirely different positions.

Third. The plaintiff states that the governor, pretending to act as the agent for plaintiff, wrongfully and illegally conveyed by deed to said *Cairo & Fulton Railroad Company, one hundred thousand eight hundred and sixty-eight and fifty-six hundredths* acres of land, and does not make profert of said deed or make any excuse therefor.

Fourth. Plaintiff states that on the *twenty-third* day of *May*, 1857. said *Cairo & Fulton Railroad Company* conveyed said lands to *John Moore, John Wilson* and *A. G. Waterman* without making profert of said conveyance, or any excuse therefor.

Bedford & Owen,
Attorneys for the Defendants."

In justices' courts, the demurrer, when in writing, may be in all material respects like the demurrer given in Form No. 7085, *supra*, for courts of record. In fact. it is often expressly so provided by statutes regulating pleadings and practice in justices' courts.

In the *North Carolina* code (1 N. Car. Code (1883). p. 360), the following form of a demurrer to a complaint in a justice's court is set out:

"*John Doe* against *Richard Roe.* } Justice Court.
County of *Mecklenburg.*

The defendant demurs to the complaint in this action for that the said complaint does not state facts sufficient to constitute a cause of action (or *for that the said complaint is not sufficiently explicit to enable this defendant to understand it*).

Jeremiah Mason,
Defendant's Attorney "

1. The matter to be supplied in [ ] will not be found in the reported case. but should be added to render the form complete.

2. **For the general form** of demurrer for this cause see *supra*, Form No. 7085, par. I.

[In the *Superior* Court of the *City and* County of *San Francisco*, State of *California*.

Wolcott A. Blodgett, *Maria Blodgett Clark* and her husband, *Smith Clark*, *Benjamin Blodgett*, *Elutheria H. Adams* and her husband, *Marshall Waldo*, *Victoria McFarland* and her husband, *John McFarland*, plaintiffs,

against

The Potosi Gold and Silver Mining Company, *R. W. Faulkes*, *Peter Rice*, *V M. Moore*, *S. M. Atchison*, *John H. Atchison*, *Lloyd Tevis*, *James B. Haggin*, *G. M. Sweezey*, *R. J. Morganstern*, and *The Chollar Potosi Mining Company*, defendants.

Demurrer of defendants *The Potosi Gold and Silver Mining Company*, *John H. Atchison*, *Lloyd Tevis* and *James B. Haggin*.][1]

Now come the said defendants, *The Potosi Gold and Silver Mining Company*, *John H. Atchison*, *Lloyd Tevis* and *James B. Haggin*, by *J. P. Hoge* and *E. D. Wheeler*, their attorneys, and demur to the complaint as amended herein, upon the ground that it appears upon the face of the amended complaint:

First — That the court has no jurisdiction of the persons of the defendants.

Second — (*Stating other grounds of demurrer.*)

[*E. D. Wheeler* and *J. P. Hoge*, Attorneys for the Defendants.][1]

c. Want of Jurisdiction of Subject of Action.[2]

Form No. 7098.

(Precedent in State *v.* Brown, 35 Kan. 168.)[3]

[State of *Kansas*, *Coffey* County. } ss. In the *District* Court in and for the county and state aforesaid.

The State of Kansas ex relatione A. W. Edgerly, *County Attorney of Coffey County*, *Kansas*, plaintiff,

against

C. O. Brown as Probate Judge of Coffey County, *Kansas*, defendant.][1]

Demurrer.

Comes now said defendant, *C. O. Brown*, probate judge of *Coffey*

1. The matter enclosed by [ ] is not found in the reported case, but should be added to complete the form.

In the second, third, fourth and fifth paragraphs were contained grounds of demurrer for want of jurisdiction of the subject of the action, for want of legal capacity of plaintiffs to sue, for an improper union of several causes of action, and for an insufficient statement of facts to constitute a cause of action. The lower court sustained the demurrer, but the case was reversed on appeal, no objection having been raised, however, to the form of the demurrer. Blodgett *v.* Potosi Gold, etc., Min. Co., 34 Cal. 227.

2. For the general form of demurrer for this cause see *supra*, Form No. 7085, par. II.

Forms of demurrer for this ground are also set out in Blodgett *v.* Potosi Gold, etc., Min. Co., 34 Cal. 227; Beedy *v.* State, 4 Kan. App. 578; Oliver *v.* Wiley, 75 N. Car. 323.

3. This demurrer was sustained. State *v.* Brown, 35 Kan. 168.

county, *Kansas*, and demurs to the petition of the plaintiff filed herein, for the following reasons, to wit:

1. This court has no jurisdiction of the subject of the action attempted to be stated in the said petition.

2. Said petition does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against this defendant.

[*Jeremiah Mason*, Attorney for Defendant.][1]

Form No. 7099.

(Precedent in Stowe *v.* Stowe, 140 Mo. 599.)[2]

[(*Title of court and cause, and commencement as in Form No. 7108.*)][1]

First. The court had no jurisdiction to set aside the probate of said will of *Asa H. Stowe*, deceased, for fraud or otherwise, nor has

1. The matter to be supplied in [ ] is not in the reported case, but should be added to complete the form.

2. On appeal, it was held that the circuit court properly sustained the demurrer to the petition, as the defects for which the demurrer was interposed appeared upon the face of the petition. Stowe *v.* Stowe, 140 Mo. 594.

And Other Precedents. — In Mullen *v.* Hewitt, 103 Mo. 645, the demurrer sustained to the complaint, omitting formal parts, was as follows:

"First. This court, as a court of equity, has no jurisdiction to hear and try the matters and things set out in said petition.

Second. It appears from the face of said petition that plaintiff is not entitled to the relief prayed.

Third. Said petition does not state facts sufficient to constitute a cause of action.

Fourth. It does not appear from said petition, that, during the *ten* years succeeding the date of the rendition of said judgment, plaintiff and his assignor, both or either of them, diligently availed themselves of all the legal remedies provided by law, by way of execution and proceedings supplemental to judgment against the defendant *Hewitt*. And it does appear from said petition that by their laches they had lost their right to such remedies prior to the institution of this suit.

Fifth. The averment of said petition, to wit: 'Issuance of an execution would be wholly futile to the plaintiff in an effort to collect said judgment,' while true, is not made in good faith by plaintiff, for it appears from the averment of said petition that any execution which the plaintiff might cause to be issued on said judgment would be absolutely null and void, more than *ten* years having passed since the rendition of said judgment.

Sixth. It appears from said petition that plaintiff by laches has lost not only his statutory lien, but also his right to execution against defendant *Hewitt*, and cannot now ask a court of equity by its process to re-establish such statutory lien, or to supplement the voluntary loss at law of plaintiff's right to execution, by recovering the alleged property of defendant *Hewitt*, and ordering it sold, by a decree in equity or equitable execution, when even if the said alleged property was already uncovered and said *Hewitt* had property standing in his own name, plaintiff could not in either case have it levied upon to satisfy plaintiff's alleged judgment.

Seventh. Plaintiff's petition does not present a case in which plaintiff has an existing right to execution, which right and remedy is made ineffectual by the alleged fraudulent acts of defendants, but presents a case in which plaintiff's right and remedy by execution has by plaintiff's laches been lost, and cannot be availed of to satisfy plaintiff's alleged judgment, even if the court should recover alleged property of said *Hewitt*.

Eighth. The said petition is multifarious, in that it seeks to charge the several defendants herein with separate and distinct acts, with reference to separate, distinct pieces of realty, and does not charge that all the defendants and properties were joined or embraced in one and the same general scheme of alleged fraud, or that the alleged individual separate fraudulent acts were participated in by each of de-

this court jurisdiction to hold the defendants or any of them, trustee or otherwise, by contract or for fraud or otherwise, nor can the land or any of it, nor can the rents and profits or any part thereof be held or adjudged by this court to belong to the plaintiff as trust property or otherwise.

Second. The second amended petition does not state facts sufficient to constitute a cause of action.

Third. The second amended petition shows plaintiff has no title to subject-matter of the suit, either at law or equity, either to the land or any part thereof, nor to the rents or profits or any part thereof, nor to any personal liability of these defendants or either of them or any of them, because the plaintiff's title to the real estate became vested in these defendants by their possession continuous from *November*, 1876, they claiming to own the same, no suit for possession, and no suit was begun to contest said will until the filing of this suit, and from the facts set up in the second amended petition plaintiff's title was divested by the statute of limitation (of ten years) out of him and vested in these defendants, and said will of *Asa H. Stowe* having been probated in 1876 by the facts stated in said second amended petition is now incontestable either for the purpose of being overthrown as a will or for the purpose of holding these defendants as trustees by reason of the frauds charged.

Fourth. Plaintiff's case of action as set up in said amended petition is barred by the statute of limitation of five years before this suit was begun.

Fifth. There are no facts set forth in the second amended petition or in the record by which these defendants, or any or either of them, are made trustees for the plaintiff, either by contract or by operation of law or otherwise, either for said land or any part thereof or for any other matter or thing whatever.

Sixth. This is a suit in equity to set aside the will of *Asa H. Stowe*, deceased, and this court has no jurisdiction.

Seventh. Under the facts set up in the second petition this court has no jurisdiction to determine or adjudge or decree that the said will of *Asa H. Stowe*, deceased, was not executed or signed, or that it was obtained by undue influence, or that said will was forged, or that the probate thereof was obtained by fraud. Under the facts stated the probate is conclusive.

[*Jeremiah Mason*, Attorney for Defendants.][1]

fendants as a part of one scheme of alleged fraud.

Ninth. With the exception of the alleged purchase of said property from one *Giddings*, it does not appear that said *Hewitt* paid any money, or contributed anything to or any part of the purchase price of any of the property described in said petition, or, for a consideration, even acquired any right, title or interest in the same. And, with reference to the property acquired from said *Giddings*, said petition does not state whether said *M. A. Wolff*, or said *Hewitt*, paid the purchase price, or how much each paid.

Nor does said petition state by what names said *Hewitt* 'caused' said *E. O. Standard* and others to make said alleged 'transfers of realty.'"

1. The matter enclosed by [ ] is not found in the reported case, but is added to complete the form.

d. Want of Capacity to Sue.[1]

Form No. 7100.

(Precedent in State *v.* Minton, 49 Iowa 592.)[2]

[In the *District* Court in and for *Harrison* County, *Iowa.*

Charles Gilmore, plaintiff, against *Jacob Minton*, defendant. } *February* Term, 1878. Demurrer to Petition in the Nature of Information for Quo Warranto.

The defendant demurs to the petition herein, and shows to the court the following grounds therefor:][3]

1. That said petition shows upon its face that the plaintiff has no legal capacity to sue, in this: That said action was commenced by a private individual in his own name, as plaintiff and not as relator, whereas said action should have been commenced in the name of the State of Iowa, as plaintiff, on the relation of the said *Charles Gilmore.*

2. That said petition contained no averments showing the fact that this action was brought on the relation of any private individual.

3. That said petition does not contain any averments that the defendant is unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by this state.

[*Jeremiah Mason*, Attorney for Defendant.][3]

Form No. 7101.

(Precedent in Phœnix Bank *v.* Donnell, 40 N. Y. 412.)[4]

1. For the general form of demurrer for this cause see *supra*, Form No. 7085, par. III.

Form of demurrer for this cause is also set out in Blodgett *v.* Potosi Gold, etc., Min. Co., 34 Cal. 227.

Relating to Mining Claims. — In Back *v.* Sierra Nevada Consol. Min. Co., 2 Idaho 386, the demurrer was as follows: "That the plaintiff herein has not the legal capacity to sue in this action; that it does not appear from said complaint that the plaintiff has any right, interest, or adverse claim upon which he can base an action against the *Sierra Nevada Mining Company*, by reason of its application for a patent herein; that he is not the owner of any lode, vein or surface ground, by location or otherwise, authorizing him to file any adverse claim herein, or to maintain any action upon any pretended adverse claim," etc. The demurrer was sustained by the district court, but reversed on appeal, the court holding that "a tunnel located and run for the development of veins or lodes, pursuant to the provisions of section 2323 Rev. Stat. U. S., becomes a mining claim and entitles the owner thereof to make an adverse claim against one claiming to locate upon the line of the tunnel; and, while the same was being prosecuted with reasonable diligence, such tunnel owner is entitled to proceed under the provisions of section 2326 Rev. Stat. U. S."

2. The court overruled the demurrer, but required that the cause be entitled: "State of Iowa on the relation of Charles Gilmore *v.* Jacob Minton." On appeal, it was held that any error in overruling the demurrer was waived by afterwards filing an answer.

3. The matter enclosed by [ ] is not found in the reported case, but is added to complete the form.

4. This demurrer was overruled in special term, but this ruling was reversed at the general term, which judgment was affirmed on appeal.

Another precedent in Dubois *v.* Cassidy, 75 N. Y. 300, omitting formal parts, is as follows:

"1st. That the plaintiff in his complaint does not show legal capacity to sue or maintain this action.

2d. That the complaint does not show that the plaintiff has any estate of in-

The Phœnix Bank of the City of New York,
vs.
Ezekiel J. Donnell.

The defendant demurs to the complaint herein, and states, as the grounds for his demurrer:

1. That it appears by the complaint that the plaintiff has not legal capacity to sue.

2. That it does not appear that the plaintiff is a corporation duly incorporated, and entitled to sue.

And for a further and separate ground of demurrer to said complaint, this defendant states:

That the complaint does not state facts sufficient to constitute a cause of action.

Cummins, Alexander & Green,
20 Exchange Place, New York City

e. Another Action Pending.[1]

Form No. 7102.

(Precedent in Galbreath *v.* Drought, 29 Kan. 715.)[2]

[State of *Kansas*, *Wyandotte* County. } ss. In the *District* Court in and for the county and state aforesaid.

John Galbreath, plaintiff,
against
E. S. W. Drought, defendant.][3] } Demurrer.

Now comes the said *E. S. W. Drought*, defendant, and demurs to the amended petition of plaintiff herein filed, and, for cause of demurrer, says: (1) That said court has no jurisdiction of the subject-matter of the action set out in the amended petition. (2) Said petition shows upon its face that the matters therein stated have been determined and are pending in the *district* court of *Leavenworth* county, in the state of *Kansas*, between the party from whom the plaintiff claims any right and this defendant. (3) The judgment set out and mentioned in the amended petition appears from said petition to have been fully satisfied by the decree of the *district* court of *Leavenworth* county, which sale has been fully confirmed by said court and conveyed to the purchaser under the order of said court of *Leavenworth* county, and no cause is alleged why this court should interfere with the decrees and orders of the court of *Leavenworth* county, or take jurisdiction of said proceedings. (4) The assignment mentioned in the amended petition does not give, nor could the plaintiff acquire, any right of action to sue for wrongs committed

heritance, or for life or years in the real estate.

3d. That the complaint does not show facts sufficient to constitute a cause of action"

1. For the general form of demurrer for this cause see *supra*, Form No. 7085, par. IV.

Forms of demurrer for this cause are also set out in Debolt *v.* Carter, 31 Ind. 360; Nance *v.* Carolina Cent. R. Co., 94 N. Car. 621.

2. This demurrer was sustained both in the lower court and on appeal.

3. The matter enclosed by [ ] will not be found in the reported case, but should be added to render the form complete.

on the rights of the assignee in bankruptcy, or *F. C. Eames*, before the said transfer. (5) This court has no jurisdiction to modify, change, or in any manner interfere with the judgment or orders of the *district* court of *Leavenworth* county. (6) This court has no jurisdiction to grant the relief demanded in said amended petition, a way having been provided by statute for making a judgment rendered in one county a lien upon the real estate of the defendant in another county, and also for obtaining execution upon judgments rendered in this state. (7) Said amended petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.

[*Jeremiah Mason*, Attorney for Defendant.][1]

f. Defect or Misjoinder of Parties.[2]

Form No. 7103.

(Precedent in Oliver *v.* Wiley, 75 N. Car. 323.)[3]

[(*Title of court and cause, and commencement as in Form No. 7112.*)][1]

1. That there is a defect of parties defendant, in the omission of *Spencer Hooper*, and those who purchased his interest; the said *Hooper* being the sole legatee of *A. H. Hooper*.

2. That there is a defect of parties defendant, in the omission of *J. C. Griffith*, administrator of *Susan P. Hooper*.

[(*Concluding as in Form No. 7112.*)][1]

Form No. 7104.

(Precedent in Tuck *v.* Walker, 106 N. Car. 287.)[4]

[(*Title of court and cause as in Form No. 7112.*)][1]

In this action the defendant having obtained leave to withdraw his answer, now demurs to the complaint filed, on the ground that only the administrator of *W. H. Winstead* could maintain an action to sell the lands of *W. H. Winstead*, and if the judgment of said plaintiff be a lien thereon, the same can be enforced in the application of the

1. The matter enclosed by [ ] will not be found in the reported case, but is added to complete the form.

2. For the general form of demurrer for this cause see *supra*, Form No. 7085, pars. V, VI, VII, VIII, IX and X.

Forms of demurrer for this cause are set out in Woodgate *v.* Fleet, 9 Abb. Pr. (N. Y. Supreme Ct.) 234; Wilson *v.* Deweese, 114 N. Car. 656; McCadden *v.* Pender, 115 N. Car. 67; Macauley *v.* Central Nat. Bank, 27 S. Car. 219.

3. This demurrer assigned five causes, the first two being those given in the text, as to which the demurrer was sustained. The demurrer was overruled on the third, fourth and fifth grounds.

4. This demurrer was overruled by the following judgment: "This cause coming on to be heard by demurrer filed by defendant after hearing argument on same in behalf of each party, on motion of *J. S. Merritt* and *Graham & Winston*, attorneys for plaintiff, it is ordered that the demurrer be overruled, and it is further ordered that defendant have leave to file an answer herein." This was reversed on appeal, the court holding that the action could not be maintained except by the personal representative of W. H. Winstead, or by making him a party if he refuse to discharge the debt out of the personal assets or to institute a proceeding to have the land sold to satisfy it. Tuck *v.* Walker, 106 N. Car. 288.

proceeds of said sale, and that the plaintiff has no right as a creditor of said estate to maintain this action.

[(*Concluding as in Form No. 7112.*)][1]

g. Several Causes Improperly United.[2]

Form No. 7105.

(Precedent in Price *v.* Kramer, 4 Colo. 551.)[3]

[State of *Colorado*, } ss. In the *District* Court within and for said
County of *Pueblo*. } county.][1]

M. B. Price, treasurer of Bent county; The board of county commissioners of Bent county; Geo. W. Morgan, treasurer of Pueblo county, and the board of county commissioners of Pueblo county,
ats.
Ludwig Kramer.

The defendants, *M. B. Price*, treasurer of *Bent* county, and the board of county commissioners of *Bent* county, demur to the plaintiff's complaint on the following grounds:

First. That several causes of action have been improperly united in this, that the plaintiff's grounds for relief by way of interpleader as to the taxes assessed against him for the years 1875, 1876 and 1877 constitute, as to the taxes of each year, a separate cause of action to be separately stated.

Second. That the complainant does not state facts sufficient to constitute a cause of action.*

Third. (*Continuing and concluding as in Form No. 7115.*)

h. Insufficiency of Statement of Facts.[4]

1. The matter enclosed by [ ] will not be found in the reported case, but is added to complete the form.

2. For the general form of demurrer for this cause see *supra*, Form No. 7085, pars. XI and XII.

Forms of demurrer for this cause are set out in Tarabino *v.* Nicoli, 5 Colo. App. 545; Stillwell *v.* Hamm, 97 Mo. 584; Mullen *v.* Hewitt, 103 Mo. 645; Oliver *v.* Wiley, 75 N. Car. 324; McCadden *v.* Pender, 115 N. Car. 67; Lowry *v.* Jackson, 27 S. Car. 320.

3. This demurrer was overruled. Defendants elected to stand by their demurrer, and appealed from the judgment, which was reversed by the supreme court. The third ground of demurrer was uncertainty, which was not unfavorably considered by the appellate court. See *infra*, Form No. 7115.

4. For the general form of demurrer for this cause see *supra*, Form No. 7085, par. XIII.

Forms of demurrer for this ground are set out in Blodgett *v.* Potosi Gold, etc., Min. Co., 34 Cal. 227; Pipe *v.* Smith, 5 Colo. 156; Gwaltney *v.* Cannon, 31 Ind. 227; Beedy *v.* State, 4 Kan. App. 578; Stillwell *v.* Hamm, 97 Mo. 584; Thias *v.* Silner, 103 Mo. 314; Foster *v.* Wilson, 5 Mont. 53; Jacobs Sultan Co. *v.* Union Mercantile Co., 17 Mont. 61; Haire *v.* Baker, 5 N. Y. 358; Kent *v.* New York Cent. R. Co., 12 N. Y. 629; Buffalo *v.* Holloway, 7 N. Y. 494; Harper *v.* Chamberlain, 11 Abb. Pr. (N. Y. Super. Ct.) 238; Connecticut Bank *v.* Smith, 9 Abb. Pr. (N. Y. Supreme Ct.) 168; 17 How. Pr. (N. Y. Supreme Ct.) 487; Nance *v.* Carolina Cent. R. Co., 94 N. Car. 621; McCadden *v.* Pender, 115 N. Car. 67; Macaulay *v.* Central Nat. Bank, 27 S. Car. 219; Lowry *v.* Jackson, 27 S. Car. 320; Campbell *v.* Taylor, 3 Utah 330.

In Luby *v.* Chicago, etc., R. Co., 52 Iowa 168, the demurrer filed to plain-

(1) Generally.

Form No. 7106.

(Precedent in Martin *v.* McLaughlin, 5 Colo. 389.)[1]

[(*Title of court and cause as in Form No. 7105.*)][2]

The said defendant demurring to the amended complaint of the plaintiff, and for cause of demurrer, shows that said complaint does not contain sufficient facts to constitute a cause of action, because:

First. As shown by the complaint, the title to the goods, and the sole right to sue for any injury thereto, or conversion thereof, was vested in the purchaser and consignee of said goods.

Second. After purchase by the consignee and delivery to the carrier, the plaintiff had no control over the goods, other than a right of stoppage *in transitu*, which he did not exercise.

Third. The complaint states a cause of action by the plaintiff against the consignee only. The consignee became liable to the plaintiff when the goods were delivered to the carrier, and had the sole right to authorize, permit or sue for their conversion by defendant.

[*Jeremiah Mason*, Defendant's Attorney.][2]

Form No. 7107.

(Precedent in Indiana, etc., R. Co. *v.* Dailey, 110 Ind. 77.)[3]

[State of *Indiana*, } ss. *Fountain Circuit* Court.
Fountain County. } *October* Term, 1885.

John Doe, plaintiff,
against
Richard Roe, defendant.][2]

tiff's petition to recover for personal injuries, omitting the formal parts, was as follows:

"1st. Said petition shows that plaintiff's intestate was guilty of contributory negligence in this, that he was passing over said train while in motion without showing any necessity therefor.

2d. Said petition shows said intestate to have been engaged in a dangerous movement without there being any necessity or emergency therefor."

The lower court sustained the demurrer. On appeal, however, the supreme court said. "Whether we could declare as a matter of law that Luby was guilty of contributory negligence * * * we need not determine. The petition, we think, is not susceptible of the meaning which the defendant puts upon it * * * In our opinion, the demurrer should have been overruled."

1. This demurrer was sustained by the county court, and plaintiff, electing to stand by his complaint, appealed. The judgment was reversed and the cause remanded, no question arising as to the form of the demurrer.

Compare also Henderson *v.* Johns, 13 Colo. 280; Higgins *v.* People, 2 Colo. App. 567; Jennings *v.* Rickard, 10 Colo. 395; Manning *v.* Haas, 5 Colo. 37, upon the sufficiency of a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action.

2. The matter to be supplied in [ ] will not be found in the reported case, but should be added to complete the form.

3. This demurrer was held sufficient as challenging the sufficiency of each of the paragraphs separately, although the court said: "that in the early decisions of this court (see Meyer *v.* Bohlfing, 44 Ind. 238) * * * demurrers very similar in form * * * were held to be joint and not several demurrers."

Other Precedents. — In Stone *v.* State, 75 Ind. 236, a demurrer in the follow-

The defendant demurs separately to the *first*, *second*, *third*, *fourth*, *fifth*, and *sixth* paragraphs of the plaintiff's complaint in the above entitled cause, for the reason that none of said paragraphs states facts sufficient to constitute a cause of action.

[*Jeremiah Mason*, Attorney for Defendant.][1]

Form No. 7108.

(Precedent in Sherrin *v.* St. Joseph, etc., R. Co., 103 Mo. 381.)[2]

ing form: "The defendants herein demur to each of the paragraphs of the complaint, for the reason that neither of said paragraphs states facts sufficient to constitute a cause of action," was approved, the court saying: "This accords, substantially, with the form for a several demurrer suggested in Silvers *v.* The Junction R. Co., 43 Ind. 435, and is sufficient. It is addressed to each paragraph, and the addition of the words 'separately and severally' would be a meaningless tautology. The statement of the cause of demurrer, 'that neither of said paragraphs states facts sufficient,' etc., is doubtless subject to the criticism * * * that it alleges the insufficiency of each paragraph as a ground of objection to any one, while it ought to be so stated as to charge the insufficiency of the particular paragraph under consideration. * * * We are not inclined to hold that papers must be drawn with absolute nicety and accuracy of expression. It is enough if the meaning is reasonably clear."

In Krathwohl *v.* Dawson, 140 Ind. 6, a demurrer to the effect that "defendants jointly and severally demur to the second paragraph of plaintiff's reply to answer filed herein, and for cause of demurrer say that said paragraph does not contain facts sufficient to constitute a good defense or reply to the answer filed herein," was held to be improper in form as not stating a statutory reason for demurrer.

In Porter *v.* Wilson, 35 Ind. 349, the demurrer was in these words: "Now come the defendants and demur to the first, second and third paragraphs of the plaintiff's complaint, for the following grounds of objection, to wit: first, said first, second and third paragraphs, nor either of them, is good in law; second, there is a misjoinder of causes of action; third, there is a misjoinder of parties defendant; wherefore," etc. This demurrer was held insufficient as presenting no issue of law, and not assigning to any one of the causes of demurrer enumerated in the code.

In Duckworth *v.* Matlock, 31 Ind. 380, the complaint sought probate of an alleged will, averring that the defendant pretended that such a will as was described, and of which a copy was set out, was not duly executed, but did not allege that the defendant had the custody of the will nor did the plaintiff offer to produce it. The defendant demurred to the complaint on he grounds, "first, that the court has no jurisdiction of the subject of the action; second, that there is a defect of parties defendants; third, that said *Thomas S. Vermillion* is an improper party defendant and ought not to be required to answer herein; fourth, that said complaint does not state facts sufficient to constitute a cause of action against the defendants or either of them; fifth, that several causes of action have been improperly united in said complaint." The demurrer was sustained.

1. See note 2, p. 399, *supra*.

2. The petition to which this demurrer was sustained is set out at large in the reported case. On appeal, the supreme court held: "The court evidently sustained the demurrer on the first ground assigned, 'that the facts stated in the petition showed that the deceased was a fellow servant with Fort and the men in his employ by whose negligence it was charged deceased was injured.' Two foremen of gangs of section men working independently of each other, but under the same roadmaster of the railroad, are fellow servants, and where a collision between their handcars is caused by the negligence of one, and occasions an injury to the other, the company is not liable. The demurrer was properly sustained."

Another Precedent. — In Mitchell *v.* Clinton, 99 Mo. 156, the demurrer to the petition, omitting formal parts, was as follows: "1. That it did not state facts sufficient to constitute a cause of action.

Maggie Sherrin & Grace Sherrin, by *Honn, next friend*, plaintiffs,
v.
The St. Joseph & St Louis Railroad Company, defendant.

In the *circuit* court of *Clinton* county, *Missouri*, *May* term, 1888.

Now comes defendant and demurs to plaintiff's second amended petition herein and for cause thereof says:

First. That said petition fails to state facts sufficient to constitute a cause of action.

Second. That this second amended petition is a new and different cause of action from the cause of action stated in the first amended petition, and upon which a trial was held at the last term of this court.

Jas. Limbird, Attorney.

Form No. 7109.

(Precedent in Howes *v.* Lynde, 7 Mont. 548.)[1]

[(*Title of court and cause, and commencement as in Form No. 7113.*)][2] That said amended complaint shows on its face that the alleged cause of action was, at the commencement of said action, and now is, barred by the provisions of section 44 of the Code of Civil Procedure, page 69 of the Compiled Statutes of Montana, and is so barred by section 1 of the act of the twelfth legislative session of Montana *Territory*, approved February 20, 1881.

[*Jeremiah Mason*, Attorney for Defendant.][2]

Form No. 7110.

(Precedent in Blakeslee *v.* Missouri Pac. R. Co., 43 Neb. 64.)[3]

2. That it did not show any authority in the defendant to set up and operate the scales as therein charged.

3. That it did not show that deceased was exercising ordinary care at the time of his injury.

4. That it did not state how, or to what extent, deceased was injured. so as to advise defendant whether such injuries were of a character likely to produce death."

The petition was for damages against the city for its failure to keep weighing scales and the approaches thereto in a reasonably safe condition. The demurrer was sustained on the ground that petition failed to aver facts from which the conclusion could be drawn that it was within the scope of defendant's corporate powers to erect and maintain such scales; without which power no duty could arise to keep them in reasonably safe condition. and consequently no liability for failure to discharge the duty. Facts from which a legal conclusion is to be drawn and upon which the right of action depends must be stated to show a cause of action.

1. There was another ground of demurrer assigned, to wit, that the complaint did not state facts sufficient to constitute a cause of action, but the one set out in the text was the one relied on by demurrant.

2. The matter enclosed by [ ] is not found in the reported case, but is added to complete the form.

3. This demurrer was overruled in the lower court, which ruling was reversed on appeal, the court holding that the demurrer should have been sustained (Blakeslee *v.* Missouri Pac. R. Co., 43 Neb. 64), on the theory that a petition in such case is demurrable when it states conclusions and not the facts upon which such conclusions are based, or where the acts, the doing or threatening to do which it is sought to enjoin are not averred but must be supplied, or appear only by inference.

In Moore *v.* Kime, 43 Neb. 519, the demurrer was as follows: "Comes now the defendant, *James B. Kime*, by *Spargur & Fisher*, his attorneys, and enters herein his demurrer to the petition and cross-petition, and

[*Francis D. Blakeslee*, plaintiff, against *The Missouri Pacific Railway Company*, defendant.] In the *District* Court of *Nuckolls* County, *Nebraska*.

The defendant demurs to the petition of the plaintiff for the following causes, which appear on the face of said petition:][1]

1. The court has no jurisdiction over the person of the defendant.
2. The court has no jurisdiction of the subject of the action.
3. There is a defect of parties defendant.
4. The petition does not state facts sufficient to constitute a cause of action.

[*Jeremiah Mason*, Attorney for Defendant.][1]

Form No. 7111.[2]

for the following reason: Because it appears upon the face of said cross-petition that it does not state facts sufficient to constitute a cause of action, or to entitle them to relief against this defendant." This demurrer purports to be directed against both the petition and cross-petition, but states no ground of demurrer against the petition. Therefore, by virtue of section 95 of the Code of Civil Procedure, it must be taken as a demurrer to the petition on the ground that it does not state facts sufficient to constitute a cause of action.

1. The matter enclosed by [ ] will not be found in the reported case, but has been added to render the precedent complete.

2. **Copied from the record** in the case of Casserly *v.* Witherbee, 119 N. Y. 522. In that case the supreme court, both at special and general terms, sustained the demurrer, but on appeal the court of appeals reversed the case, saying, "We are of the opinion that this complaint with this prayer for general and specific relief was sufficient for an action to redeem from the mortgagees, and that therefore the judgments of the special supreme and of the general supreme courts were wrong."

Another Precedent. — In Gould *v.* Venice, 29 Barb (N. Y.) 449, the demurrer to the complaint, omitting formal parts, was as follows: "That said complaint does not state facts sufficient to constitute a cause of action herein against the defendant. That the act mentioned and referred to in said complaint was and is unconstitutional and void. That said complaint does not show that any money was ever borrowed under and in pursuance of said act. That if borrowed, it was not borrowed at the time or in the manner required by said act. That said complaint does not show or state that the supervisor or assessors, or any other officer of said town, ever met to agree, resolve, move or determine, to borrow any money for the purposes contemplated by said act, or to 'deem' or adjudge that $25,000, or any other sum of money, was necessary for the purposes and objects contemplated by said act. That said complaint does not show that any bonds were ever issued in pursuance of said act, or otherwise, or according to the provisions and requirements of said acts, and that the instruments mentioned and referred to in said complaint and therein denominated bonds, are void and of no effect upon their face. That it is not stated or averred in said complaint, that the assent mentioned and referred to in said complaint was ever obtained or filed by any supervisor, assessor or other officer of said town of *Venice*. Nor does it appear that said assent was the written assent of two-thirds of the resident persons taxed in said town, as appeared on the assessment roll of said town, next previous to the time said money was borrowed; but on the contrary thereof, it appears that it was not such an assent of the taxpayers of said town as required by said act. That it does not appear by said complaint, that the subscription so made by the supervisor and assessors of said town, to the capital stock of said railroad company, in said complaint mentioned, was a valid or legal subscription, or binding upon said town in any way whatsoever."

Supreme Court, *City and* County of *New York.*

Bernard Casserly as receiver, etc., of the Port Henry Steel and Iron Company, Limited,
against
Silas H. Witherbee, George R. Sherman, Frank S. Witherbee, George D. Sherman and *William C. Witherbee.*

The defendants above named demur to the complaint herein, and for the grounds of their demurrer state that the complaint does not state facts sufficient to constitute a cause of action.

Dated *October* ———, 1*887*.

Waldo & McLaughlin, Attorneys for Defendants.
Port Henry, Essex County, *New York.*

Form No. 7112.

(Precedent in State *v.* Spencer, 114 N. Car. 771.)[1]

[*North Carolina*, } In the *Superior* Court.
Hyde County. } *Fall* Term, 1*893*.

The State of North Carolina on the relation of John H. Blount, solicitor of the First Judicial District, plaintiff,
against
C. C. Spencer, defendant.

Defendant demurs to plaintiff's complaint herein and assigns the following grounds of demurrer, to wit:][2]

1. That the complaint does not state facts sufficient to constitute a cause of action.

2. For that it appears upon the face of the complaint that the lands described in section 1 of the complaint were entered under and by virtue of the act of 1887, chapter 119, and were not any part of the lands exempt from entry under said act, but were a part of the lands expressly opened for entry and grant thereunder, and under the survey and action of the Shell-fish Commissioners therein appointed.

Wherefore defendant prays judgment:

1. That the action be dismissed; that defendant go without day, and recover his costs, etc.

[*J. H. Small*, Attorney for Defendant.][2]

1. This demurrer was sustained in State *v.* Spencer, 114 N. Car. 770. In sustaining the demurrer the supreme court held: That where a grant has been issued in strict compliance with the law, rights of property have been acquired which cannot be taken away, even by the state, in the absence of an allegation of fraud or mistake, except after compensation and under the principle of eminent domain.

2. The matter in [ ] is not found in the reported case, but has been added to complete the precedent.

Another precedent is given in Paddock *v.* Davenport, 107 N. Car. 714, which, omitting formal parts, is as follows: "The defendant *J. M. Thrash*, without waiving the many inaccuracies in the statement of facts, and the omission to state others, demurs to the complaint for that it does not state a cause of action against this defendant in this, to-wit:

1. That the contract or covenant sued upon by the plaintiffs is one inconvenient to the science and contrary to the policy of the law, and void.

(2) Contract Against Public Policy.

Form No. 7113.

(Precedent in Ford *v.* Gregson, 7 Mont. 95.)[1]

[State of *Montana*, *Silver Bow* County. } ss. In the *District* Court within and for said county.

Thomas Ford, plaintiff,
against
Eli Gregson, *William Hinkleman*, *Alexander Henninger and George Kessler*, defendants.] } Demurrer.

Now come the above-named defendants, and demur to the complaint of plaintiff herein, filed *April 15*, 1885, and for causes of demurrer state:

1. That said amended complaint does not state facts sufficient to constitute a cause of action.

2. Said amended complaint shows upon its face that the alleged contract, upon which this action is brought, was and is contrary to the public policy and void in law, in so far as it attempts to restrain or to impose a condition upon the alienation of the property therein mentioned, or of any interest therein, or the settlement or the compromise of any controversy or litigation in reference thereto; and it is for the breach of the covenants not to sell or settle or compromise that this action is brought.

3. Said amended complaint is ambiguous, unintelligible, and uncertain, in that the allegations of the contract in said complaint do not correspond with, but differ from and contradict, the contract, as set out by copy and made part of the complaint, in that, — 1. The said amended complaint, in the first clause thereof, alleges certain considerations and objects and intentions in regard to said contract, and

2. That this defendant was not a party to the same, as appears from the contract set forth in the complaint.

3. That this defendant is not a proper party to this suit, as the contract set up in the complaint is, at most, a personal covenant on the part of his co-defendant, and not such a contract as could be specifically enforced, even against the original parties.

4. That, as appears from the contract, the same was without consideration.

Wherefore, the defendant asks that plaintiff's action be dismissed, and that the defendant recover of the plaintiffs the costs, to be taxed by the clerk.

The defendant *R. W. Davenport*, without waiving the many inaccuracies in the statement of facts, and the omission to state others, demurs to the complaint, for that it does not show a cause of action against him in this, to-wit:

1. That the contract, or pretended contract, set forth in the complaint, as appears upon the face thereof, was without consideration, and void.

2. That the same is contrary to the science and against the policy of the law, and void.

3. That, as appears from the instrument therein set out, the contract is at most only a covenant, and not such as can be specifically enforced.

Wherefore, defendant demands judgment whether he shall be compelled to answer the facts alleged in the complaint, and that plaintiff's action be dismissed and defendant recover his costs." This demurrer was sustained, but on appeal the ruling was partially reversed, no objection having been made, however, to the form of the demurrer.

1. This demurrer was sustained in the lower court, and this ruling affirmed on appeal, on the theory that the contract sued on was void as against public policy.

entering into the same, none of which are contained or expressed in the contract as set out by copy, but are inconsistent with said contract, and the terms thereof; 2. Said amended complaint alleges that by said contract the said parties there "covenanted, promised, and agreed to and with each other that they, or either of them, without the written consent of the other parties to said contract, would not sell, compromise with, or settle with the parties referred to in said contract, or any other person or persons who were then or thereafter endeavoring to obtain possession of said water or water-rights"; whereas the copy of the contract set out provides that the parties thereto "covenant, promise, and agree to and with each other that they, or either or any of them, will not sell said water-right, or their interest in the same, except by and with the written consent of all the parties; and that without such written consent, neither of said parties will make any sale to, or settlement or compromise with, said parties above referred to, or any other person or persons who may be now or hereafter endeavoring to obtain the possession of said water and water rights; 3. Said amended complaint is in many other respects ambiguous, unintelligible, and uncertain.

Wherefore defendants ask judgment that this action be dismissed, and for their costs.

W. W. Dixon,
Attorney for Defendants.

(3) Relief Barred by Laches.

Form No. 7114.

(Precedent in Burgess *v.* St. Louis County R. Co., 99 Mo. 506.)[1]

[(*Title of court and cause, and commencement as in Form No. 7108.*)][2]

First. That it appears on the face of said bill, and from the allegations therein, that the right of action set up in the said bill to set aside the *three hundred* bonds and the deed of trust of said *St. Louis County Railroad Company* securing the same to said *Lackland*, and the right to set aside the sale thereunder to said *Miller*, and the conveyance of said *Miller* to these defendants, and of these defendants to said *Forest Park and Central Railroad Company* did not accrue, if it accrued at all, to said plaintiffs within *ten* years before the bringing of this suit.

Second. It also appears on the face of said bill and the allegations therein, that the issuing of *three hundred* bonds, and the execution of said deed of trust securing the same, and the sale thereunder by said *Lackland* and *Allen* to said *Miller*, and the conveyance thereof by said *Miller* to these defendants, and of these defendants to said *Forest Park and Central Railroad Company*, were well known to said plaintiffs at the time they severally took place, and their long delay

1. The demurrer was sustained, holding that the laches of the plaintiffs was fatal. *Compare* also demurrer in Mullen *v.* Hewitt, 103 Mo. 645, and in Stillwell v. Hamm, 97 Mo. 584.

2. The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the precedent.

and laches and want of diligence in seeking redress in the premises deprive them of all right to equitable relief; especially so in view of other facts stated in said bill, that innocent mechanical laborers and others have invested their services and money in the improvement of said roadbed under the ownership of said *Forest Park and Central Railroad Company* without any notice from plaintiffs of the matters set out in said bill.

Third. The allegations in said bill that plaintiffs had no knowledge of the taking possession of said property by the *Forest Park and Central Railroad Company*, and the execution by said railroad company of said conveyance to said *Durkee*, and of the letting of contracts, performance of work, creation of liens, suits, judgments, and immediate sales vesting said property in the *St. Louis, Kansas City and Colorado Railroad Company*, until long after the latter entry was made, are wholly insufficient in law, and according to the principles and practices of courts of equity, to excuse the laches and long delay of plaintiffs in seeking equitable relief, and on the facts stated in said bill, it would be inequitable and against good conscience to grant the relief prayed for.

Fourth. There is no equity in said bill, and it does not state facts sufficient to constitute a cause of action.

Fifth. There is a defect of parties in this: That said bill asks the court to set aside conveyances made by one *Lackland* and *D. P. Dyer*, to *James A. Garland*, and yet said persons are not made parties to this proceeding, as they should be if these conveyances are to be set aside.

Sixth. That plaintiffs have no legal capacity to sue, which appears on the face of, and by the allegations of, their bill.

Seventh. That the institution of said suit by the *St. Louis County Railroad Company*, as alleged in the petition, and the proceedings thereunder are a bar to this suit by the plaintiff.

[(*Prayer and signature as in Form No. 7105.*)][1]

i. Ambiguity, Uncertainty and Unintelligibility.[2]

Form No. 7115.

(Precedent in Price *v.* Kramer, 4 Colo. 551.)[3]

1. The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the precedent.

2. For the general form of demurrer for this cause see *supra*, Form No. 7085, par. XV.

Forms of demurrer for this cause are set out in Pipe *v.* Smith, 5 Colo. 156; Foster *v.* Wilson, 5 Mont. 53; Jacobs Sultan Co. *v.* Union Mercantile Co., 17 Mont. 61; Nance *v.* Carolina Cent. R. Co., 94 N. Car. 621; Campbell *v.* Taylor, 3 Utah 330. *Compare* Ghiradelli *v.* Bourland. 32 Cal. 585.

Matter of uncertainty should be specially stated as a ground of demurrer. It cannot be relied on upon a demurrer that the complaint does not state facts sufficient to constitute a cause of action. Palmer *v.* Utah, etc., R. Co., 2 Idaho 290.

3. **Another Precedent.** — In Foster *v.* Wilson, 5 Mont. 53, the demurrer to a complaint to recover possession of real property, among other causes of demurrer, assigned the following: "That it [the complaint] is ambiguous, unintelligible and uncertain in that it contains no adequate description of the land attempted to be brought into controversy sufficient to apprise defendant of the land intended to be claimed or to enable an officer to identify it."

(*Commencing as in Form No. 7105, and continuing down to* *.)

Third. The complaint is ambiguous, unintelligible and uncertain in this:

a. It does not show that the cattle and horses mentioned in the complaint were all the cattle and horses owned by plaintiff and ranging in *Bent* county and *Pueblo* county during the years 1875, 1876 and 1877.

b. It does not appear with sufficient certainty that the taxes assessed against the plaintiff by *Pueblo* and *Bent* counties, and each of them for the years aforesaid, were for the same cattle and horses.

By *Chas. E. Gast*, their Attorney.

IV. TO ALTERNATIVE WRIT OF MANDAMUS.[1]

Form No. 7116.

(Precedent in Burkhart *v.* Reed, 2 Idaho 482.)[2]

[*H. Z. Burkhart, Speaker of the House of Representatives of the Territory of Idaho*, plaintiff, against *Charles H. Reed, Chief Clerk of the House of Representatives of the Territory of Idaho, and Edward J. Curtis, Secretary of the Territory of Idaho*, defendants.][3]	Demurrer to Alternative Writ of Mandate.

1. Consult list of statutes cited *supra*, note 1, p. 365, as well as other statutory provisions in some states expressly providing for demurrers in mandamus proceedings.

In Harwood, etc., R. Co. *v.* Case, 37 Iowa 692, the third and sixth grounds of demurrer to a petition for mandamus to compel county treasurer to collect certain taxes was as follows: "3. The petition does not state facts sufficient to constitute a cause of action, in this: That it does not state that the president or managing director of the *Cedar Falls and Minnesota Railroad Company* has drawn an order on the treasurer, defendant, for the amount of said tax, and that such order has been presented to said treasurer for payment, accompanied with estimates of the engineer in charge of the work on said road, showing that an amount equal to the amount of the tax has been expended by said company in *Floyd* county, in the construction of said road. * * * 6. The petition does not show that the trustees of *Floyd* township have certified to the county treasurer, or township collector, that the *Cedar Falls and Minnesota Railroad Company* has complied with the statute relative to such tax, and is entitled thereto." These grounds of demurrer were expressly sustained on appeal. The demurrer would now, under Iowa Anno. Stat. (1897), § 3562, contain the words "that the facts stated in the petition do not entitle the plaintiff to the relief demanded," followed by particular reasons.

2. **The writ of mandate** to which this demurrer was sustained was upon the application of the speaker of the house of representatives to compel the secretary of the territory to produce a document delivered to him by the clerk of the house, and purporting to be the journal thereof signed by the speaker pro tem., in order that petitioner might make corrections therein, and to receive the corrected journal as the journal of the house. The demurrer was sustained on the ground that no cause of action was stated.

3. A demurrer of this character may be framed for any particular code jurisdiction by using Form No. 7116, *supra*, as a model and referring to Forms Nos. 7085 to 7115, *supra*, for the formal parts. The matter in [ ] is not in the reported case, but has been added to complete the precedent.

Consult also list of statutes cited *supra*, note 1, p. 365.

Now comes the defendant, *Chas. H. Reed*, and demurs to the alternative writ of mandate herein filed, on the grounds that it appears on the face thereof (1) that this honorable court has not jurisdiction of the subject of this proceeding; (2) that the court has no jurisdiction of the person of the defendant in this proceeding; (3) that said *H. Z. Burkhart* has not legal capacity to sue in this proceeding; (4) that there is a misjoinder of parties defendant in that said alternative writ joins this defendant and *Edward J. Curtis*, the *secretary of the territory* and an officer of the *United States*, as defendants; (5) that several causes of action have been improperly united, in that relief is demanded against this defendant on the ground that this defendant has in his possession certain proceedings of the house of representatives of the territory, and another alleged and distinct cause of action is stated against *Edward J. Curtis*, the *secretary of the territory*, on the ground that said *Edward J. Curtis*, as such *secretary*, has possession of said proceedings; (6) that the same does not state facts sufficient to constitute a cause of action, or to entitle said plaintiff to relief by writ of mandamus against this defendant; (7) that the same is ambiguous, unintelligible, and uncertain in this, that it is first averred therein, as a ground of relief against this defendant, that this defendant has in his possession the minutes of the proceedings sought to be reached herein, as a ground of relief against the said defendant *Edward J. Curtis*, *secretary of the territory*; that this defendant has filed said minutes with said *secretary*, as this defendant is required by law to do; and that said *secretary* retains and preserved the same, as he is required by law to do.

[*Jeremiah Mason*, Attorney for Defendant,
Charles H. Reed.][1]

Form No. 7117.[2]

New Jersey Supreme Court.

The State of New Jersey *ex relatione John Doe* against *Richard Roe.*	On Mandamus. Demurrer.

Richard Roe, the said respondent, by *Jeremiah Mason*, his attorney, comes and says that he should not be compelled to enter judgment upon the report of the referees, *Thomas Young* and *Harvey Fleming*, in favor of *John Doe*, for the sum of *two thousand* dollars due upon contract and lawful costs of suit, and to issue execution thereon, as by the annexed writ he, the said *Richard Roe*, is commanded to do, because he says, that the matters contained in the said writ, in manner and form as the same are stated and set forth, are not sufficient in law for the said *John Doe*, the above named relator, to have or maintain his aforesaid writ of mandamus against him, the said respondent, *Richard Roe*; and that he, the said *Richard Roe*, is not

1. See note 1, p. 406, *supra*.

2. **This precedent** is substantially the one given in Jeffery's Law Prec., p. 459.

A demurrer of this chararter may be framed for any particular common-law jurisdiction by using Form No. 7117, *supra*, as a model and referring to Forms Nos. 7085 to 7115, *supra*, for the formal parts.

bound by the law of the land to obey the command of the said writ of mandamus and enter judgment upon the said report of the said referees, and issue execution thereon, as by the said writ he is commanded to do; and the said *Richard Roe*, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the said writ of mandamus, that is to say: That the report of the said referees in the said writ of mandamus mentioned and set forth is of no binding force and effect, because the said referees were not nominated and agreed upon by and between the parties to the said action commenced before the said *Abraham Kent*, one of the justices of the peace as aforesaid, as by the act constituting the court for the trial of small causes they were required to be nominated and agreed upon by and between the said parties; and that the allegation and statements set forth in the said writ are uncertain, and do not authorize the command of the said writ; and the said respondent, *Richard Roe*, prays judgment that the said writ be set aside, and he, the said *Richard Roe*, be relieved from obeying the said command.

Jeremiah Mason, Attorney of Respondent.

(*Affidavit as in Form No. 7010.*)[1]

V. To Information in Nature of Quo Warranto.[2]

Form No. 7118.

(Precedent in State *v.* Brown, 35 Kan. 168.)

[In the *Supreme* Court of the State of *Kansas*.

The State of Kansas, on the relation of A. W. Edgerly, County Attorney, of Coffey County, Kansas, plaintiff,
against
C. O. Brown, a Probate Judge, of Coffey County, Kansas, defendant.
} Demurrer.][4]

1. This demurrer must be accompanied by affidavit as in Form No. 7010.

Demurrer to return to alternative writ of mandamus, omitting the formal parts, may be as follows:

"The petitioner, or plaintiff, in this cause demurs to the return of *Richard Roe*, the defendant in this cause, to the alternative writ of mandamus issued herein, and for demurrer assigns the following grounds: That it appears upon the face of said return that said return does not state facts sufficient to constitute a defense, and does not show any cause or excuse on the part of the said *Richard Roe*, the defendant, for not obeying the said alternative writ of mandamus."

Such a demurrer is proper and is, in fact, often expressly authorized by statute.

Maine.—Rev. Stat. (1883), c. 102, § 17.

Michigan.—How. Anno. Stat. Mich. (1882), § 8664.

Montana.—Code Civ. Proc. (1895), § 1967.

Wyoming.—Rev. Stat. (1887), § 3081.

Consult also list of statutes cited *supra*, note 1, p. 365.

2. Consult list of statutes cited *supra*, note 1, p. 365, as well as other statutory provisions in some states expressly providing for demurrers in quo warranto proceedings.

3. **This demurrer was sustained,** the court holding that the petition, which is set forth at length in the reported case, did not show any ground for declaring that defendant had forfeited his office as county judge. For a more particular statement of the case see State *v.* Brown, 35 Kan. 167.

4. The matter in [ ] is not in the re-

Comes now said defendant, *C. O. Brown*, *probate judge* of *Coffey* county, *Kansas*, and demurs to the petition of the plaintiff filed herein for the following reasons, to wit:

1. This court has no jurisdiction of the subject of the action attempted to be stated in the said petition.

2. Said petition does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against this defendant.

[By *G. E. Manchester*, Defendant's Attorney.][1]

Form No. 7119.[2]

Richard Roe
ads.
The State of New Jersey, *ex relatione John Doe*, relator.

New Jersey Supreme Court.
On Information in Nature of Quo Warranto.

And now, as yet, of the term of *June*, in the year 1*898*, comes the said *Richard Roe*, the defendant, by *Jeremiah Mason*, his attorney, and having heard the said information read to him he says, that the State of *New Jersey* ought not to impeach or implead him, the said

ported case, but has been added to complete the precedent.

A demurrer of this character may be framed for any particular code jurisdiction by using Form No. 7118, *supra*, as a model and referring to Forms Nos. 7085 to 7115, *supra*, for the formal parts.

Another Precedent. — In State *v.* Minton, 49 Iowa 592, the defendant demurred to the information, which information was entitled: "*Charles Gilmore* v. *Jacob Minton*," setting out as grounds of demurrer the following:

"1. The said petition shows upon its face that the plaintiff has no legal capacity to sue, in this, that said action was commenced by a private individual in his own name, as plaintiff, and not as relator, whereas, the said action should have been commenced in the name of the *State of Iowa* as plaintiff on the relation of the said *Charles Gilmore*.

2. That said petition contains no averments showing the facts that this action was brought on the relation of any private individual.

3. That said petition does not contain any averments that the defendant is unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by this state." The court overruled the demurrer and required the cause to be entitled as follows: "State of *Iowa* on the relation of *Charles Gilmore* vs. *Jacob Minton*."

1. See note 4, p. 409, *supra*.

2. *New Jersey.* — Gen. Stat. (1895), p. 2634, § 7.

A demurrer of this character may be framed for any particular common-law jurisdiction by using Form No. 7119, *supra*, as a model and referring to Forms Nos. 7085 to 7115, *supra*, for the formal parts.

The precedent given in the text is substantially the one which is set out in Jeffery's Law Prec., p. 574, and in Besson's Law Prec., p. 323.

Another Precedent. — In State *v.* Gleason, 12 Fla. 246, the following demurrer was filed:

"In the *Supreme* Court,
State of *Florida*.

In the matter of the Information filed by Almon R. Meek, representing himself to be the Attorney-General of the said State,
vs.
William H. Gleason, Lieutenant-Governor, State of Florida.

And now the said defendant, *William H. Gleason*, *Lieutenant-Governor* of the state of *Florida*, *in propria persona*, says that the said information is bad in substance, and for cause of demurrer says that:

First. That the said information is not prosecuted nor instituted as required by the 2d section of Article Six of the Constitution of the State of *Florida*.

Second. That there is no cause of action alleged in the said information sufficient in law to sustain the said prosecution against defendant.

(*Affidavit.*) *W. H. Gleason.*"

Richard Roe, by reason of the premises in the said information above mentioned and specified, because he says that the said information and the matters therein contained are not sufficient in law, and that he need not, nor is he obliged by the law of the land, to answer thereto, and this he is ready to verify; wherefore, and because of the insufficiency of the said information, the said *Richard Roe* prays judgment, and that he may be dismissed and discharged by the court here, of and from the premises above charged upon him, in form aforesaid.

Richard Roe, Defendant.
Jeremiah Mason, Attorney for Defendant.

(*Affidavit as in Form No. 7010.*)

VI. To Indictment.[1]

1. At Common Law.[2]

a. In General.

1. Demurrer in Criminal Cases. — See the following statutes:

Arizona. — Pen. Code (1887), § 1528 *et seq.*, § 1197.

Arkansas. — Sand. & H. Dig. (1894), § 2147.

California. — Pen. Code (1897), § 1004 *et seq.*

Colorado. — Mills' Anno. Stat. (1891), § 1504 *et seq.*

Connecticut. — Gen. Stat. (1888), § 1627 *et seq.*

Georgia. — 3 Code (1895), § 950, and cases cited.

Idaho. — Rev. Stat. (1887), § 7741 *et seq.*

Iowa. — Code (1897), § 5330 *et seq.*

Kentucky. — Bullitt's Crim. Code (1895), §§ 162, 165.

Massachusetts. — Pub. Stat. (1882), c. 214, § 25.

Minnesota. — Stat. (1894), §§ 7291–7301.

Mississippi. — Anno. Code (1892), § 1354.

Missouri. — Rev. Stat. (1889), § 4112.

Montana. — Pen. Code (1895), § 1921 *et seq.*

Nebraska. — Comp. Stat. (1897), §§ 7164, 7167, 7171, 7172.

Nevada. — Gen. Stat. (1885), §§ 4154–4171.

New York. — Code Crim. Proc., § 321 *et seq.* (Birds. Rev. Stat. (1896), p. 1517, § 38).

North Dakota. — Rev. Codes (1895), § 8090 *et seq.*

Ohio. — Bates' Anno. Stat. (1897), § 7251 *et seq.*

Oklahoma. — Stat. (1894), §§ 5118–5126, 5271.

Oregon. — Hill's Anno. Laws (1892), § 1320 *et seq.*

South Dakota. — Dak. Comp. Laws (1887), § 7290 *et seq.*

Texas. — Code Crim. Proc. (1895), art. 558, § 3.

Utah. — Rev. Stat. (1898), §§ 4777–4787.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 6896 *et seq.*

Wyoming. — Rev. Stat. (1887), §§ 3264–3268.

Defects must appear on the face of the indictment in order that a demurrer may lie thereto. Butler *v.* State, 22 Ala. 46; Bass *v.* State, 29 Ark. 143; McRae *v.* State, 71 Ga. 97; State *v.* Briggs, 68 Iowa 420; People *v.* Fredericks, 106 Cal. 554.

2. Rarely Used. — Demurrers in criminal prosecutions are rarely used, as the same advantage may generally be taken in motion of arrest. 2 Rev. Swift's Dig. 424.

Similar to Demurrers in Civil Cases. — Demurrer in criminal cases is similar in all material respects to demurrers in civil cases. 2 Rev. Swift's Dig. 424.

Form No. 7120.

(*Title of court and cause as in Form No. 6969.*)[1]

And the said *John Doe* in his own proper person cometh into court here, and having heard the said indictment (or *information*) read, says that the said indictment (or *information*) and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that he, the said *John Doe*, is not bound by the law of the land to answer the same, and this he is ready to verify; wherefore for want of a sufficient indictment (or *information*) in this behalf, the said *John Doe* prays judgment, and that by the said court he may be dismissed and discharged from the said premises in the said indictment (or *information*) specified.

b. In Common-law States.[2]

(1) General Demurrer.

Form No. 7121.

State of *Maine*.

Kennebec, ss.[3]

Superior (or *Supreme*) Court, *June* Term, 1*898*. No. *97*.

State of Maine against *John Doe*.

And now said respondent comes and defends, etc., when, etc.,[4] and says, that said indictment is insufficient in law.

Wherefore, he prays judgment and that he may be discharged.

By *Jeremiah Mason*, his Attorney.

Form No. 7122.[5]

(*Title of court and cause as in Form No. 7005.*)

And the said *John Doe*, in his own proper person, comes into court here and having heard the said indictment read, says that the said indictment and the matters therein contained in manner and form as the same are above stated and set forth, are not sufficient in law, and that he, the said *John Doe*, is not bound by the law of the land to answer the same, and this he is ready to verify; wherefore, for want

1. **As to the form of demurrer,** at common law, to an indictment, see 1 Chit. Cr. L., p. 440. The form of such demurrer, given in the text in Form No. 7120, is set out in Whart. Prec. (1849), p. 669 (*citing* as authority Archb. Cr. Pl., p. 102).

2. **In the common-law states,** the demurrer to an indictment or information does not differ materially from the demurrer set out in Form No. 7120, *supra*, by the use of which form as a model, referring to Forms Nos. 6995 to 7021, *supra*, for the formal parts, a demurrer for any particular jurisdiction may readily be framed. See also examples of demurrers to indictments given *infra*, Forms Nos. 7121 to 7128. And consult list of statutes cited *supra*, note 1, p. 411.

3. **In Kennebec and Cumberland counties** the superior court has exclusive jurisdiction in criminal cases; in other counties, the supreme judicial court and the superior court have concurrent jurisdiction.

4. **For the significance of "etc."** see vol. 1, p. 24, note 1, p. 184, note 3; vol. 2, p. 109, note 2.

5. *Michigan.* — How. Anno. Stat. (1882), § 9535.

of a sufficient indictment in this behalf, the said *John Doe* prays judgment and that by the court he may be dismissed and discharged from the premises in said indictment specified.

(2) Special Demurrer.

Form No. 7123.[1]

(*Title of court and cause as in Form No. 7000.*)

And the said *John Doe*, in his own proper person, comes into court here (*continuing and concluding as in Form No. 7122; then proceed*

1. See list of statutes cited *supra*, note 1, p. 411.

Precedents. — In Perkins *v.* State, 50 Ala. 155, the demurrer to the indictment assigned the following causes of demurrer: 1st. "that there is no such court as the *Eufaula* City Court"; 2nd. "that said indictment purports to have been found by the grand jury of said court, when an indictment can only be found by the grand jury of the county." It was held in this case, however, that an indictment on its face purporting to have been found by the grand jury of "said court" instead of "said county" is not demurrable on that account, when the caption shows that the grand jury was properly organized.

In Cunningham *v.* State, 49 Miss. 686, to an indictment for an attempt to forge auditor's warrants on the state treasury, the following causes of demurrer were assigned:

"1. Said indictment shows no offense under the statute; does not aver that defendant received said box with knowledge or information of its contents, or that he received the same with intent to fill up said blank warrants and to use said seal thereon in order to forge Auditor's warrants, or to do any illegal act; does not aver any intent to forge such warrants.

2. Such alleged receiving and taking into possession was not an overt act towards the forging of such warrants, within the meaning of the statute.

3. The alleged receiving and possession of said box is not apparently an attempt to forge anything, and there are no averments to show an attempt to forge.

4. An attempt to forge or counterfeit instruments only purporting to be Auditor's warrants is no offense.

5. It is not shown there was any attempt to injure or defraud the State, or any person or corporation.

6. And for other causes," etc. This demurrer was sustained by the supreme court and the indictment quashed.

In People *v.* Gilkinson, 4 Park. Cr. Rep. (Dutchess Oyer & T. Ct.) 28, decided before the adoption of present code, the following demurrer was interposed to an indictment for a misdemeanor in selling spirituous liquors without a license:

"*Dutchess Oyer and Terminer.*

Thomas Gilkinson ads. *The People.* } And the said *Thomas Gilkinson*, by *L. B. Sackett*, his attorney, comes into court here and defends the wrong and injury, and saith that the said indictment, and the matters therein stated and set forth, are not sufficient in law, and that he, the said *Thomas Gilkinson*, is not bound by the law of the land to answer the same; and this he is ready to verify.

Therefore, for want of a sufficient indictment in this behalf, the said *Thomas Gilkinson* prays judgment, and that by the court here he may be dismissed and discharged from the premises in the said indictment specified.

And the said *Thomas Gilkinson* shows to the court here the following causes of demurrer to the said indictment, that is to say: the statement of the alleged offense in the first count in said indictment is in the disjunctive form, and not made with sufficient certainty.

And also, for that there is not in all or any of the counts of the said indictment any offense shown or stated by or for the people, to have or maintain a criminal action against the said *Gilkinson*, inasmuch as the sale of the spirituous and other liquors mentioned and set forth in the said counts, is not a crime or misdemeanor, and is not an indictable offense.

And also, for that it appears by the said indictment that the alleged offenses therein charged, and each and

thus :) And the said *John Doe* assigns the following special causes for demurrer to the said indictment, and to each and every count therein, as follows, to wit: (*specifying particularly the grounds of demurrer in numbered paragraphs, if more than one grouna*).

John Doe.

2. Under the Codes and Practice Acts.[1]

every of them, were committed since the finding of the said indictment, and that the presentment of the said *Gilkinson* was made before the commission of the alleged offenses, or either of them. And also that the said indictment is in other respects uncertain, informal and insufficient.

L. B. Sackett,
Attorney for *Gilkinson.*"

In People *v.* Fish, 4 Park. Cr. Rep. (Buffalo Super. Ct.) 209, also decided before the adoption of the code, the demurrer book contained the following demurrer to an indictment for buying, and receiving, and storing grain for hire by false weights in the exercise of defendant's business as a warehouseman:

"And hereupon, the said *James M. Fish* appears in his own proper person, in the said *Superior* Court of *Buffalo*, before the justices thereof, on the *second* day of *October*, 1854, and the said *Albert Sawin*, who prosecutes for said People, also comes and brings into the said court the said bill; and the said *James M. Fish* prays that the same may be read to him; and it is read to him; and thereupon the said court orders that said bill be filed in said *Superior* Court, and it is done accordingly.

And the said *James M. Fish* is thereupon ordered by said court to answer said bill, and he answers the same accordingly, and says that there is no such court as the *Superior* Court of *Buffalo*, which, by the laws of this State, can or ought to take cognizance of the said bill and the matters therein alleged.

And he also says, that if the said court can or ought to take cognizance of the said bill and the matters therein alleged, then, he says, that said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he, the said *James M. Fish*, is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore, for want of sufficient authority in this behalf, and for want of a sufficient indictment in this behalf, the said *James Fish* prays judgment, and that the court here may not take cognizance of said bill, and that he may be dismissed and discharged by said court, from the said premises in said indictment specified." The demurrer to the indictment was sustained and judgment given for the defendant.

1. Form of a demurrer to an indictment is in all material respects similar to a demurrer to a complaint. State *v.* Barrett, 54 Ind. 436.

The demurrer to an indictment for any particular jurisdiction may be framed by using Form No. 7124, *supra*, as a model and referring to Forms Nos. 7085 to 7115, *supra*, for the formal parts. See also list of statutes cited *supra*, note 1, p. 411. And consult also forms of demurrers to indictments given *infra* in Forms Nos. 7125 to 7128.

Illustrations and Precedents. — In *Arkansas* (Sand. & H. Dig. (1894), § 2147), it is provided that the entry on the record of the demurrer may be substantially in the following form: "That defendant demurs to the indictment."

At page 1667, Sand. & H. Dig. (1894), the following form of demurrer is given:

"*State of Arkansas*, plaintiff, }
against }
John Smith, defendant. }

The defendant demurs to the indictment." See also §§ 2131 to 2140; see also State *v.* Kirkpatrick, 32 Ark. 117; Cooper *v.* State, 37 Ark. 412; State *v.* Gill, 33 Ark. 129; State *v.* McMinn, 34 Ark. 160.

In State *v.* Baumon, 52 Iowa 69, the demurrer to the indictment, omitting the formal parts, was as follows: "And now comes the said defendant and demurs to the indictment herein found, because the instrument set forth in the indictment does not purport to create any legal liability, and the forgery thereof or uttering the same does not

Form No. 7124.[1]

Supreme Court, *Suffolk* County.

The People of the State of New York
against
John Doe.

The defendant *John Doe*, above named, demurs to the indictment presented by the last grand jury, on the *tenth* day of *June*, 1*898*, charging him with the crime of *arson*, on the following grounds:

First. That the crime set forth in the indictment was committed in the county of *Albany*, and was not within the jurisdiction of this court.

Second. The facts stated in said indictment do not constitute a crime.

Wherefore this defendant asks judgment of the court that he be dismissed and discharged from the said premises specified in the said indictment.[2]

Dated at *Riverhead*, *first* day of *October*, 1*898*.

Jeremiah Mason, Attorney for Defendant.

constitute a crime under the laws of the state of *Iowa*." The demurrer was sustained in the lower court, but on appeal by the state the court said: "The demurrer does not point out specifically the objections urged to the form of the instrument or order, and there is no argument for the appellee."

Form of demurrer to an indictment, omitting the formal parts, is given in Kelly's Crim. L. (Mo.), p. 134, substantially as follows: "And the said *John Doe*, in his own proper person, comes into court, and having seen and heard read the indictment herein, says that the said indictment and facts therein contained and stated are not sufficient in and do not constitute any offense under the laws of the state of *Missouri*, and that he, the defendant, is not bound to answer the said indictment because he, the defendant, says (*setting out specifically the grounds of objection to the indictment*). Wherefore, the defendant prays judgment and that by the court he may be dismissed and discharged from the premises in said indictment specified."

In State *v.* Harris, 12 Nev. 417, the demurrer to an indictment for murder in the second degree, omitting the formal parts, was as follows: "Now comes said defendant and demurs to the indictment herein upon the grounds: First, The facts charged therein do not constitute a public offense; Second, It does not substantially conform to the requirements of sections 234 and 235 of the Criminal Practice act. In that part of the indictment which charges the shooting, the technical word assault is not used, and the offense is not substantially charged nor directly charged as in section 235, but argumentatively and inferentially alone. In the latter part of the indictment there is no direct charge of any offense, and no charge at all of any offense. The words used, to wit: 'So the grand jury aforesaid do say,' etc., are not sufficient to charge the defendant with any crime. Said indictment is a mongrel between a statutory and a common-law indictment, and is not sufficient in form or substance for either. It nowhere alleges that the defendant did, without authority of law and with malice aforethought, kill the deceased, either in form or substance." The court held the demurrer to be utterly baseless and trivial.

For substance of another demurrer to indictment see Patswald *v.* U. S., 5 Okla. 351.

1. N. Y. Code Crim. Proc., § 321 *et seq.* (Birds. Rev. Stat. (1896), p. 1517, § 38). See also list of statutes cited *supra*, note 1, p. 411.

2. Grounds of Demurrer.—Defendant may demur to the indictment if it appears upon the face thereof: 1. That the grand jury by which it was found had no local authority to inquire into the crime charged by reason of its not being within the local jurisdiction of the county; or 2. That the indictment does not conform substantially to the requirements of the statute; or 3. That

Form No. 7125.[1]

(Precedent in State *v.* Barker, 28 Ohio St. 585.)[2]

The State of Ohio
v.
Wm. B. Barker. } *Manslaughter.*

The defendant now comes, and, by leave of the court, files his demurrer to the indictment presented herein against him, and for cause of demurrer he shows:

1. Said indictment is double.

2. Said indictment does not sufficiently charge any offense punishable by the laws of the State of *Ohio.*

3. Said indictment is insufficient in law to require this defendant to answer thereto in this, to wit: Said indictment charges the crime of *manslaughter* to have been committed in the perpetration of an unlawful act, which act, when death ensues therefrom, is made punishable in a particular manner by a certain term of confinement in the penitentiary, which is different from the time of imprisonment provided by the statute for the imprisonment for the crime of *manslaughter.* The defendant therefore prays the judgment of the court whether he be required to answer unto said indictment, and that the same may be quashed, and that he may go hence without day.

By *Loudon & Young,*
White, Biehn & Waters,
His Attorneys.

Form No. 7126.[3]

The State of Texas
against
John Doe. } No. *102.*
In the *District* Court of *Freestone* County,
Texas, September Term, A. D. 1*898.*

more than one crime is charged in the indictment; or 4. That the facts stated do not constitute a crime; or 5. That the indictment contains matter which, if true, would constitute a legal justification or excuse for the acts charged or other legal bar to the prosecution. N. Y. Code Crim. Proc., § 323 (Birds. Rev. Stat. (1896), p. 1517, § 40). See also list of statutes cited *supra,* note 1, p. 411.

Must distinctly specify grounds of objection to the indictment. N. Y. Code Crim. Proc., § 324 (Birds. Rev. Stat. (1896), p. 1517, § 40); People *v.* McCarthy, 110 N. Y. 314. See also list of statutes cited *supra,* note 1, p. 411.

Specification of demurrer to indictment is sufficient where it is stated that the indictment "does not substantially conform to the requirements of sections 150 and 151 of the code of procedure in criminal cases as to the offense charged and the particular circumstances." People *v.* Hill, 3 Utah 334.

Must be in writing, and signed either by the defendant or his counsel. N. Y. Code Crim. Proc., § 324 (Birds. Rev. Stat. (1896), p. 1518, § 41). See also list of statutes cited *supra,* note 1, p. 411; People *v.* Hill, 3 Utah 354; McGarr *v.* State, 75 Ga. 158; Wimbish *v.* State, 70 Ga. 718; State *v.* Risley, 72 Mo. 610; Lampkin *v.* State, 87 Ga. 524.

1. *Ohio.* — Bates' Anno. Stat. (1897), § 7251 *et seq.* See also list of statutes cited *supra,* note 1, p. 411.

2. This demurrer was sustained in the lower court, but the exceptions by the prosecuting attorney were sustained by the supreme court holding that the indictment, to which the demurrer was intervened, was a good indictment for manslaughter, and it was ordered to sustain the demurrer.

3. *Texas.* — Code Crim. Proc. (1895), art. 558 *et seq.* See also list of statutes cited *supra.* note 1, p. 411.

Now comes the defendant, *John Doe*, and excepts to the form of indictment herein because (*setting out specifically objections to the indictment*).[1]

John Doe, Defendant.

Form No. 7127.[2]

(*Title of cause as in Form No. 7126.*)

In the *County* Court of *Freestone* County, *Texas*. *September* Term, A. D. 1*898*.

Now comes the defendant, *John Doe*, and excepts to the form of the information herein, because (*setting out specifically the objections to the information*).

Jeremiah Mason, Attorney for *John Doe*, Defendant.

Form No. 7128.

(Precedent in U. S. *v.* Waddell, 112 U. S. 81.)[3]

United States *v.* *David Waddell et als.* } No. *959*.

1. **Exceptions** to the indictment or information may be either to the substance or the form. Texas Code Crim. Proc. (1895), art. 558, § 3.

Exceptions to Substance. — There is no exception to the substance of an indictment or information, except:

1. That it does not appear from the face of the same that an offense against the law was committed by the defendant.

2. That it appears from the indictment or information that a prosecution for the offense is barred by a lapse of time or that the offense was committed after the finding of the indictment.

3. That it contains matter which is a legal defense or bar to the prosecution.

4. That the indictment or information shows upon its face that the court trying the case had no jurisdiction thereof. Texas Code Crim. Proc. (1895), art. 564.

Exception to the form of an indictment or information may be taken for the following causes only:

1. That the indictment or information does not appear to have been presented in the proper court, as required by article 439 or 466.

2. The want of any other requisite or form prescribed by articles 439 and 466, except the want of the signature of the foreman of the grand jury or, in the case of an information, of the signature of the attorney representing the state. Texas Code Crim. Proc. (1895), art. 565.

Shall be in Writing. — Exceptions to the indictment or information shall be in writing. Texas Code Crim. Proc. (1895), art. 566.

2. *Texas.* — Code Crim. Proc. (1895), art. 558 *et seq.* Consult annotations to Form No. 7126, *supra*.

3. **This was a demurrer to an information** charging a conspiracy to violate a law of the United States. The case arose on a criminal information filed by the district attorney of the United States for the Eastern District of Arkansas in the circuit court for that district. Upon the demurrer the judges of the circuit court were divided in opinion on the first three grounds assigned in the demurrer, and certified the case to the supreme court, as follows:

1. Whether section 5508 is constitutional.

2. Whether the information charged any offense under § 5508, or against any statute of the United States.

3. Whether the demurrer was well taken and should be sustained.

The first and second questions were answered affirmatively. As to the third question, namely, whether the case can be prosecuted by information, the case was remitted to the circuit court that the question might there be raised in an appropriate manner.

Come the defendants, by their attorney, and demur to the information herein filed against them, and for cause thereof say:

1st. The matters and things alleged therein do not constitute any offense against the laws or sovereignty of the United States.

2nd. Said information does not allege any offense of which this court has jurisdiction.

3d. Because said section 5508, so far as it may attempt to impose penalties and inflict punishment for the lawlessness and violence set forth in said information, is in violation of the constitution of the United States, and void.

4th. And because said information is in other respects informal, is insufficient and defective.

Wherefore said defendants pray judgment of said information, and that the same may be quashed, etc.

Joseph W. Martin, Att'y for Def'ts.

VII. To Plea.

1. In General.

a. Plea in Abatement.

(1) General Demurrer.

Form No. 7129.[1]

(2 Chit. Pl., p. 727.)

In the *King's Bench.*

Trinity Term, *51 Geo. III.*

And the said plaintiff saith, that the said plea of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to quash the said bill (or *writ*) and that the said plaintiff is not bound by the law of the land to answer the same. And this he is ready to verify. Wherefore, for want of a sufficient plea in this behalf, the said plaintiff prays judgment, and that the said defendant may answer further to the said declaration, etc.

1. **As to the form of this demurrer,** and the joinder thereto, see 2 Saund. 210*b*, 210*f*, 210*g*, notes, 211, note (3).

General demurrer to a plea in abatement should state that it is not sufficient to quash the bill, or writ, and conclude with a prayer of judgment that defendant may answer over, or further, to the declaration. 1 Chit. Pl., p. 698.

Under the Hilary Rules. — The following form of demurrer to a plea in abatement was prescribed in *England* by rules of court of Hil. T. 4 Wm. IV. See Stephen's Pl., p. 56:

(*Title of court, etc.*) "And the plaintiff says that the said plea of the defendant, and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to quash the said writ and that he, the plaintiff, is not bound by law to answer the same, and this he is ready to verify. Wherefore, for want of a sufficient plea in this behalf the plaintiff prays judgment and that the defendant may answer further to the said declaration, etc."

If the demurrer be special, the introduction to the causes of demurrer will be the same as in the special demurrer to a plea in bar. 2 Chit. Pl., p. 727, note (b). See Form No. 7135, *infra.*

(2) Special Demurrer.

(a) *For Beginning "And the Said Richard Roe" when No Such Person Named in Declaration.*

Form No. 7130.

(3 Chit. Pl., p. 570.)[1]

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) For that by the said declaration it appears, that the said plaintiff hath brought his action against *Robert Roe* and no such person as *Richard Roe* is mentioned in the said declaration, and yet the said plea begins with these words, "And the *said Richard Roe*," which is wholly repugnant to the said declaration; and for that the said plea is not any answer to the said declaration, and is wholly uncertain, etc.

(b) *For Not Concluding to the Country.*

Form No. 7131.

(3 Chit. Pl., p. 571.)

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) For that the said defendant hath not concluded his said plea by putting himself upon the country, etc.

(c) *For Pleading Variance from Original Writ. Without Craving Oyer, etc.*

Form No. 7132.

(3 Chit. Pl., p. 570.)

(*Commencing as in Form No. 7135, and continuing to *; then proceed*

1. Precedent. — In Jackson *v.* Ford, 3 Wils. 413, to a plea in an action on the case plaintiff interposed the following demurrer: "And the said *John Jackson* as to the plea of the said *Harriot Ford* by her above pleaded in bar says, that the said plea, and the matters therein contained, are insufficient in law to bar the said *John* from having his aforesaid action thereof maintained against her the said *Harriot Ford*; to which said plea in manner and form as the same is above made and set forth, he the said *John*, is under no necessity nor in any wise bound by the law of the land to answer, and this he is ready to verify; wherefore, for want of a sufficient plea in this behalf, he the said *John* prays judgment, and his damages by him sustained on occasion of the not performing the said several promises and undertakings in the said declaration mentioned to be adjudged to him, etc., and for causes in demurrer in law in this behalf, according to the form of the statute in such case made and provided, he, the said *John* sets down and shows to the court here the causes following, that is to say, for that by the said declaration it appears that the said *John* hath brought his action against *Harriot Ford*, and no such person as *Ann White* is mentioned in said declaration, and yet the said plea begins with these words, 'And the said *Ann White*,' which is wholly repugnant to the said declaration, and for that the said plea is not any answer to the said declaration, and is wholly uncertain, insufficient, dubious, and informal," etc.

thus:) For that the said *John*, otherwise *Nathan George*, in the beginning of his said plea prayed judgment of the original writ aforesaid, although he hath thereby alleged a matter supposed to be apparent on the face of the said original writ, to wit, that the said original writ was sued out against him by the name of *John Long* only, and not by the names of *John*, otherwise *Nathan George Long*; and also for that the said *John*, otherwise *Nathan George*, hath in and by his said plea alleged a supposed variance between the original writ and declaration aforesaid, without craving oyer of the said original writ, or setting forth the same; and also for that the said plea is double, in this, to wit, that the said *John*, otherwise *Nathan George*, hath thereby alleged a supposed variance between the original writ and declaration aforesaid; and also that he is not nor at the time of suing the said original writ of the said *Jonathan*, was or ever before had been called or known by the christian name of *John*; and also for that the said *John*, otherwise *Nathan George*, hath not in or by his said plea stated or alleged his real name, so as to give the said *Jonathan* a better writ against him the said *John*, otherwise *Nathan George*; and also for that the said *John*, otherwise *Nathan George*, hath not in or by his said plea denied, but hath admitted that he is called and known by the name of *Nathan George Long* as by the said declaration is above supposed; and also, etc.

(*d*) *To Plea of Misnomer.*

Form No. 7133.

(3 Chit. Pl., p. 570.)[1]

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) For that the said *Richard* by his plea aforesaid, hath admitted himself to be the person named the defendant in and by the aforesaid bill and declaration of him the said plaintiff; and also for that the said plea is in other respects informal and insufficient.

b. Plea in Bar in Assumpsit.

(1) General Demurrer.

1. **Precedent.** — In Roberts *v.* Moon, 5 T. R. 487, to a plea of abatement in an action of assumpsit, alleging as follows: "And the said *Richard*, against whom the said *R. Roberts* hath exhibited his said bill by the name of *Robert*, in his own proper person, comes and pleads that he was baptised by the name of *Richard*, and has always been called by that name, traversing that he was called by the name of *Robert*," etc. The plaintiff interposed a special demurrer, and assigned for cause that "The said *Richard* by his plea aforesaid admitted himself to be the person named the defendant in and by the aforesaid bill and declaration of him the said *Robert*," etc. In this cause it was held that in a plea in abatement a misnomer of the defendant beginning "And the said *Richard* sued by the name of *Robert*" is bad.

Form No. 7134.

(2 Chit. Pl., p. 727.)

In the *King's Bench.*

Trinity Term, *51 Geo. III.*

And the said plaintiff, as to the said plea of the said defendant, by him (*secondly*) above pleaded, saith that the same, and the matters therein contained, in the manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him the said plaintiff from having or maintaining his aforesaid action thereof against the said defendant, and that he the said plaintiff is not bound by law to answer the same. And this he the said plaintiff is ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment and his damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be judged to him, etc.

(2) Special Demurrer.

(*a*) *Generally.*

Form No. 7135.

(2 Chit. Pl., p. 727.)

(*Commencing and concluding as in Form No. 7134 to the end, and proceed thus:*) And the said *John Doe*, according to the form of the statute in such case made and provided, states and shews to the Court here the following causes of demurrer to the said *second* plea, that is to say,* that, etc. (*Here set out the causes, and conclude thus:*) And also that the said *second* plea is in other respects uncertain, informal and insufficient, etc.

(*b*) *For Pleading Double.*

Form No. 7136.

(3 Chit. Pl., p. 572.)

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) For that the said pleas are double, and contain a two-fold answer to the said declaration, in this, to wit, that the said defendant hath thereby pleaded and alleged, that he did not undertake and promise in manner and form as the said plaintiff hath above thereof complained against him, and also the several causes of action in the said declaration mentioned, did not nor did any of them, accrue to the said plaintiff at any time within *six* years next before the date of the said plaintiff's issuing out his original summons in this behalf; and also, etc.

(*c*) *For Pleading "Non Assumpsit Infra Sex Annos" Instead of "Actio Non Accrevit Infra," etc.*

Form No. 7137.

(3 Chit. Pl., p. 571.)[1]

(*Commencing as in Form No. 7135 to *; then proceed thus:*) That although the said cause of action, in the said first count of the said declaration mentioned, did not accrue upon the making of the said promise and undertaking in that count mentioned; yet nevertheless the said defendant hath pleaded that he did not undertake or promise, within *six* years next before the suing out of the original writ of the said plaintiffs, instead of pleading that the said cause of action of the said plaintiffs did not accrue to them within that time; and also, etc.

(*d*) *That Plea Amounts to General Issue.*

Form No. 7138.

(3 Chit. Pl., p. 571.)

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) For that the said last-mentioned plea, in manner and form as the same is above pleaded, amounts to the general issue, and tends to great and unnecessary prolixity of pleading; and also for that the said defendant hath not, in or by his said last plea, alleged or shewn any matter of fact in avoidance of the said agreement, or the said promise and undertaking of the said defendant in the said first count of the said declaration mentioned, but that the said last-mentioned plea consists altogether of matter of law, upon which no apt or material issue can be taken, etc. And as to the said plea of the said defendant, by him thirdly above pleaded, as to the said second count of the said declaration, and the said promise and undertaking in that count mentioned, the said plaintiff saith (*same as demurrer to the last plea.*) (*Demurrer to fourth plea the same as that to the second, to the end, and then proceed:*) And also for that the said defendant hath, in and by his said last-mentioned plea, supposed that the several sums of *£500* and *£350* were and are mentioned in said count as intended to be respectively paid by the said *Edward Frost* and the said defendant to the said plaintiff in the event in that behalf aforesaid, when, in truth and in fact, no sum of £—— was or is mentioned in the said count, nor any sum of money whatsoever, etc.

1. **The like demurrer in another form** is given in 3 Chit. Pl., p. 572, as follows: "That although the said causes of action in the said first, second, and third counts mentioned, did not arise or accrue upon the making of the promises and undertakings in those counts mentioned, but on contingencies and on the happening of events which occurred after the making of the said promises and undertakings; yet the said defendant, in and by his said plea, states, that he the said defendant did not, at any time within *six* years next before the exhibiting of the bill of the said plaintiff in this behalf, undertake or promise in manner and form as he the said plaintiff hath above thereof complained against him, instead of pleading as to the said first, second, and third counts, that the causes of action therein mentioned, did not accrue within *six* years."

(*e*) *To Plea of Nil Debet.*

Form No. 7139.

(3 Chit. Pl., p. 571.)

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) For that the said defendant hath not, in or by his said plea, confessed and avoided, or traversed and denied the making of the several promises and undertakings in the said declaration mentioned; and also for that the said plea is inartificially pleaded, and in other respects uncertain, etc.

c. Plea in Bar in Case.

(1) In General.

Form No. 7140.

(2 Chit. Pl., p. 728.)

(*General or special demurrer as in Forms Nos. 7134 and 7135, except as to the prayer of judgment, which is as follows:*) Prays judgment and his damages by him sustained on occasion of the committing of the said grievances to be adjudged to him, etc.

(2) To Two Pleas to Special Action for Nonperformance of Agreement.

Form No. 7141.

(3 Chit. Pl., p. 571.)[1]

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) That the defendant has not by his plea traversed or denied, or attempted to put in issue any matter of fact alleged by the plaintiffs, but has introduced, and attempted to put in issue, matters of fact not alleged, nor necessary to be alleged; and that the plea is no answer to the said first count, but evasive and argumentative, etc.

d. Plea in Bar in Covenant.

(1) In General.

Form No. 7142.

(2 Chit. Pl., p. 728.)

(*General or special demurrer as in Forms Nos. 7134 and 7135, except*

1. **Precedent.** — In Jones *v.* Barkley, 2 Doug. 685, to a plea in a special action on the case for the nonperformance of an agreement, the plaintiff demurred and showed for cause in the demurrer to the plea to the first count. "that the defendant had not, by his plea, traversed, or denied, or admitted to be in issue any matter of fact alleged by the plaintiff, but had introduced and admitted to put in issue matters of fact not alleged nor necessary to be alleged, and that the plea was no answer to the said first count, but evasive and argumentative;" and the same to the plea to the second count.

as to the prayer of judgment, which is as follows:) Prays judgment and his damages by him sustained, on occasion of the said breach of covenant, in the said declaration mentioned to be adjudged to him, etc.

(2) For Being Double and Not Concluding with Verification.

Form No. 7143.

(3 Chit. Pl., p. 571.)

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) That the said fourth plea, in manner and form as the same is above pleaded, is double, in this, to wit, that two several and distinct breaches of covenant are thereby pleaded in bar of the said action of the said plaintiff; and also that the said fourth plea contains several and distinct matters of defense; and also that the said plaintiff cannot take or offer any certain issue upon the said fourth plea; and also that the same fourth plea ought to have concluded to the country, and not with a verification, etc.

(3) For Tendering Immaterial Issues.

Form No. 7144.

(3 Chit. Pl., p. 574.)

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) For that the said defendant hath, in and by his said plea, put in issue a matter of inference from the fact before alleged; and for that the said defendant hath, in and by his said plea, offered to put in issue a matter not properly issuable, and for that the said defendant hath not, in and by his said plea, denied, confessed, or avoided the substantial matter in the said breach of covenant above alleged; and for that the said plea is in various other respects informal, etc.

e. Plea in Bar in Debt.

(1) In General.

Form No. 7145.

(2 Chit. Pl., p. 728.)

(*General or special demurrer as in Forms Nos. 7134 and 7135, except as to the prayer of judgment, which is as follows:*) Prays judgment and his debt aforesaid, together with his damages by him sustained, on occasion of the detention thereof to be adjudged to him, etc.

(2) For Not Setting Forth Articles of which Defendant Pleaded General Performance, etc.

Form No. 7146.

(3 Chit. Pl., p. 574.)[1]

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) For that the condition of the said writing-obligatory refers to certain articles of agreement to be performed by the said defendant, for the performance of which the said writing-obligatory is made and conditioned, but the said defendants have not in their said plea set forth the said articles of agreement, though they have pleaded performance of the matters therein contained generally, but only so much thereof as is recited in the said condition; and also for that the said articles of agreement, for anything which appears to the court, might contain negative or disjunctive covenants, to which performance cannot be pleaded generally; and also for that articles of agreement, not before the court, or in any manner set out in the said plea of the said defendants, or in the record, cannot by law be pleaded against a bond for securing the performance of such articles, etc.

(3) For Pleading Nil Debet to Debt on Bond.

Form No. 7147.

(3 Chit. Pl., p. 573.)

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) That although the said plaintiff in his declaration hath demanded of and from the said defendant a sum certain due to him to the said plaintiff from the said defendant, by virtue of a writing-obligatory under his seal; yet the said defendant hath not in or by his plea denied the said writing-obligatory to be his deed, nor in any manner shewn himself to be discharged therefrom; and also for that the defendant should have pleaded that the said writing-obligatory was not his deed, and not that he did not owe the debt demanded; and also for that although the said plaintiff hath demanded the sum of £——, yet the defendant hath only pleaded to the said sum of £——, above demanded, and hath not traversed, denied, confessed, or avoided the action of the said plaintiff, as to the residue of the said sum of £——; and also, etc.

1. **Precedent.** — In Kerry *v.* Baxter, 4 East 340, to a plea in an action of debt on a bond, there was a demurrer assigning for special causes, "that the condition of the said writing-obligatory refers to certain articles of agreement to be performed by the defendant *Baxter*, for the performance of which the said writing-obligatory is made and conditioned; but the defendants have not in their plea set forth the said articles of agreement, though they have pleaded performance of the matters therein contained generally: but only so much thereof as was recited in said condition. And also for that the said articles of agreement for anything which appears to the court might contain negative or disjunctive covenants, to which performance cannot be pleaded generally. And also for that articles of agreement not before the court, or in any manner set out in the plea of the defendants, or in the record, cannot by law be pleaded against a bond for securing the performance of such articles."

(4) To Plea Nul Tiel Record.

Form No. 7148.

(3 Chit. Pl., p. 574.)

(*Commencing as in Form No. 7135, down to *; then proceed thus:*) For that the said defendants have not, in or by their said plea, denied that there is any such record of the recovery against them the said defendants, at the suit of the said plaintiff, remaining in the said court of our said lord the king, before the king himself, as in and by the said first count of the said declaration is above in that behalf alleged; and also for that the said plea, although it professes to be and contain an answer to the second count thereof, yet it in truth contains no answer thereto, etc.

(5) To Plea of Non Assumpsit to Debt on Simple Contract.

Form No. 7149.

(3 Chit. Pl., p. 573.)

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) For that the said defendant hath not, in or by his said plea, confessed and avoided, or traversed or denied, that he owes to the said plaintiffs the said sum of £——, above demanded, or any part thereof; and also for that the said defendant hath, in and by each of his said pleas, tendered an immaterial issue; and also for that the said pleas, although they profess to be and contain an answer to the whole of the said declaration, do not, in truth, contain any answer to the same; and also for that the said pleas are pleaded as if the said declaration had been a declaration on promises, whereas the same is a declaration in debt; and for that the first of the said pleas denies that the said defendant did undertake or promise, instead of denying that the said defendant was indebted to the said plaintiffs; and for that the second of the said pleas states, that the said defendant was ready and willing to pay the said sum of £——, therein mentioned, from the time of making the several promises and undertakings in the said declaration mentioned, as to the said sum of £—— instead of stating that he was ready and willing from the time of his becoming indebted to the said plaintiffs in manner and form as the said plaintiffs have in their said declaration complained against him, etc.

f. Plea in Bar in Replevin.

(1) To an Avowry or Cognizance.

Form No. 7150.

(2 Chit. Pl., p. 728.)

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) And the said *John Doe* saith that the said avowry (or *cognizance*) of the said *Richard Roe* and the matters therein contained, in manner and form as the same are above pleaded and set forth, are

not sufficient in law for the said *Richard Roe* to avow or acknowledge the taking of the said cattle, in the said declaration above mentioned, in the said place in which, etc., to be just; and that he the said *John Doe* is not bound by the law of the land to answer the same, and this he the said *John Doe* is ready to verify; wherefore he prays judgment and his damages, by reason of the taking and unjustly detaining of the said cattle to be adjudged to him, etc.

(2) For that Defendant Avows Taking, but States Another Locus in Quo, etc.

Form No. 7151.

(3 Chit. Pl., p. 575.)

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) For that the said avowry avows the taking of the said mare, and yet varies from the declaration of the said *John Doe* in relation to the place of taking, whereas, by the laws of this realm, if the said *Richard Roe* would have denied the place of taking mentioned in the declaration, he should have pleaded the same, by way of plea, in abatement to the said declaration, and then made a suggestion for having a return of the said mare; and also for that the said *Richard Roe* avows the taking of the said mare upon a possessory title only of the place wherein he alleges the same was taken; and for that the said avowry is no answer to the said declaration, nor does it in any way admit or deny the same; and is pleaded in bar, which is wholly repugnant, etc.

g. Plea in Bar in Trespass.

(1) In General.

Form No. 7152.

(2 Chit. Pl., p. 728.)

(*General or special demurrer as in Forms Nos. 7134 and 7135, except as to the prayer of judgment, which is as follows:*) Prays judgment and his damages by him sustained, on occasion of the committing of the said trespasses to be adjudged to him, etc.

(2) That Plea Amounts to General Issue, etc.

Form No. 7153.

(3 Chit. Pl., p. 574.)

(*Commencing as in Form No. 7135, and continuing to *; then proceed thus:*) That the said plea amounts to the general issue; and for that the said defendant, in and by his said plea, hath attempted to put in issue, to be tried by a jury, a matter of right, that is, what sort of wood the said defendant had a right to cut or take for the making, maintaining, and supporting of the said fences in the said plea mentioned; and for that the said defendant hath not in his said plea set

forth what sort of wood he the said defendant had a right to cut or take for the purpose in the said plea mentioned; and for that he hath not in his said plea set forth that no such sort of wood was on the said premises, nor hath he set forth what the custom of the country is with respect to the making, maintaining, and supporting of the said fences in the said plea mentioned, or any custom relating thereto; and for that the said defendant hath not set forth in his said plea any request to the said plaintiff to assign proper wood for the purpose in the said plea mentioned; and for that the said plea is in other respects multifarious, defective, etc.

2. In Common-law States.[1]

1. In Common-law States.—Some states follow strictly the procedure and practice at common law.

Delaware.—See Forms Nos. 7129 to 7153, *supra*, and notes to Form No. 6995, *supra*.

Illinois.—See Forms Nos. 7129 to 7153, *supra*, Form No. 7157, *infra*, and notes to Form No. 7000, *supra*.

Michigan.—See Forms Nos. 7129 to 7153, *supra*, Form No. 7155, *infra*, and notes to Form No. 7005, *supra*.

Mississippi.—See Forms Nos. 7129 to 7153, *supra*, and notes to Form No. 7007, *supra*.

New Hampshire.—See Forms Nos. 7129 to 7153, *supra*, Forms Nos. 7156, 7158, *infra*, and notes to Form No. 7008, *supra*.

New Jersey.—See Forms Nos. 7129 to 7153, *supra*, Forms Nos. 7154, 7159, *infra*, and notes to Form No. 7009, *supra*.

Vermont.—See Forms Nos. 7129 to 7153, *supra*, and notes to Form No. 7017, *supra*. The form of a demurrer to a plea is exactly the same as that to a declaration, except that it alludes throughout to the plea instead of to the declaration. Aiken's Prac. F., p. 302.

In other states, where by statute or rule of court the procedure and forms of pleading have been more or less simplified or modified, the form of a demurrer to a plea does not differ materially from that to a declaration, except that it alludes throughout to the plea instead of to the declaration.

Alabama.—Civ. Code (1886), § 2690. Consult Form No. 7086, *supra*.

District of Columbia.—Com. Law Rules, No. 28. See Form No. 6996, *supra*.

Florida.—Rev. Stat. (1892), § 1053; Prac. Act, § 36. See Form No. 6997, *supra*.

Georgia.—2 Code (1895), § 5050. See Form No. 7089, *supra*.

Maine.—See Form No. 7161, *infra*.

Maryland.—See Form No. 7002, *supra*.

Massachusetts.—Pub. Stat. (1882), c. 167, § 12, providing that plaintiff may demur to the answer on the following ground: That it does not state a legal defense to the declaration or to some count thereof, as the case may be, substantially in accordance with the rules contained in c. 167. See Form No. 7003, *supra*.

Pennsylvania.—See Form No. 7013, *supra*.

Rhode Island.—Gen. Laws (1896), c. 239, § 16. See Form No. 7160, *infra*.

Tennessee.—Code (1896), § 4655 *et seq.* See Form No. 7016, *supra*.

Virginia.—Code (1887), § 3271. See Form No. 7019, *supra*.

West Virginia.—Code (1891), c. 125, § 28. See Form No. 7020, *supra*.

Federal Courts.—U. S. Rev. Stat., § 914. See Form No. 7021, *supra*.

Precedents.—In Parker *v.* Providence, etc., Steamboat Co., 17 R. I. 379, the demurrer, omitting formal parts, was as follows: "And the said plaintiff as to the first plea, or plea of settlement of said cause of action, comes, etc., when, etc., and says: That the said plea and the matter therein contained, in manner and form as therein set forth, are not sufficient in law for a bar to said action and the said plaintiff is not bound by law to answer the same, because said right of action is given to said plaintiff in her said capacity, as a representative of her children as well as herself, and is not included in the powers given by statute to administrators to compromise claims such as appear in favor of ordinary estates, and is such a claim as cannot

a. In General.

Form No. 7154.[1]

Morris County *Circuit* Court.

John Doe against *Richard Roe.* } *On Contract.* Demurrer to Plea.

And the said plaintiff as to the defendant's (*first*) plea says that the same is not sufficient in law (or *that the same is bad in substance*), wherefore he prays judgment, etc.

Oliver Ellsworth, Attorney for Plaintiff.

b. To Plea in Abatement.[2]

Form No. 7155.[3]

The *Circuit* Court for the County of *Lenawee.*

John Doe against *Richard Roe.* }

And the said plaintiff says that the said plea of the defendant, and the matters therein contained (*concluding as in one of Forms Nos. 7129* to *7133*).

Form No. 7156.[3]

Sullivan, ss.

Horace Hopkins v. *Shadrack Shacklebury.*

And the said plaintiff says that the said plea of the said defendant is not sufficient in law to quash his said writ. Wherefore he prays judgment and that the said defendant may answer further to the said declaration.

By his Attorney, *Samuel Savery.*

be compromised or settled by her as administratrix without concurrence of her children, if of age, or their duly qualified guardians of such of them as are minors, and this she is ready to verify. Wherefore, for want of a sufficient plea in this behalf, she prays judgment of this court, and that said defendant may further answer the said declaration."

1. **This short form** of demurrer to plea is substantially that given in Jeffery's Law Prec., p. 527.

The usual common-law demurrer to the plea used in *New Jersey* is as follows: "And the said plaintiff, as to the said plea of the said defendant by him above pleaded, saith that the same and the matters therein contained are insufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against the said defendant; and this he, the said defendant, is ready to verify; wherefore, by reason of the insufficiency of the said plea in this behalf, the plaintiff prays judgment and his damages by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, etc." See also Forms Nos. 7129 to 7153, *supra*, and Form No. 7159, *infra*.

2. **For form of demurrer of this character,** generally, consult Forms Nos. 7129 to 7133, *supra*, and list of statutes, etc., cited *supra*, note 1, p. 428.

Demurrer to plea that corporation had ceased to act, see vol. 5, p. 728, Form No. 6455.

3. **Precedent.** — In Bennett *v.* Chase, 21 N. H. 572, to a plea in abatement in an action of assumpsit on a promissory note plaintiff interposed the following demurrer:

"And the plaintiff says that the said plea of the said defendant is not sufficient in law to abate his the plaintiff's

c. To Plea in Bar.[1]

said writ, and that he is not by law bound to answer the same; and this he is ready to verify. Wherefore he prays judgment that the defendant may answer further to the said writ, etc.

And the plaintiff shows to the court the following causes of demurrer:

1. That it is not in said plea alleged that the commencement or pendency of said alleged prior suit of *Joshua Getchell* against said *Chase*, appears by the record or files of said Court *of Common Pleas*.

2. That it is not in said plea alleged that said former suit of the said *Joshua Getchell* against the said *Chase* was pending at the time of the commencement of this present action, or at any time.

3. That it is not in said plea alleged that the said *Joshua Getchell*, the plaintiff in said former suit, and the said *John S. Bennett*, the new plaintiff, are one and the same person, nor that the parties in said former suit and in this present suit, are the same persons, nor even that the parties in interest in the two suits are the same persons.

4. That said plea is uncertain in this, that it alleges that the said *Bennett* is the assignee or indorsee of said note, leaving it uncertain which he is, assignee or indorsee.

5. That it appears in and by said plea, that the plaintiff in said former action, namely, said *Joshua Getchell*, and the said *John S. Bennett*, the new plaintiff in this suit, are not one and the same persons, but are other and different.

6. That it is not in said plea alleged that said writ, sued out by said *Getchell* against said *Chase*, was ever served upon, or pending against, said *Chase*, but only that his property was attached thereon.

7. That it is not in said plea alleged that said *John S. Bennett*, at the time his action against the said *Chase* was commenced, had any knowledge of the commencement of the said former suit of said *Joshua Getchell* agaiast said *Chase*.

8. And that said plea is, in other respects, uncertain, defective, informal, and insufficient."

This demurrer was sustained, the court holding that, in general, to sustain the plea in abatement of a former action pending it is necessary that the cause of action and the plaintiff be the same in both suits; thus, where one Getchell, on the day of the date of a promissory note of which he was the payee and holder, commenced the suit against one Chase, and three days thereafter indorsed the note to Bennett, and Bennett sued the same, it was held that a plea in abatement of another action pending which set forth these facts simply was insufficient.

1. For forms of demurrer of this character, generally, see Forms Nos. 7134 to 7153, *supra*, and list of statutes, etc., cited *supra*, note 1, p. 428.

Precedents. — In Tate *v.* Anderson, 9 Mass. 93, a demurrer to a declaration in debt on a judgment assigned among others the following ground: "Because there is no averment or allegation in said plea that the real estate therein said to be set off in satisfaction of said execution was set out by metes and bounds; nor is there, in said plea alleged, any certain description of any real estate whatever, nor any description of any real estate which, by any reference in said plea set forth, can be made certain, as by law there ought to have been" — upon which the defendant's plea in bar was adjudged bad.

In Savage *v.* Everman, 70 Pa. St. 316, a special plea of accord and satisfaction to an action of debt on a judgment was demurred to for the following reasons: "For that the first part thereof sets forth matter which is not pleadable against the record sued on, and the second part thereof does not aver payment after judgment rendered. And the said plea is wholly argumentative and contains no traverse." This was sustained, but was reversed on appeal, the supreme court holding that accord and satisfaction could now be pleaded to an action on a judgment and that the special plea showed payment of the judgment sued on.

In Easton *v.* Driscoll, 18 R. I. 318, a demurrer to pleas in an action of debt on a bond was as follows: "As to the second and third of the defendant's aforesaid pleas, the plaintiff says (*precludi non*) because he says the said pleas are both insufficient in law to exonerate the said defendants, and this the plaintiff is ready to verify. Wherefore," etc. The demurrer was sustained and the pleas overruled, the court holding that, although quite defective in form, the demurrer should be

Form No. 7157.

In the *Greene Circuit* Court.

September Term, 1898.

John Doe against *Richard Roe.* } *Assumpsit.*

[And the plaintiff as to the plea of the defendant by him first above pleaded, and whereof he has put himself upon the country, does the like.]

And the plaintiff as to the plea of the defendant by him secondly above pleaded, says that the same and the matters therein contained (*concluding as in forms Nos. 7134 to 7153*).[1]

treated as a general demurrer to the plea, *citing* 1 Chit. Pl., p. 644.

Demurrer to plea of condemnation as prize of war, in Jecker *v.* Montgomery, 13 How. (U. S.) 499, was as follows: "The libellants, as to so much of the answer of the respondent, filed in this case, as alleges and sets up any act or thing on the part of the captain and crew of the said ship *Admittance*, or any of omission or commission of any sort or kind, as a justification of the said seizure of said ship or her cargo as lawful prize of war, or which might amount to probable cause of said seizure, demurs to the same; and for cause of demurrer avers and says, that this court in this cause has no rightful jurisdiction or authority to examine or adjudicate upon any question of prize, or of probable cause of capture as prize of war, but that the same belongs exclusively to the courts of the United States exercising prize jurisdiction, and having within its jurisdiction and control the property so seized or captured as prize, which this court has not, and, in consequence of the tortious and illegal acts of said respondent, as alleged and set forth in said libel, cannot have. Wherefore, and for other causes, these libellants do demur to so much of said answer as is above set forth.

Coxe, Advocate and Proctor for Libellants."

Demurrer to Special Plea to Scire Facias. — In Gans *v.* Philadelphia, 102 Pa. St. 99, the plaintiff demurred to such a plea, assigning as causes of demurrer: "For that the matters in the said plea averred are an allegation of nonjoinder and misjoinder of parties, whereas the Act of Assembly in such case provides that no such plea shall be allowed. And also that the said plea avers that the said *Solomon Gans* who was served with the writ of scire facias in the above case was at the time said writ issued, a part owner and tenant in common of the lot of ground, against which the said municipal claim was filed. And also that the said claim was filed by the city of *Philadelphia* to collect from the said lot of ground the amount of benefits assessed against it by the confirmed report of the road jury in the matter of the opening of *Jackson* street; and the said claim being a proceeding in rem, the said matters alleged in the said plea are irrelevant."

1. Specification. — "Demurrer and joinder in demurrer, in short, by consent," because the matters pleaded furnish no bar to the action, held in Donegan *v.* Wood, 49 Ala. 242, to be not a sufficient specification of the grounds of demurrer.

A demurrer to a plea on the ground that "the matters and things set out in each of said pleas are not material" is not sufficiently specific within the meaning of the statute. Shahan *v.* Alabama G. S. R. Co., (Ala. 1897) 22 So. Rep. 449.

It is not sufficient in a special demurrer to assign for special cause in general that the pleading demurred to is double or lacks form. It must show in what the duplicity consists or wherein the form is deficient. Holmes *v.* Chicago R Co., 94 Ill. 439.

The following assignment of special demurrer to a plea in bar was sustained in Tate *v.* Anderson, 9 Mass. 92: 'Because there is no averment or allegation in said plea that the real estate therein said to be set off in satisfaction of said execution was set out by metes and bounds; nor is there, in said plea alleged, any certain description of any real estate whatever, nor any description of any real estate which, by any reference in said plea set forth, can be

Form No. 7158.[1]

Supreme Court.
Sullivan, ss.
Horace Hopkins v. *Shadrack Shacklebury.*

And the said plaintiff says that the said plea of the said defendant is not sufficient in law to bar the said plaintiff from having and maintaining his action aforesaid against him. Wherefore, for want of a sufficient plea, he prays judgment, and for his damages and costs to be adjudged to him.

By his Attorney, *Samuel Savery.*

Form No. 7159.

Ocean County *Circuit* Court.

Charles H. Kimball and *Samuel D. Davis* vs. *Walter T. Phipps* and *Franklin M. Train.*	*On Contract.* Demurrer.

made certain, as by law there ought to have been."

Precedent. — In Smith *v.* Doty, 24 Ill. 164, a demurrer to two pleas in an action of assumpsit was sustained. The material causes assigned in such demurrer were: "Because said first plea does not show that the note alleged to have been assigned by this plaintiff, to the said defendants, was given without consideration.

And to the said second plea, that said second plea alleges said note declared on in this case was fraudulent and void; and that said assigned note was assigned after said note matured.

That said pleas each show a valid consideration from the plaintiff, to said defendants, for the promissory note declared on."

1. Demurrer to plea to writ of entry is set out in Lyman *v.* Dodge, 13 N. H. 199, which assigned as causes: "1. It is not averred to a certainty what the fault is. It is not said that the land demanded in the writ is a different tract from the land demanded in the summons, nor anything averred showing that fact to a certainty, as the land might be known by one name or number as well as by another. 2. It is not averred to a certainty that the summons enrolled in the plea is the same summons as that given by the officer in the service of said writ; nor that it is the only summons given by the officer in the service of said writ; and, for aught that appears, a true summons, as set forth in the return enrolled, might have been given to the defendant, and not enrolled. 3. It doth not appear to a certainty what return is enrolled in said plea, as oyer is not prayed of the return of service made by the officer, and indorsed on said writ by him, nor is it in said plea averred that it is the return made by him on said writ, and, for aught that appears in said plea, there may be a different return of service on said writ. 4. Said plea craves oyer of the writ and declaration, as if there were two precepts, or independent matters, and says they are read to him. It does not appear what is read to him except the writ enrolled, nor what they offer to, to a certainty to every intent. 5. It is not stated in said plea to a certainty to every intent, whether the defendant makes half defense, or full defense, or what, or to what. 6. The said plea first prays that said writ may abate, and then that it may be quashed, and so is double," etc. All these grounds of demurrer were overruled and the plea sustained. The court held that it is immaterial whether defendant in a plea of abatement crave oyer of the writ and declaration, or of the writ only (the declaration being in this state incorporated into the writ), if he enroll the whole. It was held also that the distinction between a half and full defense in a plea are obsolete. As to the last objection, it was held that it is no substantial objection that in the beginning the plea prays judgment of the writ that it may abate and in the conclusion prays judgment of the writ that it may be quashed.

And the said plaintiffs as to the said plea of the said defendants, by them secondly above pleaded say that the same, and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendants, and that they the said plaintiffs are not bound by law to answer the same. And this they the said plaintiffs are ready to verify, wherefore by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment and their damages by them sustained on occasion of the said breach of covenant in the said declaration mentioned, to be adjudged to them, etc.

Bedle, Muirheid & McGee, Attorneys of Plaintiff.

d. To Plea of Set-off.

Form No. 7160.[1]

Supreme Court, *Common Pleas* Division.

Providence, sc.

The Specialty Manufacturing Co.
vs. } No. *6549.*
Providence Electric Thermostat Co.

The plaintiff demurs to the amended plea of the defendant, by it lastly above pleaded, and states the following specific grounds of demurrer, namely:

First. That matters in said plea set out do not constitute a set-off to the plaintiff's claims stated in its declaration.

Second. Said matters, or such of them as are admissible in evidence, are admissible under the general issue.

Third. Said matters, or such of them as are admissible in evidence, arise from the claims and transactions stated in the plaintiff's declaration, and not from any transaction extrinsic to the plaintiff's cause of action.

Fourth. It does not appear that the plaintiff has expressly agreed with the defendant to pay to the defendant money claimed by the defendant in its said plea, or any sum of money whatever.

Fifth. It does not appear that the demand alleged in said plea is for a sum liquidated.

Sixth. It appears by said plea that the plaintiff's and defendant's demands aforesaid are not mutual, and do not constitute cross-debts.

Seventh. It appears by said plea that the defendant accepted said regulators and waived its rights — if any it had — to object to, or complain of, any defectiveness, or want of fitness, therein.[2]

Jeremiah Mason, Plaintiff's Attorney.

1. *Rhode Island.* — Gen. Laws (1896), c. 239, § 16.

Tennessee. — When the plea contains new matter by way of avoidance and set-off, the plaintiff shall reply thereto by demurrer or otherwise. Tenn. Code (1896), § 4649.

2. **Specification.** — Demurrer to the plea shall be accompanied by a statement of the specific grounds of demurrer; and no other grounds shall be considered under such demurrer than those so stated, unless for cause shown and on proper terms. R. I. Gen. Laws (1896), c. 239, § 16.

e. To Statement Filed with General Issue.

Form No. 7161.

(Precedent in Corthell *v.* Holmes, 87 Me. 25)[1]

[(*Statement of venue, and title of court and cause as in Form No. 7001.*)][2]

As to the defendant's plea, in which he says he is not guilty and thereof puts himself upon the country, the plaintiffs do the like, as required by statute. And the said plaintiffs as to the defendant's brief statement of defense by him filed above, saith that the same and the matters therein contained in manner and form as the same are stated and set forth are not sufficient in law to bar or preclude the plaintiffs from having or maintaining their aforesaid action against the said defendant, and the plaintiffs are not bound by law to answer the same, and this the plaintiffs are ready to verify.

Wherefore, and by reason of the insufficiency of the said brief statement of the defense in his behalf, the plaintiffs pray judgment and for their damages by reason of the trespasses aforesaid.

And the plaintiffs state and show to the court, the following reasons and causes of demurrer to the said statement of defense: For that the first ground of defense in said brief statement contains no matter not in issue under his plea of the general issue, and tends to prolixity and confusion in pleadings, and is inconsistent with other parts of said statement.

The second ground of defense alleged in said brief statement contains no matter of fact constituting a defense to this action. And the matter therein as set forth is immaterial and irrelevant.

The third ground of defense alleged in said brief statement as set forth therein is inconsistent with itself in that it states facts and a conclusion of law inconsistent with said facts, and nothing therein alleged amounts to more than the general issue. [(*Concluding as in Form No. 7001*).][2]

1. This demurrer, overruled at nisi prius, was sustained in every particular on appeal. The brief statement demurred to is set out in full in the reported case, and in ruling on the demurrer the court held: "Under our statute the general issue may be pleaded in all cases and a brief statement of special matter of defense, or a special plea or double pleas in bar, may be filed. Rev. Stat., c. 82, § 22. Brief statements should contain specification of matters relied upon in defense, aside from such as would come under the general issue and be certain and precise to a common intent. Washburn *v.* Mosely, 22 Me. 163. The first and third grounds of defense in the brief statement were admissible under the general issue and cannot be treated as special matter of defense. The second ground of defense is * * * The allegations in the brief statement, if true, are clearly insufficient to afford a justification to the defendant. The special demurrer should have been sustained."

2. The matter to be supplied in [ ] will not be found in the reported case, but should be added to render the form complete.

In New Hampshire it is held that a brief statement appended to the general issue is but a notice requiring no answer, and is not subject to demurrer. Leslie *v.* Harlow, 18 N. H. 518.

Vermont. — Notice filed with general issue is not subject to demurrer. Campbell *v.* Camp, 69 Vt. 97.

f. To Pleas in Criminal Cases.[1]

Form No. 7162.[2]

(*Statement of venue and title of court and cause.*)

And *Daniel Webster*, *state's* attorney for said county, who prosecutes for the said people in this behalf, as to the plea of the said *John Doe* by him above pleaded, says, that the same and the matters therein contained, in the manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the *people of the state of Illinois* from prosecuting the said indictment against him, the said *John Doe*; and that the said people are not bound by law to answer the same; and this the said *Daniel Webster*, who prosecutes as aforesaid, is ready to verify; wherefore, for want of a sufficient plea in this behalf he, the said *Daniel Webster*, for the said people prays judgment, and that the said *John Doe* may be convicted of the premises of said indictment specified.

Daniel Webster, *State's* Attorney.

1. Demurrers to pleas in criminal cases do not differ materially from demurrers to pleas in civil cases. Using Form No. 7162, *supra*, as a model and referring to Forms Nos. 7129 to 7161, *supra*, a demurrer in a criminal case for any particular jurisdiction may be framed.

Demurrer to a plea in bar is set out in Whart. Prec. (1849), p. 787 (*citing* as authority for the same Archb. Cr. Pl., p. 103), omitting the formal parts, as follows:

"And *Daniel Webster*, who prosecutes for the said state in this behalf as to the said plea of the said *John Doe* by him above pleaded, says that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said state from prosecuting the said indictment against him the said *John Doe*; and that the said state is not bound by the law of the land to answer the same; and this he the said *Daniel Webster*, who prosecutes as aforesaid, is ready to verify; wherefore for want of a sufficient plea in this behalf, he the said *Daniel Webster* for the said state prays judgment, and that the said *John Doe* may be convicted of the premises in the said indictment specified."

Demurrer to plea of autrefois acquit is given in Stark. Crim. Pl., p. 474, omitting the formal parts, as follows:

"And *Daniel Webster*, who prosecutes for the said state in this behalf cometh and saith that for and notwithstanding anything in the said plea of the said *John Doe* and *Richard Roe*, both above pleaded, our said Lord the king ought further to prosecute them, the said *John Doe* and *Richard Roe*, by reason of the premises in the said indictment to which the said plea is above pleaded, mentioned; because he saith that the said plea and the matters therein contained are not sufficient in law to bar the said state from further prosecuting them, the said *John Doe* and *Richard Roe*, by reason of the premises in the said indictment, to which the said plea is above pleaded, mentioned; and this the said *Daniel Webster* is ready to verify; wherefore he prays judgment that the said state may further prosecute them, the said *John Doe* and *Richard Roe*, by reason of the premises in the said indictment to which the said plea is above pleaded, mentioned; and that the said *John Doe* and *Richard Roe* may answer over to the same indictment."

2. Plea in Abatement. — Or, if the demurrer be to a plea in abatement, instead of the prayer as given in the text, conclude praying "judgment, and that the said indictment may be adjudged good, and that the said *John Doe* may further answer thereto."

Demurrer to Plea to Jurisdiction. — In Gardiner *v.* People, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 159, the demurrer was as follows:

"*Chemung Oyer and Terminer.*

The People of the State of New York
v.
Henry Gardiner.

And *Erastus F. Babcock*, district attorney of *Chemung* county, who prosecutes for the said people of the State of

VIII. TO ANSWER.[1]

New York, as to the said plea of the said *Henry Gardiner*, by him above pleaded, saith, that the same and the matters therein contained, in manner and form as the same are pleaded and set forth to the said indictment, are not sufficient in law to bar or preclude the said people of the State of *New York* from prosecuting the said indictment against the said *Henry Gardiner*, and the said people are not bound by law to answer the same, and this the said *Erastus F. Babcock*, who prosecutes as aforesaid, is willing to verify. Wherefore, for want of a sufficient plea in this behalf, he, the said *Erastus F. Babcock*, for the said people, prays judgment that the said people may further prosecute him, the said *Henry Gardiner*, by reason of the premises in the said indictment, to which the said plea is above pleaded, and that the said *Henry Gardiner* may answer over to the said indictment.

E. F. Babcock, District Attorney."

This case was decided prior to the adoption of the code practice, and the precedent is preserved by reason of its value as such for use in states still following the common-law practice.

1. Statutory provisions relating to demurrer to answer under the codes and practice acts:

Arkansas. — Sand. & H. Dig. (1894), § 5730.

California. — Code Civ. Proc. (1897), § 443.

Colorado. — Mills' Anno. Code (1896), § 60.

Connecticut. — Gen. Stat. (1888), § 874.

Georgia. — 2 Code (1895), § 5050.

Idaho. — Rev. Stat. (1887), § 4194.

Indiana. — Thornton's Rev. Stat. (1897), § 351; Horner's Stat. (1896), § 346.

Iowa. — Code (1897), § 3575.

Kansas. — Gen. Stat. (1897), c. 95, § 102.

Kentucky. — Carroll's Civ. Code (1895), §§ 91, 92, 93.

Massachusetts. — Pub. Stat. (1882), c. 167, § 12 See *supra*, note 1, p. 428.

Minnesota. — Stat. (1894), § 5241.

Missouri. — Rev. Stat. (1889), §§ 2052, 2054.

Nebraska. — Comp. Stat. (1897), § 5702.

Nevada. — Gen. Stat. (1885), § 3072.

New Mexico. — Comp. Stat. (1897), § 2685, subs. 43.

New York. — Code Civ. Proc., § 494.

North Carolina. — Clark's Code Civ. Proc., § 248.

North Dakota. — Rev. Codes (1895), § 5277.

Ohio. — Bates' Anno. Stat. (1897), § 5068.

Oklahoma. — Stat. (1893), § 3980.

Oregon. — Hill's Anno. Laws (1892), § 77.

South Carolina. — Code Civ. Proc. (1893), § 174.

South Dakota. — Code Civ. Proc. (1887), § 122.

Utah. — Rev. Stat. (1898), § 2976.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4916.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2658.

Wyoming. — Rev. Stat. (1887), § 2455.

Demurrers to answers in equity are not allowed. 1 Daniell's Ch. Pr., p. 598; Edwards *v.* Drake, 15 Fla. 666; Brown *v.* Scottish American Mortg. Co., 110 Ill. 235; Raymond *v.* Simonson, 4 Blackf. (Ind.) 79; Barry *v.* Abbot, 100 Mass. 398; Beck *v.* Beck, 36 Miss. 72; Winters *v.* Claitor, 54 Miss. 341; Bell *v.* Clark, 71 Miss. 603; Travers *v.* Ross, 14 N. J. Eq. 254; Com. *v.* Pittston Ferry Bridge Co., 8 Kulp. (Pa.) 29; Chicago, etc., R. Co. *v.* Macomb, 2 Fed. Rep. 18; Crouch *v.* Kerr, 38 Fed. Rep. 549; Banks *v.* Manchester, 128 U. S. 250; Grether *v.* Wright, 75 Fed. Rep. 742.

Specification of Grounds. — As to the necessity and manner of specifying the particular grounds of demurrer in a demurrer to an answer, consult list of statutes cited *supra*, this note.

Instances of sufficient demurrers to answers, see Henderson *v.* Johns, 13 Colo. 280; Lewellen *v.* Crane, 113 Ind. 289; Bryan *v.* Scholl, 109 Ind. 367; Ross *v.* Menefee, 125 Ind. 432; Sluss *v.* Shrewsbury, 18 Ind. 79; Stone *v.* State, 75 Ind. 235; Thompson *v.* Voss, 16 Ind. 297; Bennett *v.* Shern, 11 Ind. 324; McFadden *v.* Fritz, 110 Ind. 1; Wright *v.* Nipple, 92 Ind. 310; Funk *v.* Rentchler, 134 Ind. 68; Allen *v.* Jerauld, 31 Ind. 373; Summers *v.* Vaughan, 35 Ind. 323; German Bank *v.* Mulhall, *cited* in 8 Mo. App. 558; Hyde *v.* Conrad, 5 How. Pr. (N. Y. Supreme Ct.) 112; Anibal *v.* Hunter, 6 How. Pr. (N. Y. Supreme Ct.) 255; Spear *v.* Downing, 22 How. Pr. (N. Y. Supreme Ct.) 30.

1. In General.

Form No. 7163.[1]

(*Title of court and cause.*)[2] } Demurrer to Answer.

The plaintiff demurs to the answer of the defendant (or *to the first*

A demurrer "to each paragraph" of an answer in several paragraphs is a separate demurrer to each paragraph. Parker *v.* Thomas, 19 Ind. 213; Fankboner *v.* Fankboner, 20 Ind. 62.

A demurrer to an answer "on the ground that said answer is insufficient in law upon the face thereof to constitute a defense" may be sufficient under N. Dak. Rev. Codes (1895), § 5277. Van Dyke *v.* Doherty, 6 N. Dak. 263.

For material parts of a demurrer to answer see Coe *v.* Lindley, 32 Iowa 440.

Instances of Insufficient Demurrers to Answers — *California.* — A demurrer that the answer "does not state facts sufficient to show that this plaintiff is estopped from maintaining the said action." Healy *v.* Visalia, etc., R. Co. 101 Cal. 585.

Indiana. — "That neither of said paragraphs of the answer constitutes a defense to this action." Reed *v.* Higgins, 86 Ind. 143; Lane *v.* State, 7 Ind. 426.

That "neither the second nor third paragraph of defendant's answer is a good defense to the complaint." W. B. Barry Saw, etc., Co. *v.* Campbell, 13 Ind. App. 455; *following* Pine Civil Tp. *v.* Huber Mfg. Co., 83 Ind. 121.

"That answer does not state facts sufficient to constitute a cause of action." Hawley *v.* Zigerly, 135 Ind. 248.

"That the answer is not a sufficient defense in law to plaintiff's complaint." Gordon *v.* Swift, 39 Ind. 212; Tenbrook *v.* Brown, 17 Ind. 410.

That answer "does not state facts sufficient to make a good answer to the complaint." Dawson *v.* Eads, 140 Ind. 208, *following* Thomas *v.* Goodwine, 88 Ind. 458; Hawley *v.* Zigerly, 135 Ind. 248.

That answer "does not state facts sufficient to constitute a good answer," as not stating, in effect, as it should, that the answer "does not state facts sufficient to constitute a cause of defense." Wade *v.* Huber, 10 Ind. App. 417.

"Comes now the cross-complainant and demurs to the second paragraph of answer to cross-complaint, and says that said paragraph does not contain facts sufficient to constitute a cause of action." School City *v.* Heinzman, 13 Ind. App. 195.

South Dakota. — That the answer "does not state facts sufficient to show that this plaintiff is estopped from maintaining the said action." Hill *v.* Walsh, 6 S. Dak. 421.

Demurrer and Reply. — Plaintiff may demur to one or more separate defenses or counterclaims in the answer and reply as to the residue. Consult list of statutes cited *supra*, note 1, p. 436.

In Justice's Court. — The form of the demurrer to an answer, when required to be in writing, may be in all material respects like the demurrer in courts of record, and in fact the statutes often so provide.

In 1 N. Car. Code (1883), p. 360, the following demurrer is given:

"*John Doe* against *Richard Roe.* } *Justice* Court.
County of *Mecklenburg.*

The plaintiff demurs to the answer of the defendant for that the facts stated in the answer are not legally sufficient to constitute a defense to this action (or *for that the said answer is not sufficiently explicit to make this plaintiff understand it*).

Oliver Ellsworth,
Plaintiff's Attorney."

1. Consult list of statutes cited *supra*, note 1, p. 436.

2. **Title of Court and Cause.** — See *supra*, note 1, p. 367.

Alleging generally that the answer is insufficient is a sufficient demurrer to an answer. Arthur *v.* Brooks, 14 Barb. (N. Y.) 533; Anibal *v.* Hunter, 6 How. Pr. (N. Y. Supreme Ct.) 255.

Only for cause specified in code will demurrer to answer lie. Singer *v.* Effler, 16 N. Y. Misc. Rep. (Albany City Ct.) 334.

Several Defenses. — Demurrer to answer should show to which of the several defenses it is interposed. Matthews *v.* Beach, 8 N. Y. 173.

or other *defense* or *counterclaim contained in the answer of the defendant*) for insufficiency, in not stating facts sufficient to constitute a defense (or *counterclaim*).

Oliver Ellsworth, Plaintiff's Attorney.

Dated the *first* day of *June*, A. D. 1898.

Form No. 7164.[1]

(*Title of court and cause.*)[2] } Demurrer to Answer.

The plaintiff demurs to the answer of the defendant (or *to the first* or other *defense* or *counterclaim contained in the answer of the defendant*) for insufficiency, in not stating facts sufficient to constitute a defense (or *counterclaim*).

2. (*Here set out any other statutory ground of demurrer.*)

Oliver Ellsworth, Attorney for Plaintiff.

Form No. 7165.[3]

(*Title of court and cause as in Form No. 7168.*)

The plaintiff, *John Doe*, demurs to the answer of the defendant, *Richard Roe*, herein, and says that it is insufficient in law to maintain his defense, and for cause of demurrer assigns the following reasons: (*Here set out specifically the grounds of demurrer relied on*). (*Concluding as in Form No. 7163.*)

Form No. 7166.[4]

In the *District* Court in and for *Calhoun* County, *Iowa*.

John Doe, plaintiff, against *Richard Roe*, defendant. } *October* Term, 1897. Demurrer to Answer.

The plaintiff demurs to the answer herein (*or to some certain count of it*),[5] and shows to the court the following grounds therefor:

1. The facts stated in said answer (or *in said count*) do not constitute a defense, in this: (*Here state specifically the defects claimed to exist.*)[6]

2. That, etc., (*setting forth any other ground of demurrer*).

Oliver Ellsworth, Attorney for Plaintiff.

1. This form properly presents a demurrer to the answer under the statutes for *California*, *Colorado*, *Idaho*, *Montana*, *Nevada*, *Utah*, and other states having similar provisions. Consult list of statutes cited *supra*, note 1, p. 436.

2. See *supra*, note 1, p. 367.

3. *Arkansas.*—Sand. & H. Dig. (1894), § 5730. Consult list of statutes cited *supra*, note 1, p. 436.

4. This form properly presents a demurrer to the answer under Iowa Code (1897), § 3575, which provides: "When the facts stated in the answer, or any count or division thereof, are not sufficient to constitute a defense or counterclaim, the adverse party may demur, and shall be held to the same certainty in the statement of the grounds therefor as obtains in a demurrer to the petition, and with like results attendant upon ruling thereon."

5. Demurrer to answer may be to one of two distinct defenses set up in a single count. Wright *v.* Connor, 34 Iowa 240.

6. **Specification.**— Demurrer to answer in a law action must particularly specify the grounds of objection under Iowa Code (1897), § 3562; and a demurrer on the general ground that the facts stated in the answer do not constitute a defense to plaintiff's action should be overruled. Traders Bank *v.* Alsop, 64 Iowa 97. A demurrer to an answer on

Form No. 7167.[1]

In the *District* Court in and for *Calhoun* County, *Iowa.*

John Doe, plaintiff, against *Richard Roe*, defendant. } *October* Term, 1897. Demurrer to Answer in Equity.

The plaintiff demurs to the answer of defendant herein and says: That the facts therein stated do not entitle him to the relief demanded.

Jeremiah Mason, Attorney for Plaintiff.

Form No. 7168.[2]

Lee Circuit Court.

John Doe, plaintiff, against *Richard Roe*, defendant. } Demurrer to the Answer.

The plaintiff demurs to the answer because it does not state facts sufficient to constitute a defense.

Jeremiah Mason, Plaintiff's Attorney.

2. Counterclaim.[3]

Form No. 7169.[4]

(*Statement of venue and title of court and cause.*)[5] } Demurrer to Counterclaim.

the ground that it does not state facts constituting a defense, where the matters pleaded are neither by way of denial nor by way of new matter, is sufficiently specific. Davenport Gas Light, etc., Co. *v.* Davenport, 15 Iowa 6.

For the material parts of a demurrer to answer in action of right claiming title to real estate see Gillis *v.* Black, 6 Iowa 441.

1. To equitable answer in an action at law the demurrer is sufficiently specific where it states that the facts stated in the answer do not constitute any defense. Reed *v.* Lane, 96 Iowa 454.

2. This form is substantially that set forth in Carroll's Civ. Code (Ky. 1888), p. 394.

3. Demurrer to Counterclaim. — Where the facts are insufficient in law to constitute a defense or a counterclaim, the proper mode of raising the question is by demurrer.

Montana. — Code Civ. Proc. (1895), § 714

New York. — Code Civ. Proc., § 495.

Ohio. — Bates' Anno. Stat. (1897), § 5069.

Oklahoma. — Stat. (1893), § 3982.

Texas. — Rev. Stat. (1895), art. 1192, to the effect that when the defendant sets up a counterclaim against plaintiff, the plaintiff may plead thereto under the rules prescribed for the pleadings of defensive matter by defendant, so far as the same may be applicable.

Utah. — Rev. Stat. (1898), § 2978.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2658.

Wyoming. — Rev. Stat. (1887), § 2455 *et seq.*

In the other code states provision is made for demurrer to counterclaim in the statutes authorizing demurrers to answers generally. See list of statutes cited *supra*, note 1, p. 436; Campbell *v.* Jones, 25 Minn. 155.

Demurrer to Cross-complaint or Cross-petition.—Consult the statutes of *Arkansas*, *California*, *Idaho*, *Iowa*, *Ohio*, *Utah* and *Wyoming*, cited *supra*, note 1, p. 365, and *supra*, note 1, p. 436.

For material parts of a demurrer to a cross-petition see Coe *v.* Lindley, 32 Iowa 440.

4. This form properly presents the demurrer to a counterclaim, asking affirmative judgment, specified in N. Y. Code Civ. Proc., § 495, subs. 5. See also list of statutes cited *supra*, note 1, p. 436.

5. See *supra*, note 1, p. 367.

Plaintiff demurs to the counterclaim of defendant herein on the ground that it appears upon the face thereof,

I. That the said counterclaim does not state facts sufficient to constitute a cause of action (or *counterclaim*).

II. That (*Here set out any other statutory ground of demurrer relied on*).[1]

Oliver Ellsworth, Plaintiff's Attorney.

Form No. 7170.[2]

(*Statement of venue and title of court and cause.*)[3] Demurrer to Answer and Counterclaim

I. Plaintiff demurs to the *first* defense in the answer herein on the ground that the same upon its face does not state facts sufficient to constitute a defense.

II. Plaintiff demurs to the counterclaim in said answer, and for cause of demurrer assigns the following reasons:

1. That said counterclaim does not state facts sufficient to constitute a counterclaim (or *cause of action*), because (*specifying the objections*).

2. (*Specifying any other statutory ground of demurrer which may be relied on.*)

Oliver Ellsworth. Plaintiff's Attorney.

IX. TO REPLICATION.

1. In General.

a. General Demurrer.

Form No. 7171.

(2 Chit. Pl., p. 553.)[4]

1. Specification of Grounds. — The demurrer must distinctly specify the objections to the counterclaim. See list of statutes cited *supra*, note 1, p. 436.

Demurrer to counterclaim in *New York*, must distinctly specify the objections to the counterclaim in like manner as objections to a complaint are specified in a demurrer. N. Y. Code Civ. Proc., § 496; Safford *v.* Snedeker, 67 How. Pr. (N. Y. Supreme Ct.) 264; Weeks *v.* O'Brien, 20 Misc. Rep. (N. Y. Supreme Ct.) 48.

Demurrer and Reply. — Plaintiff may demur to part of counterclaim and reply as to the residue. See list of statutes cited *supra*, note 1, p. 436.

2. See list of statutes cited *supra*, note 1, p. 436.

3. See *supra*, note 1, p. 367.

4. **Demurrer to plea in bar to a cognizance** is set out in 2 Chit. Pl., p. 553, as follows:

"And the said *Richard Roe* saith that the said plea in bar of the said *John Doe* to the said cognizance of him the said *Richard Roe* and the matters in the said plea in bar contained, are not sufficient in law to bar him the said *Richard Roe* from having a return of the said cattle, and that he the said *Richard Roe* is not bound by the law of the land to answer the same, and this he the said *Richard Roe* is ready to verify. Wherefore, for want of a sufficient plea in bar in this behalf, he the said *Richard Roe* as before prays judgment and a return of the said cattle, together with his damages, costs, and charges by him in this behalf expended, according to the form of the statute in such case made and provided, to be adjudged to him, etc."

In the *King's Bench.*

Trinity Term, *51 Geo. 3.*

Richard Roe ats. *John Doe.* } And the said *Richard Roe* saith that the said replication of the said *John Doe* to the said second plea of him the said *Richard Roe* and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said *John Doe* to have or maintain his aforesaid action thereof against him the said *Richard Roe*, and that he the said *Richard Roe* is not bound by the law of the land to answer the same; and this he the said *Richard Roe* is ready to verify; wherefore, for want of sufficient replication in this behalf, he the said *Richard Roe* prays judgment if the said *John Doe* ought to have or maintain his aforesaid action thereof against him, etc. *

b. Special Demurrer.

(1) Generally.

Form No. 7172.

(2 Chit. Pl., p. 553.)

(*Commencing as in Form No. 7171, and continuing to *; then proceed thus:*) And the said *Richard Roe*, according to the form of the statute in such case made and provided, states and shews to the court here the following causes of demurrer in law to the said replication, that is to say, * that, etc. (*Here state the causes, and conclude thus:*) And also, for that the said replication is in other respects uncertain, informal and insufficient, etc.

(2) For Attempting to Put in Issue a Matter of Law.

Form No. 7173.

(3 Chit. Pl., p. 575.)

(*Commencing as in Form No. 7172, and continuing to *; then proceed thus:*) For that the said replications of the said plaintiff attempts to put in issue, to be tried by the country, mere inference and matter of law, viz., whether the said defendant were or were not duly elected mayor, the same replication admitting all the facts and circumstances attending that election, as alleged in the said plea of the said defendant; and also for that the said replication is argumentative, and no certain and sufficient issue can be taken thereon; and that it is also in other respects defective, etc.

(3) For Being Double in Putting in Issue Two Several and Distinct Matters.

Form No. 7174.

(3 Chit. Pl., p. 576.)

(*Commencing as in Form No. 7172, and continuing to *; then proceed thus:*) for that the said plaintiff hath not, in or by his said replication,

taken or tendered any single or material issue out of or upon the said plea of the said defendant by him last above pleaded in her, but hath stated and put in issue, in his said replication, that the said bill of exchange, in the said first count mentioned, was not made and drawn for the corrupt considerations in the said last plea mentioned, or either of them, whereas every matter and thing stated in the said second plea in any manner relating to the said sum of £—— in the said plea mentioned, which is one of the matters stated and relied upon as a consideration in the said replication, was merely stated as inducement, and as a matter upon which no issue was intended to be offered or could be taken; and for that the said plaintiff hath not, in or by his said replication, traversed, or in any manner denied by traverse, or otherwise, the only material fact contained in the plea of the said defendant, by him lastly above pleaded in bar, and upon which any material issue could be taken, namely, whether there was any such corrupt contract and agreement for making and drawing, or in respect of the said bill of exchange in the first count mentioned, which he ought to have done; and for that the said replication is double and confused, in putting in issue two several and distinct matters, namely, whether the said bill of exchange in the said first count mentioned, was given for two illegal considerations, namely, a gambling consideration, and an usurious consideration, whereas the only material fact contained in the second plea of the said defendant, was, whether it was given upon a corrupt and usurious consideration, in pursuance of a corrupt and usurious contract and agreement; and for that the said plaintiff hath not, in or by his said replication, traversed, denied, or in any manner put in issue such corrupt contract and agreement, which is the gist and foundation of the defense of the said defendant in that respect, inasmuch as that alone could make the said bill of exchange void in law, or bring it within the meaning and intent of the said statute in such case made and provided, and also that the said replication is in other respects uncertain, informal, and insufficient, etc.

2. In Common-law States.[1]

Form No. 7175.[2]

(*Title of court and cause as in demurrer to declaration*). And the said defendant saith that the said replication (*concluding as in Forms Nos. 7171 to 7174*).

Form No. 7176.[3]

1. **Specification of Grounds.**—A demurrer to a replication cannot be entertained unless it specifies particularly the ground of objection. Browder *v.* Irby, 112 Ala. 379.

That a replication "presents immaterial issues" and that it is "no answer to said plea" is insufficient, under Ala. Civ. Code (1886), § 2690; Milligan *v.* Pollard, 112 Ala. 465.

2. In states following the common-law practice this form of demurrer to the replication is good.

3. This form of demurrer is used in many common-law states where the replication is in use as a pleading, though the long common-law form given *supra*, Form No. 7075, may always be used.

(Precedent in Clarke *v.* Manchester, 56 N. H. 502.)

[(*Title of court and cause as in Form No. 7008.*)][1] And the said defendants say that the replication is not sufficient in law. [(*Concluding as in Form No. 7008.*)][1]

1. The matter to be supplied in [ ] does not appear in the precedent, but should be added to complete the precedent.

Special Demurrer. — In Galusha *v.* Cobleigh, 13 N. H. 80, the special demurrer was as follows:

"1. That the replication was double, inasmuch as the plaintiff in error alleged that at the time of the rendition of the judgment, and until *three* years next before the suing out of his writ of error, he did not reside within the state of *New Hampshire*, but during all that time was an inhabitant of, and resided within, the state of *New York*; and also alleged that he had no notice whatever of the judgment rendered.

2. That the replication was a departure from the plaintiff's writ in error, as the writ alleged that the plaintiff had no notice of the original suit, and in the replication the plaintiff does not allege that he had no notice of the suit, but merely that he had no notice of the judgment rendered.

3. The plaintiff does not state that at the time of the rendition of the judgment, and until within three years before the suing out of his writ of error, he was 'beyond seas.'

4. He does not state that during said time he was not within any of the United States."

The demurrer was overruled, the court holding that alleging, as cause for delay in suing out a writ of error, that the defendant in the original suit was not a resident of the state at the time of service of the writ, but was an inhabitant of another state, and had no notice of the original judgment, constituted but one ground of defense, and the replication is not open to objection for duplicity.

In Quo Warranto Proceedings. — In People *v.* Jackson, etc., Plank Road Co., 9 Mich. 298, a demurrer was upheld to certain replications to pleas to an information in the nature of a quo warranto, which demurrer, omitting the formal parts, was substantially as follows: "For that the said matters therein contained are not sufficient cause for ousting the said company of its said liberties, privileges and franchises, and dissolving said corporation; and also for that the same is uncertain in this, that it does not set forth what particular parts of the plank road of said company were constructed upon a grade with a greater ascent or descent than *one* foot in *ten* feet. And also for that the same is in other respects uncertain, informal and insufficient," etc.

To the second replication: "For that the said matters therein contained are not sufficient cause for ousting said company of its liberties, privileges and franchises, and dissolving said corporation. And also for that in the said replication secondly above pleaded it is argumentatively alleged that the plank road of said company has not been kept in good repair."

To the third replication: "For that the said matters therein contained are not sufficient for ousting the said company of its said liberties, privileges and franchises, and dissolving said corporation. And also that the said company are not required by law to lay down and keep closely together and in an even manner, so that the surface should be uniform, the plank upon said road, as set forth in said replication. And also that the said replication thirdly pleaded is in other respects uncertain, informal and insufficient," etc.

To the fourth replication: "For that the said matters therein contained are not sufficient cause for ousting the said company of its said liberties, privileges and franchises, and dissolving said corporation. And also for that the same is double in this, that it contains several separate and distinct answers, and offers several and distinct issues upon the plea of said defendants, namely, whether the said company have, before the filing of said information, removed or caused to be removed, the plank from a large portion of the said plank road, to wit, from *six* miles thereof; and whether the said company had not for a considerable portion of said *six* miles, to wit, for *one* mile thereof, substituted anything in the place of such plank; and whether for the remainder of said distance the said company have not substituted gravel entirely for such plank, but a mixture

X. To Reply.[1]

1. In General.

of earth and gravel of a quality inferior to gravel; and whether the said company has constructed said road, composed of earth and gravel, less than *nine* feet in width and *seven* inches deep; and also whether the said company has kept the said gravel road in good repair in pursuance of the statute in such cases made and provided. Whereas, only one issue could or ought to have been offered or taken upon the said plea, or upon the matter therein contained, in and by the said replication fourthly above pleaded as aforesaid. And also for that the said replication fourthly above pleaded is uncertain in this, to wit, that it does not set forth nor allege what particular part or parts of said plank road the said company have removed the plank therefrom; and in this, to wit, that it does not set forth nor allege what particular part or parts of said road from which said plank has been removed, there has not been substituted anything in the place of such plank; and in this, to wit, that it does not set forth nor allege upon what particular part or parts of said road there has been substituted a mixture of earth and gravel inferior to gravel, in the place of such plank. And in this, that the same does not set forth nor allege how or in what particular the said company have failed to keep said gravel road in repair. And also for that the same is in other respects uncertain, informal and insufficient," etc.

To the fifth replication: "For that the matters therein contained are not cause for ousting said company of its liberties, privileges and franchises, and dissolving said corporation. And also for that the same is uncertain in this, to wit, that it does not set forth nor allege what part or parts of said road were so constructed as not to have at least *sixteen* feet in width of good, sound and permanent road, nor where nor what parts thereof were constructed with a rough and uneven surface, nor upon what portions of said road carriages and other vehicles could not conveniently and easily pass each other. And also for that in the same it is argumentatively alleged that carriages and other vehicles could not conveniently and easily pass each other on said road, because the same was constructed of a rough and uneven surface. And also for that the same is in other respects uncertain, informal and insufficient," etc.

1. Demurrer to reply, generally, see *Arkansas*, Sand. & H. Dig. (1894), § 5734.

Indiana. — Thornton's Stat. (1897), § 362; Horner's Stat. (1896), § 357.

Iowa. — Code (1897), § 3575. When the facts stated in the reply do not amount to a sufficient defense, the defendant may demur, subject to the same requirements of certainty in statement of the grounds thereof as obtain in demurrer to the petition, and with like results attendant upon the ruling thereon.

Kansas. — Gen. Stat. (1897), c. 95, § 103.

Minnesota. — Stat. (1894), § 5243.

Montana. — Code Civ. Proc. (1895), § 723.

New Mexico. — Code Proc. (1897), § 2685, subs. 45.

New York. — Code Civ. Proc., § 493.

North Carolina. — Clark's Code Civ. Proc., § 250.

North Dakota. — Rev. Codes (1895), § 5279.

Ohio. — Bates' Anno. Stat. (1897), § 5067.

Oklahoma. — Stat. (1893), § 3981.

Oregon. — Hill's Anno. Laws (1892), § 79.

South Carolina. — Code Civ. Proc. (1893), § 176.

South Dakota. — Code Civ. Proc. (1887), § 124.

Utah. — Rev. Stat. (1898), § 2982.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4919.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2663 (providing that the ground of demurrer must be specified).

Wyoming. — Rev. Stat. (1887), § 2454 (providing that defendant may demur to a reply or to a separate traverse or avoidance contained in the reply of a defense or counterclaim on the ground that it is insufficient in law on its face).

Form No. 7177.[1]

(*Statement of venue and title of court and cause.*)[2] } Demurrer to Reply.

The defendant demurs to the plaintiff's reply[3] (*or first or other reply*) for insufficiency in not stating facts sufficient to constitute a reply (or *defense*). [(*Here may be stated specifically the grounds of demurrer.*)][4]

Jeremiah Mason, Defendant's Attorney.

Dated the *first* day of *June*, A. D. 1*898*.

2. Accompanying Rejoinder.

Form No. 7178.[5]

John Doe vs. *Richard Roe.* } Court *of Common Pleas*, *Fairfield* County, *September* Term, 1*898*.

1. This form presents the proper mode of demurring under N. Y. Code Civ. Proc., § 493. Consult list of statutes cited *supra*, note 1, p. 444.

2. See *supra*, note 1, p. 367.

Precedent. — In Le Roy Bank *v.* Harding, 1 Kan. App. 389, the demurrer was as follows (omitting title): "Comes now said defendant, and demurs to the third count in the amended reply of said plaintiff upon the following ground, to wit: First. That said third count does not state facts sufficient for a reply to the answer of said defendant herein." This demurrer was overruled on the ground that sufficient facts were stated, but it is formally good.

3. **Where only part of the reply is demurred to,** that part must be expressly designated. To entitle the demurrer to consideration, the part so specified must assume to present an entire defense to the new matter in the answer by denial or matter of avoidance.

The demurrer may be phrased: "The defendant, etc., demurs to paragraphs IV, V, VI and VII of the reply herein on the ground," etc., as in the above form.

4. **Particular defects** may be specified at the end of this demurrer. See list of statutes cited *supra*, note 1, p. 444.

Should be in Statutory Form. — In Krathwohl *v.* Dawson, 140 Ind. 6, the demurrer was as follows: "Defendants jointly and severally demur to the second paragraph of plaintiff's reply to answer filed herein and for cause of demurrer say that said paragraph does not contain facts sufficient to constitute a good defense or reply to the answer filed herein." This was overruled and on appeal the court held: "There is no such reason for demurrer recognized by the code, for it provides that the cause for demurrer shall be 'that the facts therein are not sufficient to avoid the paragraph of answer.' Rev. Stat. (1881), § 357 (Rev. Stat. (1894), § 360); Peden *v.* Mail, 118 Ind. 556. The demurrer not being in proper form, there was no error in overruling the same."

A demurrer to a paragraph of a reply that it "does not contain facts sufficient to constitute a good defense, or reply, to the answer" is insufficient under Burns' Anno. Stat. Ind. (1894), § 360, providing that defendant "may demur to any paragraph of a reply, on the ground that the facts stated therein are not sufficient to void the paragraph of the answer." Krathwohl *v.* Dawson, 140 Ind. 1.

"That reply does not state facts sufficient to constitute a good reply to the defendant's answer to which it is directed" has been held to be insufficient. Peden *v.* Mail, 118 Ind. 556.

That reply does not state facts sufficient to constitute a defense to the answer is the only ground for a demurrer to a reply. McAroy *v.* Wright, 25 Ind. 22. See also Wilson *v.* Madison, etc., R. Co., 18 Ind. 226.

5. This form of rejoinder and demurrer is substantially that set out in Conn. Prac. Act, p. 238.

By leave of court[1] the defendant further pleads and says:

1. In respect to the first paragraph of the reply, the facts therein stated are insufficient in the law to justify the refusal of the plaintiff to surrender said check.

2. The defendant denied (*Here set out the rejoinder*).

By *Jeremiah Mason*, Defendant's Attorney.

XI. To Rejoinder.[2]

FOR DUPLICITY.[3]

Form No. 7179.

(3 Chit. Pl., p. 577.)[4]

(*Proceed as in Form No. 7134 to the end, substituting "rejoinder" for "plea" and "replication" for "declaration," and then as follows:*) And the said plaintiff states and shows to the court here the following causes of demurrer: That the said rejoinder is double and multifarious, in this, that it contains two separate and distinct answers, and offers two separate and distinct issues upon the aforesaid replication of the said plaintiff to the said plea of the said defendant, so by him lastly above pleaded in bar, whereas only one issue could or ought to have been offered or taken upon the said replication or upon the matter therein contained; and that the said rejoinder is also double and informal, in this, that it offers to put in issue two distinct and different escapes, whereas the said plaintiff hath originally declared upon, and in his subsequent replication hath supported his said declaration by only one escape, and that according to the rules of good pleading, the said rejoinder should and ought to have been confined to and have concluded with a traverse, which is thereby taken on the said escape so set forth in the said replication of the said plaintiff; yet the said defendant hath very unnecessarily, and inartificially extended the said rejoinder to further and other and different matter, by way of supposed second answer to the said replication, whereas only one answer could or ought to have been made

1. After the reply, "further pleadings subsequent in their nature may be had if necessary by leave of court." Conn. Gen. Stat. (1888), § 875.

2. **The demurrer to a rejoinder** is similar in form to a demurrer to a plea, saying "rejoinder" instead of "plea." 2 Chit. Pl., p. 553.

For Not Tendering Issue of Fact Traversed in Replication. — In 3 Chit. Pl., p. 578, is set out such a demurrer to a rejoinder, taken from the case of Morewood *v.* Wood, 4 T. R. 157, which is as follows, omitting the formal parts: "For that the said defendants, in their rejoinder, have not tendered an issue on the fact traversed by the said plaintiff in his said replication; and for that the issue, tendered in the said rejoinder, is too large, comprehending not only the fact of the prescription traversed by the replication, but also a matter of fact not alleged or traversed by the said replication, namely, a prescription to dig for stones, etc., in *Swanwick Green*; and because the last prescription, so attempted to be put in issue, is wholly immaterial and irrelevant in this action, etc."

3. If a rejoinder is double, it is demurrable. U. S. *v.* Cumpton, 3 McLean (U. S.) 163.

4. **This form** is substantially that given in Chit. Pl. (10th Am. from 6th Lond. ed.), p. 1265, and is a precedent taken from Griffiths *v.* Eyles, 1 B. & P. 415.

to, and only one issue offered or taken upon, the said replication, or in or by the said rejoinder; and that the matter so secondly alleged in the said rejoinder is no answer to the said replication, nor direct or positive denial of such escape therein mentioned, but only an argumentative denial of such escape, whereas the said escape should have been expressly and directed traversed and denied by the said rejoinder; and that the said rejoinder is calculated to occasion the trial of two separate issues upon one and the same fact, and also to introduce a vexatious and unnecessary length of pleading in this cause; and that the said rejoinder is repugnant and informal, in this, that although in one part thereof it considers the said replication and answers the same as being a replication, yet in another part thereof it considers the said replication as being a new assignment, and professes to answer the same accordingly; and that the said rejoinder is in various other respects repugnant, multifarious, insufficient, and informal.

XII. JOINDER IN DEMURRER.

1. In General.[1]

a. To Declaration or Replication.

IN ASSUMPSIT.

Form No. 7180.

(2 Chit. Pl., p. 730.)[2]

In the *King's Bench.*

Trinity Term, *51 Geo. 3.*

John Doe agst. *Richard Roe.* } And the said *John Doe* saith that the said declaration (or *first count* or *replication*), and the matters therein contained in manner and form as the same are above stated and set forth, are sufficient in law for him the said *John Doe* to have and maintain his aforesaid action thereof against him the said *Richard Roe*, and the said *John Doe* is ready to verify and prove the same as the court here shall direct and award; wherefore inasmuch as the said *Richard Roe* hath not answered the said declaration (or *first count* or *replication*), nor hitherto in any manner denied the same, the said *John Doe* prays judgment, and his damages by reason of the not performing of the said several promises and undertakings in the said declaration mentioned to be adjudged to him, etc.

1. **At common law,** where one party demurs, the adversary whose pleading was demurred to must join, as there could be no demurrer to a demurrer. 8 Encycl. of Pl. and Pr. 312.

2. This form is substantially that given in 3 Chit. Pl. (10th Am. from 6th Lond. ed.), p. 1267. A joinder in demurrer to a declaration or replication in debt, covenant, detinue, case or trespass, is precisely similar to the above, except in the prayer of judgment, which is to be according to the form of the action, and the same as in the conclusion to the plea. 2 Chit. Pl., p. 730.

b. To Plea.[1]

(1) In Abatement.

Form No. 7181.

(2 Chit. Pl., p. 730.)[2]

(*Commencement as in demurrer to plea, Form No. 7129.*)

And the said *Richard Roe* saith that the said plea of him the said *Richard Roe*, and the matters therein contained, are sufficient in law to quash the said writ (or *bill*), and which said plea, and the matters therein contained, he the said *Richard Roe* is ready to verify and prove, as the court here shall direct, etc., wherefore inasmuch as the said *John Doe*, hath not denied nor in any manner answered the said plea, he the said *Richard Roe* as before prays judgment of the said writ (or *bill*), and that the same may be quashed, etc.

(2) In Bar.

(*a*) *Generally.*

Form No. 7182.

(2 Chit. Pl., p. 731.)[3]

(*Commencement as in demurrer to plea, Form No. 7129.*)

And the said *Richard Roe* saith that his said plea by him secondly above pleaded, and the matters therein contained in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said *John Doe* from having or maintaining his aforesaid action thereof against him the said *Richard Roe* and that he the said *Richard Roe* is ready to verify and prove the same, when, where, and in such manner as the said court here shall direct and award, wherefore inasmuch as the said *John Doe* hath not answered the said plea, nor hitherto in any manner denied the same, the said *Richard Roe* prays judgment, and that the said *John Doe* may be barred from having or maintaining his aforesaid action thereof against him the said *Richard Roe*, etc.

1. **A joinder in demurrer to plea for pleading dilatory plea** after general imparlance is given in 3 Chit. Pl., p. 649, as follows:

"*Richard Roe* ats. *John Doe.* } And the said *Richard Roe* says, that the matters by him alleged in manner and form as the same are above stated and set forth, are sufficient in law for him the said *Richard Roe* to have aid of the said *Henry Mason*, the son, and this he is ready to verify and prove as the court, etc. And because the said *John Doe* hath not made any answer to the said aid prayer, nor hitherto denied the same, the said *Richard Roe* prays judgment, and also as before, prays aid of the said *Henry Mason*, the son, etc."

2. This form is also substantially that given in 3 Chit. Pl. (10th Am. from 6th Lond. ed.), p. 1267.

3. This form is also substantially that given in 3 Chit. Pl. (10th Am. from 6th Lond. ed.), p. 1268.

(*b*) *In Replevin.*

Form No. 7183.

2 Chit. Pl., p. 731.)[1]

(*Commencement as in demurrer to plea, Form No. 7129.*)

And the said *John Doe* saith that the said plea in bar of him the said *John Doe* to the said cognizance of the said *Richard Roe* and the matters in the said plea in bar contained, are sufficient in law to bar him the said *Richard Roe* from having a return of the said cattle, and which said plea in bar, and the matters therein contained, he the said *John Doe* is ready to verify and prove as the court here shall direct and award, and because the said *Richard Roe* hath not answered the said plea in bar, nor in any manner denied the same, he the said *John Doe* as before, prays judgment, and his damages, on occasion of the taking and unjustly detaining of the said cattle, to be adjudged to him, etc.

2. In Common-law States.[2]

a. In General.

Form No. 7184.[3]

1. This form is also substantially that given in 3 Chit. Pl. (10th Am. from 6th Lond. ed.), p. 1268.

2. **Joinder in demurrer is not necessary** in many common-law jurisdictions. Davies *v.* Gibson, 2 Ark. 115, decided prior to the doctrine of the code practice.

District of Columbia. — Com. Law Rules, No. 28.

Illinois. — Mix *v.* Chandler, 44 Ill. 174.

Michigan. — Rev. Cir. Ct. Rules, No. 5 (d).

Massachusetts. — Pub. Stat. (1882), c. 167, § 25.

Mississippi. — Anno. Code (1892), § 700.

Rhode Island. — Gen. Laws (1896), c. 239, § 15.

In the code states the opposite party shall be deemed to join in a demurrer whenever he shall not amend the pleading to which it is addressed. Iowa Code (1897), § 3565, and similar provisions in the other code states.

In some common-law states joinder in demurrer is still necessary.

Delaware. — Like common-law joinder in demurrer. See Forms Nos. 7180 to 7183, *supra.*

Florida. — Rev. Stat. (1892), § 1053. See Form No. 7184, *infra.*

Illinois. — Like common-law joinder in demurrer. See Forms Nos. 7180 to 7183, *supra*, and Form No. 7185, *infra.*

Maine. — Rev. Stat. (1883), c. 82, § 23. See Form No. 7186, *infra.*

Maryland. — Tyler's Pl., p. 59. See Form No. 7184, *infra.*

New Hampshire. — See Form No. 7187, *infra.*

New Jersey. — Gen. Stat. (1895), p. 2557, § 140. Like common-law joinder in demurrer. See Forms Nos. 7180 to 7183, *supra*, and Form No. 7188, *infra.*

Pennsylvania. — See Form No. 7184, *infra.*

Vermont. — Like common-law joinder in demurrer. See Forms Nos. 7180 to 7183, *supra.*

Virginia. — Code (1887), § 3271 (prescribing form).

West Virginia. — Code (1891), c. 125, § 28 (prescribing form).

Federal Courts. — U. S. Rev. Stat., § 914.

3. This form of joinder to demurrer is often used in the common-law states wherein, by rule of court or statute, the common-law procedure has been modified or simplified. Fla. Rev. Stat. (1892), § 1053; Tyler's Pl. (Md.), p. 59; Richards' F. (Pa.), p. 519.

In *Virginia* and *West Virginia*, the form of a joinder in demurrer shall be, "The defendant, or plaintiff, says that the declaration, or plea, etc., is sufficient in law."

Virginia. — Code (1887), § 3271.

West Virginia. — Code (1891), c. 125, § 28.

(*Title of court and cause.*)[1]

The plaintiff (or *defendant*) says that the declaration (or *plea* or other pleading) is good in substance (or *is sufficient in law*).

Joseph Story, Plaintiff's (or *Defendant's* Attorney.

Form No. 7185.[2]

State of *Illinois*, } ss. In the *Circuit* Court of *Greene* County,
Greene County. } Of the *May* Term, A. D. 1898.

John Doe }
against }
Richard Roe. }

And the said plaintiff *John Doe*, by *Jeremiah Mason*, his attorney, comes and says that the said declaration and the matters and things therein contained, in manner and form as the same are above set forth, are sufficient in law for him, the said plaintiff, to maintain his aforesaid action against the said defendant, and this he is ready to verify, wherefore inasmuch as the said defendant has not denied the said declaration the plaintiff prays judgment, and his damages, etc., to be adjudged to him, etc.

Jeremiah Mason, Plaintiff's Attorney.

Form No. 7186.[3]

(*Annexed to the demurrer is the following joinder:*)

And the plaintiff says that said declaration is sufficient in law. Wherefore he prays judgment.

By *Oliver Ellsworth*, his Attorney.

Form No. 7187.[4]

(*Annexed to the demurrer this joinder:*)

And the said plaintiff says that his said declaration is sufficient in law for maintaining his action aforesaid. Wherefore, for want of a plea to said declaration, he prays judgment, and his damages and costs to be adjudged to him.

By his Attorney, *Joshua Johnston.*

b. To Information in the Nature of Quo Warranto.

Form No. 7188.[5]

New Jersey Supreme Court,
As yet of the term of *March*, in the year of our Lord one thousand eight hundred and *ninety-eight.*

1. See *supra*, note 1, p. 367.

2. Joinder in demurrer is not actually necessary, it being a mere formality. Mix *v.* Chandler, 44 Ill. 174.

3. *Maine.* — Rev. Stat. (1883), c. 82, § 23.

Demurrer must be joined, and it shall not be withdrawn without leave of court and of the opposite party. Me. Rev. Stat. (1883), c. 82, § 23.

4. **Should conclude with a prayer** that the defendant answer over and not for judgment in chief, where the plaintiff replies to a plea in abatement and the defendant demurs to the replication. Whitford *v.* Flanders, 14 N. H. 371.

5. **This precedent** is substantially that set out in Besson's Law Prec., p. 323; Jefferv's Law Prec., p. 574.

Another Precedent. — In State *v.*

The State of New Jersey,
on the relation of
John Doe
against
Richard Roe.
} On information in nature of quo warranto.

And the said the *State of New Jersey*, at the relation of *John Doe*, saith, that the said information and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for the said the *State of New Jersey*, at the relation of *John Doe*, to impeach and implead the said *Richard Roe*, and the said relator is ready to verify and prove the same, as the court here shall direct and award.

Wherefore, inasmuch as the said defendant hath not answered the said information, nor hitherto in any manner denied the same, the said relator prays judgment, that the said *Richard Roe* was not duly and lawfully elected from the ——— assembly district of *Morris* county, to be a member of the board of chosen freeholders of the county of *Morris*; and that *John Doe* was duly and lawfully elected from the ——— assembly district of *Morris* county, to be a member of the board of chosen freeholders of the county of *Morris*; and that the said *Richard Roe*, during all the time since he entered upon the duties of said office, as in the said information stated, hath usurped, intruded into and unlawfully held, used, and exercised, and yet doth usurp, intrude into and unlawfully hold, use, and exercise, to the exclusion of said *John Doe*, the office of chosen freeholder of the county of *Morris*, from the ——— assembly district therein, and the liberties, privileges, and franchises thereof; and that the said *Richard Roe* do not, in any manner, intermeddle with, or concern himself in and about the office, liberties, and franchises aforesaid, but that he be absolutely forejudged and excluded from ever exercising or using the same, or any of them, for the future; and that *John Doe*, the relator above mentioned in this behalf, do recover, against said *Richard Roe*, his costs by him laid out and expended in carrying on his suit in this behalf, according to the form of the statute in such case made and provided.[1]

Daniel Webster, Attorney-General.

Jeremiah Mason, Attorney for Relator.

3. In Criminal Cases.[2]

Gleason, 12 Fla. 247, the following was the joinder in demurrer filed:

"*Almon R. Meek*, Attorney-General of the State of *Florida*, says that the information filed by him in this cause is good in substance.

Almon R. Meek, Attorney-General of the State of *Florida*.

December 3d, 1868."

1. See note 3, p. 449, *supra*.

2. **Necessary at Old Common Law.** — 1 Chit. Cr. Law 440; but see Com. *v.* McCormack, 126 Mass. 258. Consult list of statutes cited *supra*, note 1, p. 411, relating to demurrers to indictments.

Joinder to a demurrer to an indictment or information is set out in Whart. Prec. Ind. and Pl. (1849), p. 669, *citing* as authority for the same Archb. Cr. Pl., p. 103. as follows:

"And *Daniel Webster*, who prosecutes for the said state in this behalf, says that the said indictment, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said *John Doe* to answer the

Form No. 7189.[1]

(*Annexed to the demurrer in Form No. 7121 the following joinder:*)

And the undersigned county attorney, who prosecutes for the state, says, that said indictment is sufficient in law.

Wherefore, he prays judgment and that said respondent may be convicted of the offense alleged in said indictment.

Daniel Webster, County Attorney.

Form No. 7190.[2]

State of *Michigan*.

The People of the State of Michigan against *John Doe*. } In the *Circuit* Court for the county of *Lenawee*.

same; and the said *Daniel Webster*, who prosecutes as aforesaid, is ready to verify and prove the same, as the court here shall direct and award; wherefore, inasmuch as the said *John Doe* hath not answered the said indictment, nor hitherto in any manner denied the same, the said *Daniel Webster*, for our said lady the queen, prays judgment and that the said *John Doe* may be convicted of the premises in said indictment specified."

A precedent is given in Gardiner *v.* People, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 160, which, omitting formal parts, is as follows:

"And the said *Henry Gardiner*, being now here as aforesaid, in his proper person, in custody of the sheriff of *Chemung* county, says that the said plea by him the said *Henry Gardiner* above pleaded, and the matters therein contained are sufficient in law to bar the said people from further prosecuting the said *Henry Gardiner*, by reason of the premises in the indictment to which the said plea is above pleaded, and this he is ready to verify. Wherefore he prays judgment that he may be dismissed this court without delay," etc.

Joinder to a demurrer to plea in bar is set out in Whart. Prec. Ind. and Pl. (1849), p. 670, *citing* as authority for the same Archb. Cr. Pl., p. 103, omitting the formal parts, as follows.

"And the said *John Doe* says that his said plea by him above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said state from prosecuting the said indictment against him, the said *John Doe*; and the said *John Doe* is ready to verify and prove the same, as the said court here shall direct and award; wherefore, inasmuch as the said *Daniel Webster*, for the said state, hath not answered the said plea, nor hitherto in any manner denied the same, the said *John Doe* prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified."

Joinder in demurrer to plea of autrefois acquit is set out in Whart. Prec. Ind. and Pl. (1849), p. 671, which, omitting the formal parts, is as follows, to wit:

"And the said *John Doe* and *Richard Roe*, being now here as aforesaid in their proper persons, under the custody of the said sheriff of the county of *Middlesex*, say that the said plea of them, the said *John Doe* and *Richard Roe*, in form as aforesaid, above pleaded, and the matters therein contained, are sufficient in law to bar the said state from further prosecuting them, the said *John Doe* and *Richard Roe*, by reason of the premises in the said indictment to which the said plea is above pleaded, mentioned; and this they are ready to verify, etc.; wherefore as before, they pray judgment, and that the said state may be barred from further prosecuting by reason of the premises mentioned in the said indictment; to which the said plea of them, the said *John Doe* and *Richard Roe*, is above pleaded; and that they may be dismissed this court without day," etc.

1. This form may be used in such common-law states as have by statute or rule of court modified or simplified common-law procedure but still require joinders in demurrer.

2. *Michigan.* — How. Anno. Stat. (1882), § 9535.

And *Daniel Webster*, who prosecutes for the said people of the state of *Michigan* in this behalf, says, (*continuing and concluding as in common-law joinder to demurrer to indictment set out supra, note 1, p. 451*).

Form No. 7191.[1]

Supreme Court, County of *Suffolk*.

The People of the State of New York against *John Doe*.

Daniel Webster, who prosecutes for the people, says that the said indictment and the matter therein contained in manner and form, as the same are there stated, are sufficient in law to compel the said *John Doe* to plead to the same; wherefore the said people ask the judgment of the court herein, that the said defendant be ordered to plead to said indictment, and proceed to trial under the same.

Daniel Webster,
District Attorney of *Suffolk* County

XIII. NOTICE OF ARGUMENT OF DEMURRER.

Form No. 7192.[2]

New Jersey Supreme Court.

Benjamin L. Ludington vs. *Hezekiah Watkins*. In *Debt*. Notice of Argument on Demurrer.

Gentlemen: Please to take notice that we shall move the argument of the demurrer, filed in above case before the *Supreme* Court, at *the State House* in the city of *Trenton*, on the *first Tuesday* in *November next*, at the opening of the court on that day, or as soon thereafter as the court can attend to the same.

Yours respectfully,
Muirheid & McGee, Pltffs. Attys.

Dated *October 7th*, 1878.
To *Williams & Cowles*, Attys. of Defts.

This form may be used in such common-law states as follow strictly the old common-law practice. See forms set out *supra*, note 2, p. 451.

1. **Precedent.** — In People *v.* Fish, 4 Park. Cr. Rep. (Buffalo Super. Ct.) 209, in the demurrer-book, the following answer to a demurrer to an indictment against a warehouseman is given:

"And hereupon, the said *Albert Sawin*, who prosecutes for the said people in this behalf, says that this court has the power and authority by law, and ought to take cognizance of the said bill and the matters therein alleged.

And he also says that the said indictment, and the matters therein alleged, in manner and form as the same are above stated, are sufficient in law to compel the said *James M. Fish* to answer the same; and this the said *Albert Sawin*, who prosecutes as aforesaid, is ready to verify and prove the same, as the court shall direct and award. Wherefore, inasmuch as the said *James M. Fish* hath not answered the said indictment, nor hitherto in any manner denied the same, the said *Albert Sawin*, for the said people, prays judgment, and that the said *James M. Fish* may be convicted of the premises in the said indictment specified; but because," etc.

2. **Notice of argument,** on demurrer, may be given by either party, which notice shall be served at least ten days before the time for hearing. N. J. Gen. Stat. (1895), p. 2557, § 142.

XIV. OVERRULING DEMURRER.[1]

1. To Declaration.

a. In General.

Form No. 7193.

(*Title of cause.*)[2] This cause having been duly brought to argument upon the demurrer of the said defendant (or *plaintiff*) to the plaintiff's (or *defendant's*) declaration (or *plea*, or other pleading, as the case may be), and all and singular the premises being seen and by the court now here fully understood, and due deliberation being thereupon had, and it appearing to said court that the declaration (or *plea*, or other pleading, as the case may be,) of the said plaintiff (or *defendant*) and all matters therein contained * (*continuing and concluding in the proper manner as indicated in Forms Nos. 7196 to 7200*).

1. Examples of orders overruling demurrers to common-law pleadings are given in Forms Nos. 7193 to 7201, *infra*. Similar orders may be framed for any particular common-law jurisdiction by using these forms as models and referring to the titles JUDGMENTS AND DECREES and ORDERS AND RULES for the formal parts.

Judgment of respondeat ouster on demurrer to plea in abatement, at common law, may be as follows: (*Commencing as in Form No. 7193, infra, and continuing to *; then proceed thus:*) "are not sufficient in law to quash the said writ of the said plaintiff; therefore it is considered that the said defendant do further answer (or *answer over*) to said plaintiff to his writ and declaration (or *to his declaration*) aforesaid."

Order overruling demurrer to information in nature of quo warranto and granting leave to plead over is found in State *v.* Gleason, 12 Fla. 253, which was as follows· "Upon considering the matters arising upon the demurrer of the respondent to the information filed herein by the said State of *Florida* by its said *Attorney-General*, it is ordered that the said demurrer is overruled, excepting so much of the first ground therein as relates to form, and as to the same, it is ordered, upon motion of the *Attorney-General*, that he have leave to amend the same instanter, so that the said information shall read, '*In the name and by the authority of the State of Florida.*'

It is further ordered that the said respondent, *William H. Gleason*, have leave to plead over to the said information by *Saturday, December 12th*, 1868, at *10* o'clock *a.* m., or show cause at that time why final judgment of ouster shall not be awarded against him.

It is further ordered that a copy hereof be served by the sheriff of this court upon the said *William H. Gleason*, the respondent."

Order overruling demurrer to indictment, in *Maine*, may be as follows: (*Indorsed upon the demurrer the following judgment:*)

"Demurrer overruled; indictment adjudged good.

John Marshall, Justice of the *Supreme Judicial* Court.

To which ruling the said respondent excepts.

By *Jeremiah Mason*, his Attorney.

Exceptions allowed.

John Marshall, Justice of the *Supreme Judicial* Court.

And the undersigned moves that said exceptions be adjudged frivolous and intended for delay.

Daniel Webster, County Attorney.

Exceptions adjudged frivolous and intended for delay; and the same are accordingly to be transmitted at once to the chief justice of the *Supreme Judicial* Court, to be argued in writing on both sides within thirty days thereafter.

John Marshall, Justice of the *Supreme Judicial* Court."

2. For the formal parts of judgments and orders, generally, consult the titles JUDGMENTS AND DECREES and ORDERS AND RULES.

MAINE.

Form No. 7194.

(*Indorsed upon demurrer this order:*)
Demurrer overruled, declaration (or *bill*) adjudged good.
Defendant (or *respondent*) has leave to plead anew forthwith.
John Marshall, Justice of the *Superior*
(or *Supreme Judicial*) Court.

To which ruling said defendant (or *respondent*) excepts.
By *Jeremiah Mason*, his Attorney.
Exceptions allowed.
John Marshall, Justice of the *Superior*
(or *Supreme Judicial*) Court.

NEW HAMPSHIRE.

Form No. 7195.

(*Indorsed upon demurrer this order:*) Upon hearing the parties the said demurrer is overruled.
I. N. B., Presiding Justice.

b. In Assumpsit.

Form No. 7196.

(*Commencing as in Form No. 7193, down to *; then proceed thus*)[1] are sufficient in law for the said plaintiff to have and maintain his aforesaid action thereof against the said defendant.† Wherefore the said plaintiff ought to recover against the said defendant his damages on occasion of the premises. And the said damages having been duly assessed at the sum of *five hundred* dollars over and above his costs and charges by him about his suit in this behalf expended; therefore it is considered that the said plaintiff do recover against the said defendant his damages aforesaid together with his costs and charges aforesaid to be taxed, and that the plaintiff have execution thereof.

c. In Debt.

Form No. 7197.

(*Commencing as in Form No. 7196, and continuing to †; then proceed thus:*)[1] Therefore it is considered that the said plaintiff do recover against the said defendant his debt for the sum of *five hundred* dollars, together with his costs and charges by him about his suit in this behalf expended, to be taxed, and that the said plaintiff have execution thereof.

1. **For the formal parts** of judgments and orders, generally, consult the titles JUDGMENTS AND DECREES and ORDERS AND RULES.

d. In Replevin.

Form No. 7198.

(*Commencing as in Form No. 7196, and continuing to* †*; then proceed thus:*)[1] Wherefore the said plaintiff ought to recover against the said defendant his damages on occasion of the unlawful detention of the goods and chattels in the said plaintiff's declaration specified; and the said damages having been duly assessed at the sum of *five hundred* dollars over and above his costs and charges by him about his suit in this behalf expended; therefore it is considered that the said plaintiff do recover against the said defendant his damages aforesaid, together with his costs and charges aforesaid to be taxed, and that the said plaintiff have execution thereof.

e. After Issues of Fact Tried.[2]

Form No. 7199.

(*Title of cause.*)[1] This cause having been duly brought to argument upon the demurrer of the said defendant to the *first* count of the said plaintiff's declaration, the issue of facts joined between the parties having been heretofore tried, and the jury (or *court*) who

1. **For the formal parts** of judgments and orders, generally, consult the titles JUDGMENTS AND DECREES and ORDERS AND RULES.

Where Goods were not Replevied. — Judgment for plaintiff on demurrer to declaration in replevin, when the goods were not replevied, may be in the following form: (*Commencing as in Form No. 7196, and continuing to* †*; then proceed thus:*) "Wherefore the said plaintiff ought to recover against the said defendant as well the goods and chattels in his declaration specified as his damages on occasion of the unlawful detention thereof, and the value of said goods and chattels having been assessed at the sum of *five hundred* dollars, and the said damages at the sum of *five hundred* dollars over and above his costs and charges by him about his suit in this behalf expended; therefore it is considered that the said plaintiff do recover against the said defendant his damages aforesaid together with his costs and charges aforesaid to be taxed; and that the said plaintiff have execution thereof. And it is further considered that the goods and chattels aforesaid be replevied and delivered to the said plaintiff without delay, or, in default thereof, that the said plaintiff do recover against the said defendant the sum of *five hundred* dollars, being the value of the said goods and chattels so assessed, according to the form of the statute in such case made and provided."

2. **Order overruling demurrer to declaration on appeal bond** is given in State *v.* Dotts, 31 W. Va. 822, as follows, omitting formal parts:

"This day came the parties, by their attorneys, and the demurrer made at a former term of this court being argued by counsel and considered by the court, the court doth overrule the said demurrer. Thereupon the defendants tendered a special plea in writing, to the filing of which the plaintiff objects, which objection being argued by counsel and considered by the court, the court doth overrule the objection, and permitted said special plea to be filed, which is accordingly done; and the plaintiff replies generally to the special plea in writing, and issue is thereon joined. Thereupon came a jury, to wit: (*naming them*), all good and lawful men, selected, tried and sworn the truth to speak upon the issue joined, and, after hearing the evidence and argument of counsel, were sent to their chamber to consider their verdict, and after some time returned into court, and, not having agreed upon a verdict, are adjourned over until to-morrow *morning* at 9 o'clock."

tried the same having found that the said defendant did undertake and promise, in the manner and form as the said plaintiff hath, in the *second* count of his declaration complained against him, and assessed the damages of the said plaintiff on occasion thereof, at *five hundred* dollars, over and above the costs and charges by him about his suit in that behalf expended; and as to the issue so joined between the parties whereon they have put themselves upon the judgment of the court, the said jurors (or *court*) having assessed the damages of the said plaintiff, upon condition that it should, upon a judgment thereupon given for the said plaintiff, by reason of the not performing of the promises and undertakings in the *first* count of said plaintiff's declaration mentioned, at the sum of *five hundred* dollars. And hereupon all and singular the premises aforesaid whereon the parties aforesaid have put themselves upon the judgment of the court, being seen and by the court, now here, fully understood, and due deliberation being thereupon had, and it appearing to the court now here that the said *first* count of the said declaration, and the matters therein contained, are sufficient in law for the said plaintiff to have and maintain his aforesaid action thereof against the said defendant; therefore it is considered that the said plaintiff do recover against the said defendant his damages aforesaid assessed at the sum of *five hundred* dollars, together with his costs and charges aforesaid, to be taxed; and that the said plaintiff have execution thereof.

f. Allowing Defendant to Withdraw and Plead Over.

Form No. 7200.

(*Commencing as in Form No. 7196, and continuing to* †; *then proceed thus:*)[1] And thereupon, upon motion of *Jeremiah Mason*, attorney for the defendant, it is ordered that the said defendant have leave to withdraw his said demurrer, and to plead to the said plaintiff's declaration within *ten* days, upon paying to the said plaintiff his costs occasioned by the said demurrer, including an attorney's fee of *ten* dollars.

2. To Bill in Equity.[2]

Form No. 7201.

(Precedent in Waters *v* Perkins, 65 Ga. 35.)[3]

1. **For the formal parts** of judgments and orders, generally, consult the titles JUDGMENTS AND DECREES and ORDERS AND RULES.

2. **An example of an order overruling demurrer to bill in equity** is given in Form No. 7201, *infra*. Using this as a model and referring to the titles JUDGMENTS AND DECREES and ORDERS AND RULES for the formal parts, similar orders may be framed for any particular equity jurisdiction.

Maine. — For order overruling demurrer to bill in equity see *supra*, Form No. 7194.

3. **Another Precedent.** — In Thomas *v.* Winter, 21 Ga. 358, is given the following form for the order overruling a demurrer:

"*William C. Thomas* vs. *John G. Winter, The Bank of St. Mary's and others.* } In Equity. Demurrer.

Jackson Perkins
vs.
H. C. Holbrook, executor of Robert Scandrett, F. W. H. Walker and Augusta Walker. } Bill for Injunction.

After argument had, it is ordered by the court that the demurrer to said bill as amended be, and the same is hereby, overruled, and that said case stand continued. *April* Term, 1879.

3. To Complaint or Petition.[1]

After hearing the argument of counsel for complainant and defendants, on the demurrer filed in the above case, it is ordered and decreed that the said demurrer be overruled."

For the formal parts of orders, generally, consult the title ORDERS AND RULES.

Order Overruling Demurrer to Bill of Review. — In Carey *v.* Giles, 10 Ga. 12, such an order or judgment was as follows:

"It is ordered, considered and adjudged by the Court, that the above demurrer be overruled, and the decree in the original bill set aside, on the following grounds:

1st. Because it is apparent from the bill of *Charles H. Rice*, *receiver*, and from the answer of the *President of the Bank of Columbus*, that the *Bank of Columbus* was, at the time of the instituting said bill, situate and located in the County of *Muscogee*, in this State; and the *President of the Bank of Columbus*, having in and by his answer, submitted the question of jurisdiction to the Court *of Equity* of *Twiggs* County, this Court is of the opinion that the bill of *Rice*, the *receiver*, was and is an original bill, relating to matters not before in litigation in the Court, by the same persons, standing in the same interests. And therefore, this Court is of opinion that the Court *of Equity* of *Twiggs* County did not have jurisdiction in said case so far as to decree separate and substantial relief against the *Bank of Columbus*, this Court being of opinion that the *Superior* Court of the County of *Muscogee* has the only rightful jurisdiction, so far as the relief sought by the *receiver* against the *Bank of Columbus* is concerned; and this Court disclaims jurisdiction, so far as to pass any judgment or decree pertaining to the notes mentioned as having been sued in *Jones* and *Houston Superior* Courts.

2d. Because it is apparent from the bill, answer and decree, when taken together, that there is error apparent in said decree, in allowing the parties in *Jones*, *Houston* and *Twiggs* Counties, to pay off said notes, in notes of the *Bank of Macon* when the parties to said notes were in default, had never answered, but allowed the bill to be taken, *pro confesso*, against them; it appearing from the original bill, and admitted by the answer, that the *Bank of Macon* had long since suspended, never had resumed payment, and was and is insolvent, and there being no allegation, charge or statement, or prayer in the original bill, or admission in the answer of the *Bank of Columbus*, that said parties were creditors of the *Bank of Macon*. This Court is of opinion that the original bill, answer and replication made no such issue, and the Jury founded this part of the decree upon no issue presented, and that it is error apparent, and therefore the bill of review is retained."

This is an example of an order not only overruling a demurrer to a bill of review, but giving effect to the bill of review as a matter of equity by setting aside the decree sought to be reviewed. On the facts in this particular case the ruling on this decree was afterward held to be reversed by a subsequent judgment of the court, but it is valuable as a precedent of the action to be taken by a court of equity on a proper state of facts. The supreme court says of this decree: "We do not question the power of the chancellor to render this judgment, and in the form in which it was rendered." See opinion in Carey *v.* Giles, 10 Ga. 21. *Compare* also Rice *v.* Carey, 4 Ga. 558.

1. **Examples of orders overruling demurrers to pleadings under the codes** and practice acts are given in Forms Nos. 7202 to 7207, *infra*. Similar orders may be framed for any particular code

a. In General.

Form No. 7202.

(Richards' F. (Colo.), p. 14.)

(*Title of cause.*)[1] At this day come the parties hereto, by their attorneys respectively, and thereupon, this cause coming on to be heard upon the demurrer of said defendant to the complaint herein, is argued by counsel, and the court being now sufficiently advised of the premises doth sustain (or *overrule*) said demurrer.*

b. With Judgment for Plaintiff.

Form No. 7203.

(Sand. & H. Ark. Dig. (1894), p. 1645, No. 99.)

jurisdiction by using these forms as models and referring to the title ORDERS AND RULES for the formal parts.

Demurrer Confessed. — In Richards' F. (Colo.), p. 15, is given this form: 'At this day comes the said plaintiff, by his attorney, and saith that his complaint herein is not sufficient in law for the said defendant to answer thereto, and on his motion it is ordered that time and until *ten* days from this day be allowed said plaintiff within which to amend his complaint herein, as he shall be advised."

Demurrer Submitted. — In Richards' F. (Colo.). p. 13, is given this form: "At this day come the parties, etc. And thereupon this cause coming on to be heard upon the demurrer of said defendant to the complaint herein, is argued by counsel, and, by consent, is submitted to the court for further consideration."

1. For the formal parts of orders, generally, consult the title ORDERS AND RULES.

Precedent. — In Thompson *v.* Stanley, 29 Abb. N. Cas. (N. Y.) 13, the order overruling demurrer, omitting formal parts, was as follows, to wit: "The defendant, *Annie Stanley*, as administratrix of *David A. Stanley*, deceased, having demurred to the complaint herein upon the grounds that said complaint does not state facts sufficient to constitute a cause of action, that plaintiff has not legal capacity to sue and that several causes of action have been improperly united, and said demurrer having come duly on to be heard, now after hearing *Frederick Seymour*, Esq., of counsel for said defendant in support of said demurrer, and *L. Karge*, plaintiff's attorney, in opposition thereto; and after reading the complaint herein, filed *April 15*, 1892, and upon reading and filing said demurrer, and upon due deliberation thereon, I do make the following conclusions of law: I. That the complaint herein states facts sufficient to constitute a cause of action. II. That the plaintiff has legal capacity to sue. III. That several causes of action have not been improperly united in said complaint. IV. That none of the grounds of demurrer assigned by said defendant, *Annie Stanley*, are well taken. V. That the plaintiff is entitled to judgment overruling said demurrer with costs which are hereby awarded to the plaintiff to be paid by said defendant to the plaintiff, but with leave, however, to said defendant to answer plaintiff's complaint herein within *twenty* days upon payment of costs. And I hereby order and direct that said costs be adjusted by the clerk of this court and that an interlocutory judgment be entered herein which shall direct that said demurrer is overruled with costs to the plaintiff to be paid by said defendant, *Annie Stanley*, as administratrix of *David A. Stanley*, deceased, but with leave, however, to said defendant, *Annie Stanley*, to answer the complaint herein within *twenty* days after the service of said interlocutory judgment upon her attorneys upon the payment by her to plaintiff's attorney within said *twenty* days of said costs so to be adjusted as aforesaid and to be included in said interlocutory judgment."

Richard Roe, plaintiff,
against
John Doe, defendant. } Judgment.[1]

The parties appeared by their attorneys, and the defendant filed a demurrer to the complaint, and the question of law arising thereon being heard, it is adjudged by the court that the complaint is sufficient. The defendant then filed an answer to the complaint, and thereupon the following jurors: *Harold J. Galpin* and eleven others from the regular panel, who had previously been sworn according to law, were impanelled to try the issue and having heard evidence rendered the following verdict:

"We, the jury, find for the plaintiff *one hundred and fifty* dollars. *Harold J. Galpin, Foreman.*"

It is therefore ordered, considered and adjudged by the court that the plaintiff have and recover of the defendant *one hundred and fifty* dollars, and his costs herein expended.

c. With Leave to Withdraw and Answer.[2]

Form No. 7204.

(Richards' F. (Colo.), p. 15.)

(*Commencing as in Form No. 7202, and continuing down to*; then proceed thus.*)[1] And thereupon it is ordered by the court that said defendant answer the complaint herein within *ten* days from this day.

Form No. 7205.

(*Title of court and cause, and caption.*)[1]

This action having been brought to trial on the issue of law joined herein, after hearing *Jeremiah Mason* in support of the demurrer, and *Oliver Ellsworth* (or *no one appearing*) in opposition:

1. **For the formal parts** of orders, generally, consult the title ORDERS AND RULES.

Precedent. — Final judgment on overruling demurrer was rendered in Matthews *v.* Copeland, 80 N. Car. 31, as follows: "This cause coming on to be heard upon complaint and demurrer and the court being of opinion with the plaintiff, it is considered that the demurrer be overruled, and it is urther considered, on motion of *R. B. Peebles*, counsel for the plaintiff, that the plaintiff recover of the defendants, *W. S. Copeland*, and *William Barrow*, the sum of *twenty thousand* dollars, to be discharged upon the payment of the sum of *three hundred and seventy-nine and four one-hundredths* dollars, with interest thereon at the rate of *twelve* per cent. per annum from *July 1st*, 1855, till paid, and the costs of this action to be taxed by the clerk. Let the plaintiff have execution." On appeal, the court held that in an action on a contract made prior to the adoption of the code, the old rules of pleading and practice governed and the final judgment entered above was proper.

2. **Demurrer Withdrawn and Time Allowed to Answer.**—In Richards' F.(Colo.), p. 16, is given this form: "At this day come the parties hereto, by their attorneys respectively, and thereupon, on motion of the defendant, the plaintiff thereto consenting, it is ordered by the court that the said defendant have leave to withdraw the demurrer heretofore filed by him, and time and until *ten* days is allowed said defendant in which to answer the complaint herein, as he shall be advised."

Ordered, that said demurrer * be overruled, and that plaintiff (or *defendant*) have judgment thereon; but with leave to the defendant (or *plaintiff*) to withdraw his demurrer and put in an answer (or *a reply*) within *twenty* days, on payment of costs. (*Concluding in the usual manner.*)[1]

Form No. 7206.

(Precedent in Campbell *v.* New York Cotton Exch., 47 N. Y. Super. Ct. 560.)[2]

[(*Title of court and cause, and caption.*)][3]

The above entitled action having been duly brought to trial upon the issue of law joined herein by the defendant, the *New York Cotton Exchange*, after hearing *Francis M. Scott, Esq.*, of counsel for the said defendant, in support of said demurrer, and *Michael H. Cardozo*, of counsel for the plaintiff, in opposition thereto,

Upon motion of *Billings & Cardozo*, plaintiff's attorneys,

It is ordered, that said demurrer be, and the same hereby is overruled, and that the plaintiff have judgment thereon; but with leave to the said defendant to withdraw his said demurrer and answer within *twenty* days, on payment of costs.

And it is hereby further ordered and directed that if the said defendant fails to comply with the terms hereby imposed, that final judgment in favor of the plaintiff and against the defendant for the relief demanded in the complaint, be entered herein, with costs. [(*Usual conclusion.*)][3]

1. For the formal parts of orders, generally, consult the title ORDERS AND RULES.

2. Another order was also entered in this case, which, omitting the formal parts, was as follows: "The above entitled cause having duly come on for trial upon the issue of law raised by the demurrer of the defendant, the *New York Cotton Exchange*, at a *special* term of this court, held on the *first Monday* of *January*, 1881, *Hon. John Sedgwick*, *Chief* Justice, presiding, and a decision having been duly rendered on the *11th* day of *January*, 1881, overruling said demurrer and directing that plaintiff have judgment thereon, but with leave to the said defendant, the *New York Cotton Exchange*, to withdraw its said demurrer and answer within *twenty* days on payment of costs, and the costs of the said plaintiff having been duly taxed at $62.41,

Now, on motion of *Billings & Cardozo*, plaintiff's attorneys,

It is adjudged that said demurrer of the said defendant, the *New York Cotton Exchange*, be and the same hereby is overruled; and that the plaintiff, *Malcolm Campbell*, as receiver of the property of *Daniel W. Talcott*, recover of the defendant, the *New York Cotton Exchange*, the sum of $62.41 costs, but with leave to the said defendant to withdraw its said demurrer and answer within *twenty* days, upon the payment of said costs.

Dated *April 21*, 1881."

3. The matter to be supplied within [ ] is not in the reported case, but should be added to render the precedent complete.

Precedents. — In Tuck *v.* Walker, 106 N. Car. 288, the judgment, omitting the formal parts, was as follows: "This cause coming on to be heard by demurrer, filed by defendant, after hearing argument on same in behalf of each party, upon motion of *J. S. Merritt* and *Graham & Winston*, attorneys for plaintiff, it is ordered that the demurrer be overruled, and it is further ordered that defendant have leave to file an answer herein."

In Willis *v.* Tozer, 44 S. Car. 3, the order was as follows, omitting formal parts: "This case came before me at the *spring* term of the court, held in *April*, 1894, on an oral demurrer. If the amended complaint does not conform to the order of Judge *Gary* giving leave to amend, a demurrer is not the

d. With Stay Granted on Appeal.

Form No. 7207.

(Precedent in Buist *v.* Melchers, 44 S. Car. 58.)[1]

[(*Title of court and cause, and caption.*)][2]

This cause having been by order of court transferred from *Calendar 1* to *Calendar 2*, upon motion of defendants' attorneys, and said cause having come on for hearing on the *23d* day of *March*, 1*893*, before his honor, Judge *Aldrich*, and an oral demurrer, to the complaint herein, having been interposed by the defendants, upon the

mode by which the error may be corrected. There may, perhaps, have been a motion to set aside the amended complaint as not in conformity to the order, and it might have prevailed, whether it was or was not sufficient on demurrer. In the amended complaint we have the following allegations: 1. There was a former action against the defendant as administratrix, in which she pleaded *plene administravit.* 2. That on this plea there was a judgment in her favor, and a judgment against her for $*633.08*, as administratrix, *quando acciderint.* 3. That since the rendition of this judgment she has received for the estate of her intestate the sum of $*1,060.02.* 4. That execution has been issued on the said judgment, and that the sheriff made a return of *nulla bona* thereto. 5. That the said sum of $*1,060.02* is applicable to the plaintiff's judgment and execution. 6. That the defendant has failed and refused so to apply the same, but has wasted and misappropriated the same. I do not think it important to enter a review of the authorities on the subject: Chit. Pl., p. 361; Wms. Ex'ors, p. 1391. I am not prepared to say that there are no circumstances under which an administrator, situated as the defendant is in this case, would not be held liable to pay the plaintiff's judgment out of his own estate, because he has received an amount equal to it since the former judgment *quando* was rendered. Take a case in which the assets which came to the hands of the administratrix after the judgment *quando* are destroyed by the act of God or of the public enemy, or, again, where there was such a wholesale destruction of values by the termination of the late civil war; and other cases might suggest themselves. These, however, would be matters to be set up in the answer. I think that the judgment in the former case is at least *prima facie* an adjudication that there are, or were at the rendition thereof, no debts or other obligations of which the administratrix had notice, which would take precedence of plaintiff's debt in administration of future assets. On the coming into possession of such assets, they are *prima facie* applicable to plaintiff's judgment, and remain so until the contrary is pleaded and shown. It is therefore, ordered and adjudged, that the demurrer be overruled, and that the defendant have leave to answer within *twenty* days, if she has not already done so."

1. Complaint by Receiver Against Former Directors. — This precedent overrules a demurrer to a complaint by receiver of a corporation against former directors to recover damages for various omissions of duty. The complaint herein declared sufficient is set out *in hæc verba* in the reported case, and the answer is likewise set out in full. In sustaining the ruling on the demurrer, the court held that:

Allegations not specific, as of the times of various omissions of duty and which of the defendants were members of the board at such times, cannot be reached by demurrer; the remedy is by motion to make more definite and certain.

Secondary liability of defendants is not ground for demurrer, as such a defense raises only an equity to be asserted by answer. See, for further discussion of questions by this ruling on the demurrer, the opinion in Buist *v.* Melchers, 44 S. Car. 46.

For another precedent see Buist *v.* Fitzsimons, 44 S. Car. 137

2. For the formal parts of orders, generally, consult the title ORDERS AND RULES.

The matter to be supplied within [ ] is not in the reported case, but should be added to render the precedent complete.

ground that the complaint does not state facts sufficient to constitute a cause of action; after full argument, it is on motion of *H. E. Young* and *Fitzsimons & Moffett*, plaintiff's attorneys, ordered that said demurrer be and the same is hereby overruled; and the defendants having given notice of intention to appeal, it is ordered, that this action be stayed till the determination of said appeal. [(*Concluding in usual manner.*)][1]

XV. SUSTAINING DEMURRER.[2]

1. To Declaration.

a. In General.

Form No. 7208.

(*Commencing as in Form No. 7193, and continuing to *; then proceed thus:*) are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant; therefore it is considered that the said plaintiff take nothing by his suit, and that the said defendant go thereof without day. And it is further considered that the said defendant do recover against the said plaintiff his costs and charges by him about his defense in this behalf expended to be taxed; and that the said defendant have execution thereof.

MAINE.

Form No. 7209.

(*Indorsed upon the demurrer the following judgment:*) Demurrer sustained; declaration (or *bill*) adjudged bad. Plaintiff (or *complainant*) has leave to plead anew forthwith.

John Marshall, Justice of the *Superior* (or *Supreme Judicial*) Court.

To which ruling said plaintiff (or *complainant*) excepts.

By *Oliver Ellsworth*, his Attorney.

Exceptions allowed.

John Marshall, Justice of the *Superior* (or *Supreme Judicial*) Court.

1. See note 2, p. 462, *supra*.

2. **Order sustaining demurrer to indictment**, in *Maine*, may be as follows: (*Indorsed upon the demurrer the following:*)

"Demurrer sustained; indictment adjudged bad.

John Marshall, Justice of the *Supreme Judicial* Court."

If the demurrer is sustained, no exceptions can be taken by the government.

Judgment for defendant on demurrer to plea in abatement may be as follows: (*Commencing as in Form No. 7193, and continuing down to *; then proceed thus:*) "are sufficient in law to quash the said plaintiff's writ (or *declaration*); therefore it is considered that the said writ (or *declaration*) of the said plaintiff be quashed, and that the said defendant go thereof without day. And it is further considered" (*concluding as in Form No. 7208, infra*).

NEW HAMPSHIRE.

Form No. 7210.

(*Indorsed upon demurrer the following order:*) Upon hearing the parties, the said demurrer is allowed.

I. N. B., Presiding Justice.

b. Allowing Amendment.

Form No. 7211.

(*Commencing as in Form No. 7198, and continuing down to *; then proceed thus:*) are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant; thereupon on motion of *Oliver Ellsworth*, attorney for the said plaintiff, it is ordered by the court now here, that the said plaintiff have leave to amend his said declaration within *ten* days upon paying to the said defendant his costs of the said demurrer, including an attorney's fee of *ten* dollars.

2. To Bill in Equity.

Form No. 7212.

(Precedent in Florida *v.* Black River Phosphate Co., 27 Fla. 321.)

[(*Title of court and cause, and caption.*)][1]

This cause came on to be heard upon the demurrer to the bill filed herein, and was argued by counsel. Upon consideration thereof, the court is of opinion that chapter 791 of the Laws of Florida vested in the riparian proprietors the fee in all land covered by water lying in front of any tract of land owned by any citizen of the United States situated upon any navigable stream as far as the edge of the channel. While the act is entitled "An Act for the benefit of commerce," and the Legislature deemed it for the interest of commerce that all submerged land and water privileges should be improved, they granted the full title to the same to the riparian proprietors, to induce them to incur the expense of making the improvements which the Legislature deemed important for the benefit of commerce. This seems to be the view entertained by the *Supreme* Court of this State, in so far as it has expressed any opinion on the subject. Entertaining this view of the law, the court does not deem it necessary to express any opinion upon the question as to whether or not the State owns the soil in the channel of rivers and streams in which the tide does not ebb and flow, though in fact capable of navigation. The court is of the opinion that the demurrer is well taken. It is therefore ordered, adjudged and decreed that the demurrer to complainant's bill herein be sustained. It is further ordered and decreed that the complainant have leave to amend its bill as it may be advised. [(*Concluding in the usual manner.*)][1]

1. **For the formal parts** of decrees and orders, generally, consult the titles JUDGMENTS AND DECREES and ORDERS AND RULES.

The matter to be supplied within [ ] is not in the reported case, but should be added to render the precedent complete.

3. To Complaint or Petition.[1]

a. With Judgment for Defendant.

Form No. 7213.

(Precedent in Sand. & H. Dig. Ark. (1894), p. 1644, No. 98.)

Richard Roe, plaintiff,
against
John Doe, defendant. } Judgment.

The parties appeared by their attorneys and the defendant filed a demurrer to the complaint, and the question of law arising thereon being heard it is adjudged by the Court that the complaint is insufficient, and the plaintiff refusing to plead further,[2] it is ordered, considered and adjudged by the Court that the complaint be dismissed and that the defendant recover of the plaintiff his costs[3] herein expended.

Form No. 7214.

(Richards' F. (Colo.), p. 14.)

At this day come (*commencing and continuing as in Form No. 7202, down to *; then proceed thus:*)

And thereupon the plaintiff saith that he will and doth abide by his complaint herein. Whereupon, it is ordered by the court that said defendant go hence hereof, and have and recover of and from the said plaintiff his costs in this behalf laid out and expended to be taxed, and have execution therefor.

1. For general form of order sustaining demurrer under the codes and practice acts see *supra*, Forms Nos. 7202 to 7207.

Ruling of Demurrer Submitted. — In Richards' F. (Colo.), p. 13, is given this form: "This cause having heretofore been submitted to the court upon the demurrer of said defendant to the complaint herein, and by the court here taken under advisement, and the court now being sufficiently advised in the premises, doth sustain said demurrer."

Misjoinder of Actions. — As to the effect of sustaining a demurrer on this ground, see the following statutes:

Indiana. — Thornt. Stat. (1897), § 345; Horner's Stat. (1896), § 340.

Kansas.—Gen. Stat. (1897), c. 95, § 93.

Nebraska. — Comp. Stat. (1897), § 5691.

New Mexico.—Code Civ. Proc. (1897), § 2685, subs. 81.

North Carolina.— Clark's Code Civ. Proc., § 272.

Ohio. — Bates' Anno. Stat. (1897), § 5065.

Oklahoma. — Stat. (1893), § 3970.

South Carolina. — Code Civ. Proc. (1893), § 193.

South Dakota. — Code Civ. Proc. (1887), § 141 (Dak. Comp. L. (1887) § 4937).

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2686.

Wyoming. — Rev. Stat. (1887), § 2452.

2. Failure to Plead Anew. — As to the effect of a failure to plead anew after demurrer sustained in the rendition of judgment thereafter, see the following.

Florida. — L'Engle *v.* L'Engle, 19 Fla. 715.

Iowa. — Newcom *v.* Dubois, 95 Iowa 194.

Maine. — Rev. Stat. (1883), c. 82, § 23.

3. Costs — *Connecticut.* — Gen. Stat. (1888), § 1015.

Michigan. — How. Anno. Stat. (1882), §§ 8226, 8976.

New Mexico. — Double costs are awarded upon second demurrer sustained and triple costs upon third demurrer sustained to a complaint. Code Civ. Proc. (1897), § 2685, subs. 61, 62.

For the formal parts of orders, generally, consult the title ORDERS AND RULES.

b. With Leave to Amend.[1]

Form No. 7215.

(Richards' F. (Colo.), p. 15.)

(*Commencing as in Form No. 7202, and continuing down to *; then proceed thus:*)[2] And thereupon, upon his motion, time, and until *ten* days is allowed said plaintiff in which to amend his complaint herein, as he shall be advised.

Form No. 7216.

(*Title of court and cause, and caption.*)[2]

This action having been brought to trial on the issue of law joined herein, after hearing *Jeremiah Mason* in support of the demurrer, and *Oliver Ellsworth* (or *no one appearing*) in opposition:

Ordered, that said demurrer be sustained, and that defendant (or *plaintiff*) have judgment thereon; but with leave to the plaintiff (or *defendant*) to amend the complaint (or *answer* or *reply*) within *twenty* days, on payment of costs. (*Concluding in the usual manner.*)[2]

XVI. Sustaining in Part and Overruling in Part.[3]

Form No. 7217.

(*Commencing as in Form No. 7205, and continuing to *; then proceed thus:*)[2] to the first cause of action set forth in the complaint be sustained; and that the defendant have judgment thereon; and that the demurrer to the second cause of action be overruled; and that the plaintiff have judgment thereon, but with leave to the plaintiff to serve an amended complaint within *twenty* days, and to the defendant to withdraw his demurrer to the second cause of action, and to answer the same. (*Concluding in the usual manner.*)[2]

1. **Precedent.** — In Ætna Ins. Co. *v.* Swift, 12 Minn. 439, the following order was made: "And now the demurrer in this cause to the complaint therein having been duly argued, and submitted, upon due advisement, ordered, that the said demurrer be, and the same is hereby sustained, with leave to the plaintiff to amend his complaint within *twenty* days after service of this order, by copy, upon his attorney.

W. Wilkin, District Judge.

Dated *August 14*, 1866."

2. **For the formal parts** of orders, generally, consult the title Orders and Rules.

3. **Precedent.** — In Buist *v.* Salvo, 44 S. Car. 143, the following was the order of the circuit judge overruling an oral demurrer: "The complaint having been read, the defendant interposed an oral demurrer thereto, upon the ground that it did not state facts sufficient to constitute a cause of action. After hearing the argument, it is ordered, that the said demurrer be and is hereby overruled. This case thereafter came on to be heard upon the complaint, answer of defendant, and the demurrer of plaintiff to such answer. After hearing argument of counsel, it is ordered, that the demurrer to said answer be and is hereby sustained in so far as the same applies to the allegations contained in the XII. and XIII. paragraphs of said answer, and said paragraphs are hereby stricken out, the court being of the opinion that neither of said paragraphs, considered either separately or together, state facts sufficient to constitute a defense; and so far as the demurrer to the other paragraphs of the answer is concerned, such demurrer is hereby overruled. After the presiding judge had given his decision orally as herein set forth, counsel for the plaintiff asked leave to withdraw their demurrer to all the paragraphs of said answer except paragraphs XII. and XIII., which leave was thereupon given, and is hereby granted. *James Aldrich*, presiding judge."

Another precedent may be found in Buist *v.* Fitzsimons, 44 S. Car. 137.

DEMURRERS TO EVIDENCE.[1]

I. TO PLAINTIFF'S EVIDENCE, 467.
II. TO DEFENDANT'S EVIDENCE, 470.
III. JOINDER IN DEMURRER, 470.
1. *By Plaintiff*, 470.
2. *By Defendant*, 471.

CROSS-REFERENCES.

For Forms of Demurrers to Pleadings, generally, see the title DEMURRERS, ante, p. 294.
For Procedure relating to Demurrers to Evidence, see 6 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 438.

I. TO PLAINTIFF'S EVIDENCE.

Form No. 7218.

(1 Robinson's F. (Va.), p. 121.)

Richard Roe.
ads.
John Doe.

Be it remembered, that after the jury was sworn to try the issue joined in this cause, the plaintiff, to prove and maintain the said

1. The office of a demurrer to evidence is to withdraw the case from the jury and to present to the court, in a formal manner, such facts as were actually proved, as well as such facts as the evidence tended to prove, so that the court may pass upon the legal sufficiency of the evidence. Crowe *v.* People, 92 Ill. 231. See also the following statutes: Ala. Civ. Code (1886), § 2746; Kan. Gen. Stat. (1897), c. 95, § 285; Okla. Stat. (1893), § 4165.

Rarely used, as the same advantage can be taken by exception to the testimony, or on a motion for a new trial, on the ground of a verdict against the evidence. 2 Rev. Swift's Dig. 674; Golden *v.* Knowles, 120 Mass. 336; 1 Richards' F. (Pa.), p. 516.

Requisites, Generally. — Demurrer to evidence should be reduced to writing, and should recite: 1. The organization of the jury; 2. The statement of the facts shown in evidence by the plaintiff; 3. That the said matters are not sufficient in law to maintain the issue on the part of the plaintiff; 4. The prayer for judgment. Stiles *v.* Inman, 55 Miss. 469. See also *infra*, note 1, p. 468, for statement of evidence and facts in the demurrer.

Must be in writing, when, see Creach *v.* Taylor, 3 Ill. 277; Golden *v.* Knowles, 120 Mass. 336. Consult also 6 Encycl. of Pl. and Pr., p. 449.

Assessment of Damages. — Where there is a demurrer to the evidence with a joinder, the court may have the damages assessed by the jury conditionally, or the jury may be discharged, leaving the damages to be assessed by another jury, or to be assessed by the court upon the consent of the parties, or the failure of either party to demand a jury. Strough *v.* Gear, 48 Ind. 100; Lindley *v.* Kelley, 42 Ind. 294; Holmes *v.* Phœnix Mut. L. Ins. Co., 49 Ind. 356; 2 Rev. Swift's Dig. 675.

issue on his part, showed in evidence to the jury by one witness, *Samuel Short*, that (*setting out the testimony of the witness*). And the plaintiff, further to prove and maintain said issue on his part, showed in evidence to the jury by another witness, *John Smith*, that (*setting out the testimony of the witness*). And the plaintiff, further to prove and maintain the said issue on his part, showed in evidence to the jury a writing, in words and figures following, to wit, (*inserting a copy of the writing*). [And the defendant, to prove and maintain said issue on his part, showed in evidence to the jury by one witness, *Banks Belk*, that (*setting out the testimony of the witness*).][1] And the

1. Statement of Facts and Evidence. — As a general rule, not only the evidence but also all the facts which such evidence establishes or which it tends to establish should be stated in the demurrer. Morris *v.* Indianapolis, etc., R. Co., 10 Ill. App. 389; Strough *v.* Gear, 48 Ind. 100; Palmer *v.* Chicago, etc., R. Co., 112 Ind. 250, Fowle *v.* Alexandria, 11 Wheat. (U. S.) 320.

In *Indiana*, the evidence should be set out at length. Strough *v.* Gear, 48 Ind. 100; Lindley *v.* Kelley, 42 Ind. 294; Fritz *v.* Clark, 80 Ind. 591. Demurring to the evidence generally is not sufficient. Strough *v.* Gear, 48 Ind. 100.

Not the evidence itself, but the facts only that are established or which the evidence tends to establish, should be stated in *Florida*, *Illinois* and *Mississippi*. Duncan *v.* State, 29 Fla. 439; Crowe *v.* People, 92 Ill. 231; Western Assur. Co. *v.* Mayer, 64 Miss. 795; Waul *v.* Kirkman, 27 Miss. 823; Ware *v.* McQuillan, 54 Miss. 703.

Stating the evidence itself, and not the facts deducible therefrom, was held in Ditto *v.* Ditto, 4 Dana (Ky.) 504, to be sufficient.

The evidence on both sides should not be stated. Woodgate *v.* Threlkeld, 3 Bibb (Ky.) 527. But in *Virginia* and *West Virginia* the rule is to insert evidence of both sides. Hyers *v.* Green, 2 Call (Va.) 555; Hyers *v.* Wood, 2 Call (Va.) 574; Richmond, etc., R. Co. *v.* Moore, 78 Va. 93; Green *v.* Judith, 5 Rand. (Va.) 1; Garrett *v.* Ramsey, 26 W. Va. 345; Allen *v.* Bartlett, 20 W. Va. 46. Hence, in these two states, the matter in [ ] is appropriate.

Need not state that the evidence set forth is all the evidence that was offered. Adkins *v.* Fry, 38 W. Va. 549.

Demurrer to written evidence should set out the writing. Baker *v.* Baker, 69 Ind. 399; Hurst *v.* Dippo, 1 Dall. (Pa.) 20.

Precedents. — In Pharr *v.* Bachelor, 3 Ala. 238, defendants demurred to plaintiff's evidence, as follows:

"'The said defendants come and say, that admitting every word, figure and statement in the above annexed memorandum, of the testimony in this case, to be facts, and to be true, and admitting every conclusion that may be reasonably drawn therefrom to be true,' etc., and concludes by referring in usual form the questions of law to the Court." This demurrer was considered sufficient.

In 2 Rev. Swift's Dig. 674, is set out the following form:

"And now come, as well the within-named *John Doe*, plaintiff, as the within-named *Richard Roe*, defendant, by their respective attorneys within mentioned. and the jury whereof mention is within made, being summoned, also come, and being chosen, tried, and sworn to say the truth of the matters within contained, the plaintiff, to prove and maintain the issue within joined on his part, shows in evidence to the jury aforesaid, by *Keever Hughes*, a witness duly sworn in that behalf (*Here state the whole of the evidence, whether in writing or by parol*); and the defendant says that the aforesaid matters to the jurors aforesaid, in form aforesaid, shown in evidence by the plaintiff, are not sufficient in law to maintain the issue within joined on the part of the plaintiff, and that he, the defendant, to the matters aforesaid, in form aforesaid, shown in evidence, has no necessity, nor is he obliged by the law of the land, to answer, and this he is ready to verify; wherefore, for want of sufficient matter in that behalf, shown in evidence to the jury aforesaid, the defendant prays judgment, and that the jury aforesaid may be discharged from giving any verdict upon the said issue, and that the plaintiff may be barred from having his said action against the defendant.

defendant says that the matters as aforesaid so shown in evidence to the jury by the plaintiff are not sufficient in law to maintain the said issue on the part of the plaintiff, and that he, the said defendant, is not bound by the law of the land to answer the same.

Wherefore, for want of sufficient matter in that behalf to the jury shown in evidence, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against him, etc.

Jeremiah Mason, Attorney for Defendant.

And the plaintiff, for that he has shown in evidence to the said jurors sufficient matter in maintenance of the said issue, which matter the defendant does not deny, nor in any manner answer thereto, prays judgment, and his damages by reason of the premises, to be adjudged to him.

Whereupon it is told to the jurors aforesaid that they shall inquire what damages the plaintiff has sustained, as well by reason of the matters shown in evidence as aforesaid, as for his costs and charges by him about his suit in this behalf expended, in case it shall happen that judgment shall be given upon the evidence aforesaid for the plaintiff, and the jurors aforesaid upon their oath aforesaid thereupon say that, if it shall happen that judgment shall be given for the plaintiff upon the evidence aforesaid, then they assess the damages of the plaintiff by him sustained by reason of the matter shown in evidence as aforesaid, besides his costs and charges by him about his suit in this behalf expended, at *five hundred* dollars, and for these costs and charges at *ten* dollars; and thereupon, the said jurors, by the assent of the said parties, are discharged from giving any further verdict upon the premises."

In Dormady *v.* State Bank, 3 Ill. 237, after a jury was impaneled and the evidence of plaintiff heard, defendant demurred, as follows: "Be it remembered, that at the trial of this cause, the plaintiff proved that (*setting out the evidence*), and the said defendants, admitting the truth of the facts, as above proved, and all inferences properly to be drawn from them, say, that the said testimony is not sufficient, in law, to enable said plaintiff to have and maintain his said action, and recover against the said defendants herein, wherefore, they pray judgment, etc. *Logan & Baker*, for Defendants."

For substance of a demurrer to plaintiff's evidence in a criminal case see Crowe *v.* People, 92 Ill. 233.

In Stiles *v.* Inman, 55 Miss. 475, defendant's demurrer to plaintiff's evidence is set out as follows:

"This day came the parties by their attorneys, and thereupon came a jury, to wit, * * * who being impaneled and sworn the truth to speak upon the issue joined, and the said plaintiff to maintain the issue on his part, show in evidence (*Here insert the facts proved*). And the said defendant says that the said aforesaid matters are not sufficient in law to maintain the issues on the part of the plaintiff, and this he is ready to verify; therefore, he prays judgment that the jury may be discharged from giving any verdict, and that the plaintiff may be barred of his action."

In Hopkins *v.* Nashville, etc., R. Co., 96 Tenn. 409, defendant interposed a written demurrer to plaintiff's evidence, as follows:

"The defendant comes and demurs to the evidence of the plaintiff, and offers to admit of record that the following testimony and proof introduced by plaintiff (*setting out all the testimony introduced by plaintiff*) is true, and further admits as true all proper and legal deductions and inferences therefrom in law. The defendant offers to admit that the facts so stated are the facts in the case, and were proven entirely by plaintiff and his witnesses, and does now aver that the facts so stated present no ground for a recovery against it under the pleadings in this cause, and this he is ready to verify. Wherefore, defendant prays the Court to allow this demurrer, and direct plaintiff to join therein; and judgment of the Court accordingly; and that plaintiff may be barred against having or maintaining his action against it, or further prosecuting the same. *East & Fogg*, *C. D. Porter*, *J. D. B. DeBow*, Attys."

This demurrer was upheld as against a motion to dismiss it, because unknown to the forms of practice of law, and because insufficient.

II. To Defendant's Evidence.

Form No. 7219.[1]

(1 Robinson's F. (Va.), p. 121.)

John Doe
against
Richard Roe.

Be it remembered that after the jury was sworn to try the issue joined in this case, the defendant, to prove and maintain said issue on his part, showed in evidence to the jury by one witness, *Banks Belk*, that (*setting out testimony of witness*). And the plaintiff says that the matter aforesaid so shown in evidence to the jury by the defendant is not sufficient in law to maintain the said issue on the part of the defendant, and that he the said plaintiff is not bound to answer the same. Wherefore for want of sufficient matter in that behalf to the said jury, shown in evidence, the said plaintiff prays judgment, and that the jury aforesaid may be discharged from giving any verdict upon the said issue, and that his damages by reason of the matters complained of may be adjudged to him, etc.

Oliver Ellsworth, Attorney for Plaintiff.

III. Joinder in Demurrer.[2]

1. By Plaintiff.

Form No. 7220.

(1 Robinson's F. (Va.), p. 121.)

John Doe
against
Richard Roe.

And the said plaintiff inasmuch as he hath shown in evidence to the jury sufficient[3] matter to maintain the issue upon his part, and which the said plaintiff is ready to verify, and inasmuch as the said defendant doth not deny or in any manner answer the said matter, prays judgment and his damages by reason of the matters complained of, to be adjudged to him, etc.

Oliver Ellsworth, Attorney for Plaintiff.

1. Consult annotations to Form No. 7218, *supra*.

2. **Joinder in demurrer is necessary** that judgment may be rendered upon the demurrer to evidence. Fowle *v.* Alexandria, 11 Wheat. (U. S.) 320.

In *Indiana*, a joinder in demurrer is not necessary. Radcliff *v.* Radford, 96 Ind. 482; Reynolds *v.* Baldwin, 93 Ind. 57.

Opponent need not join in demurrer unless demurrant distinctly admits, upon record, every fact and every conclusion which the evidence given for his adversary tended to prove. Fowle *v.* Alexandria, 11 Wheat. (U. S.) 320.

The opponent is not bound to join in demurrer when it does not set out the facts which the evidence tends to establish. Crowe *v.* People, 92 Ill. 232.

Must be in writing, when, see Creach *v.* Taylor, 3 Ill. 277; Golden *v.* Knowles, 120 Mass. 336.

3. **Plaintiff's joinder in demurrer** should affirm that the matters by him shown in evidence are sufficient, etc. Stiles *v.* Inman, 55 Miss. 469.

Precedent. — In Stiles *v.* Inman, 55 Miss. 475, the following joinder of the plaintiff in the demurrer to his evidence is set out: "And the said plaintiff says that the said matters, etc., by him shown in evidence are sufficient in law to maintain the issue on his part. Wherefore," etc.

2. By Defendant.[1]

Form No. 7221.

(1 Robinson's F. (Va.), p. 121.)

Richard Roe
ads.
John Doe.

And the said defendant inasmuch as he hath shown in evidence to the jury sufficient matter to maintain the issue upon his part, and which the said defendant is ready to verify, and inasmuch as the said plaintiff doth not deny or in any manner answer the said matter, prays judgment, and that the said plaintiff may be barred from having or maintaining his action against the defendant, and that the jury may be discharged from giving their verdict upon the said issue.

Jeremiah Mason, Attorney for Defendant.

1. **Judgment or order upon the demurrer** may be as follows, omitting formal parts:

"This day came the parties by their attorneys, and thereupon the *defendant's* demurrer to the *plaintiff's* evidence in this cause being argued, it seems to the court here that the said evidence is sufficient in law (or *is not sufficient*) to maintain the issue joined on the part of the *plaintiff*. Therefore, it is considered by the court (*entering judgment as the case may be, as, for instance*, "that the plaintiff take nothing by his said suit, and that the said defendant do recover of and from the said plaintiff his costs about his defense in this behalf expended").

DENIALS.

See the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; *PLEAS; and the GENERAL INDEX to this work.*

DENTISTS.

By Amos Burt Thompson.

I. PROCEEDINGS BY, 472.
1. *For Services*, 472.
2. *To Compel Granting of Certificate*, 474.
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II. PROCEEDINGS AGAINST, 481.
1. *For Malpractice*, 481.
a. *Complaint, Declaration or Petition*, 482.
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CROSS-REFERENCES.

For Forms of Analogous Character, see the title PHYSICIANS AND SURGEONS.
For Forms connected with Malpractice, generally, see the title MALPRACTICE.
See also the GENERAL INDEX to this work.

I. PROCEEDINGS BY.

1. For Services.[1]

Form No. 7222.[2]

The State of *Ohio*, *Lake* County, ss. } In the Court *of Common Pleas.*

1. For the formal parts of a complaint, petition or declaration in a particular jurisdiction consult the titles Complaints, vol. 4, p. 1019; Declarations, *ante*, p. 244.

2. **Right of Action for Services.** — Contract for dental services is void unless the dentist was authorized to practice. *Alabama.* — Civ. Code (1886), § 1318. *Illinois.* — Patrick *v.* Perryman, 52 Ill. App. 514.

North Carolina — Oregon — Virginia. — In these states the statutes impose a penalty for practicing without a certificate, and one convicted thereunder cannot recover for his services, but the

John Doe, plaintiff,
against
Richard Roe, defendant. } Petition.

The plaintiff is now and was during the time the services were rendered which form the subject of this action, licensed by the *Board of Dental Examiners* of the state of *Ohio* to practice dentistry within said state.[1] There is due the plaintiff from the defendant the sum of *five hundred* dollars, which he claims, with interest from the *first* day of *July*, 1897, on an account, a copy of which is hereto attached, marked Exhibit *A*, and made a part of this petition.[2] [There are no credits thereon.][3]

Wherefore plaintiff asks judgment against the defendant for *five hundred* dollars, with interest from the *first* day of *July*, 1897.

Daniel Webster, Attorney for Plaintiff.

(*Verification.*)[4]

patient may recover back all moneys paid. N. Car. Code (1883), § 3154; Hill's Anno. Laws Oregon (1892), § 3348; Va. Acts (1893–4), c. 552, § 1772.

Analogous Statutes Relating to the Practice of Medicine. — Under similar statutes relating to the practice of medicine it has been held in the following states that a physician without a certificate cannot recover for services.

California. — Roberts *v.* Levy, (Cal. 1892) 31 Pac. Rep. 570; Gardner *v.* Tatum, 81 Cal. 370.

Illinois. — North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486.

New York. — Fox *v.* Dixon, (Supreme Ct.) 34 N. Y. St. Rep. 710.

Tennessee. — Haworth *v.* Montgomery, 91 Tenn. 16.

Texas. — Kenedy *v.* Schultz, 6 Tex. Civ. App. 461.

In *Vermont*, distinction is made between revenue laws and laws limiting persons who shall conduct a business with a view to public security. Contracts in violation of the former can, but contracts in violation of the latter can not, be enforced. Aiken *v.* Blaisdell, 41 Vt. 655.

The statutes in the following states provide that physicians not licensed cannot recover, but state in terms that this does not apply to dentists.

Indiana. — Burns' Anno. Stat. (Supp. 1897), § 7323*g*.

Kansas. — Gen. Stat. (1889), § 2451.

Kentucky.—Gen. Stat. (1888), c. 85*b*, § 9.

Michigan. — How. Anno. Stat. (Supp. 1890), § 2287*b*5.

South Carolina. — Rev. Stat. (1893), § 971.

Vermont. — Stat. (1894), § 4640.

Statutes prohibiting unlicensed persons from recovering for services are no stronger than those making it unlawful without a certificate to practice for a reward or fee. Wert *v.* Clutter, 37 Ohio St. 347.

1. Averment of License. — In states whose statutes enact that no one without a license can recover, plaintiff should aver in compliance with the statute. So held under statutes relating to the practice of medicine. Bedford Belt R. Co. *v.* McDonald, 12 Ind. App. 620; Adams *v.* Stewart, 5 Harr. (Del.) 144; Rider *v.* Ashland County, 87 Wis. 160; Cooper *v.* Griffin, 13 Ind. App. 212. And it seems to be better to so aver in states forbidding persons not licensed to practice for a fee or reward and imposing a penalty for a violation of the statute. Durand *v.* Grimes, 18 Ga. 693 (under the law of 1894 unlicensed physicians cannot recover, Ga. Code (1895), § 1490; the case cited arose under a law not so stipulating); North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486; Conkey *v.* Carpenter, 106 Mich. 1. In some jurisdictions, however, it has been held that compliance with the law will be presumed and need not be alleged. McCurry *v.* Gibson, 108 Ala. 451; McPherson *v.* Cheadell, 24 Wend. (N. Y.) 15.

2. This petition is drawn under and in compliance with Bates' Anno. Stat. Ohio (1897), § 5086. The exhibit should consist of an account made out in the usual manner.

3. The credits, if any, should appear in the account.

If there are credits, instead of the words in [ ] insert the words "with all credits." Bates' Anno. Stat. Ohio (1897), § 5086.

4. For forms of verification see the title VERIFICATIONS.

Form No. 7223.[1]

The *Circuit* Court for the County of *Saginaw*.
County of *Saginaw*, ss.

John Doe, plaintiff in this suit, by *Daniel Webster*, his attorney, complains of *Richard Roe*, defendant in this suit, according to the form of the statute authorizing the commencement of suits by declaration, of a plea of trespass on the case upon promises.

For that whereas the said defendant, heretofore, to wit, on the *first* day of *July*, eighteen hundred and *ninety-six*, at *East Saginaw*, in the county aforesaid, was indebted to the said plaintiff in the sum of *five hundred* dollars, lawful money of the United States, for divers dental operations and dental work performed and aid and advice given before that time by the said plaintiff to the said defendant and at the instance and request of him the said defendant.

And being so indebted, he, the said defendant, in consideration thereof, afterward, to wit, on the day and year last aforesaid, at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said last mentioned sum of money, when he, the said defendant, should be thereunto afterward requested. Nevertheless, the said defendant, although often afterward requested so to do, hath not as yet paid the said sum of money above mentioned, or any part thereof, to the said plaintiff; but to pay the same, or any part thereof, to the said plaintiff, the said defendant hath hitherto wholly refused, and still doth refuse. To the damage of the said plaintiff of *five hundred* dollars, and therefore he brings suit.

Daniel Webster, Attorney for Plaintiff.

2. To Compel Granting of Certificate.[2]

1. Affidavit and Copy of Account. — If with a copy of the declaration an affidavit of amount due, with a copy of the account attached, is served on the defendant, a *prima facie* case is made out, unless the defendant, with his plea, serve a copy of an affidavit on the plaintiff denying the indebtedness. How. Anno. Stat. Mich. (1882), § 7525. Such an affidavit by plaintiff, to which the account should be attached, may be as follows:

"State of *Michigan*, } ss.
County of *Saginaw*. }

John Doe being duly sworn, deposes and says, that the annexed is a true and correct copy and statement of his account against *Richard Roe*, upon which he has this day commenced suit against the said *Richard Roe*, and that there is justly due to him, the said *John Doe*, over and above all legal set-offs, from the said *Richard Roe*, upon said account, the sum of *five hundred* dollars, as near as he can estimate the same.

Sworn to and subscribed before me this *first* day of *September*, 1896.

Norton Porter, Notary Public.
(SEAL) *Saginaw* Co., *Mich*."

The affidavit may be made by the plaintiff or some one in his behalf. How. Anno. Stat. Mich. (1882), § 7525. It should be made at substantially the time of the commencement of the suit. If made several days before, will be of no avail. McHugh *v.* Butler, 39 Mich. 185.

2. Mandamus to Compel Issuance of Certificate. — Mandamus will not ordinarily lie to compel the performance of acts or duties which necessarily call for the exercise of judgment on the part of the officer or body at whose hands performance is required, yet, if the discretionary power is exercised with manifest injustice, or such discretion is grossly abused, such abuse will be

Form No. 7224.

(Precedent in State Board of Dental Examiners *v.* People, 123 Ill. 228.)[1]

[To the *Circuit* court of the County of *Cook*, in the State of *Illinois*:][2]

Your petitioner, *The People of the State of Illinois, on the relation of John M. Cooper*, respectfully shows unto your honor that relator is a resident of the city of *Chicago*, county of *Cook* and State of *Illinois*, and is a citizen of said State, of lawful age.

Relator further shows, that having selected the practice of dentistry and dental surgery as his profession and life work, he did, on or about the ——— day of *November*, A. D. 18*84*, enter and matriculate as a student in the *Chicago College of Dental Surgery*, an institution situated in the said city of *Chicago*, organized for the purpose of and engaged in educating persons who might become students therein in the theory and practice of dentistry and dental surgery; that relator remained as such student in said college, and diligently prosecuted his studies therein throughout the whole course of instruction, of not less than *five* months, given by said college during the years 18*84* and 18*85*, and that during the summer and fall of 18*85* he was engaged in receiving practical instructions in dentistry and dental surgery, up to the time of entering as a student the dental college hereinafter named.

Relator further shows, that on, to wit, the *2d* day of *November*, 18*85*, he entered the *Northwestern College of Dental Surgery*, and matriculated as a student therein; that said last named institution was then and is now an institution organized for the purpose of and engaged in educating persons who become students therein, in the

controlled by mandamus. State Board of Dental Examiners *v.* People, 123 Ill. 227; State *v.* State Board of Health, 103 Mo. 22; Williams *v.* Dental Examiners, 93 Tenn. 619. And mandamus will not lie where an appeal can be taken. State *v.* Taylor, 19 Wis. 566; State *v.* Board of Medical Examiners, 10 Mont. 162. In some states, by statute, mandamus lies. See, for example, the following:

Connecticut.—Laws (1893), c. 130, § 15.

New Jersey. — Gen. Stat. (1895), p. 1190, § 4.

Analogous Statutes. — In the following states the statutes provide for review of the action of the board of medical examiners. As same procedure would possibly lie in case of a dentist, they are here given:

Kentucky. — An appeal lies to the governor. Stat. (1894), § 2615.

Montana. — An appeal lies to district court of the county in which the refusal took place. Pol. Code (1895), § 603.

Ohio. — Appeal lies to the governor and attorney-general. Their decision final. Bates' Anno. Stat. (1897), § 4403*c*.

Oregon. — Appeal lies to circuit court of county in which was held the last general meeting of the board prior to the refusal. Laws (1895), p. 64, § 6.

Rhode Island. — To the appellate division of the supreme court. Gen. Laws (1896), c. 165, § 5.

South Carolina. — Appeal lies to the governor. Rev. Stat. (1893), see § 970, § 6.

Washington. — Appeal lies to superior court of county in which last general meeting of board was held prior to the refusal. Ballinger's Anno. Codes & Stat. (1897), § 3017.

West Virginia. — To the circuit court of county in which person aggrieved lives. Acts (1887), p. 197, § 10.

For forms relating to mandamus, generally, see the title MANDAMUS.

1. In this case the court of appeals held that the allegations of the petition, considered as a whole, warranted the issuance of a writ of mandamus.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

theory and practice of dentistry and dental surgery, and was duly incorporated and organized under the laws of the State of *Illinois*, *October*, 1*885*, and is now, and has been since its organization, a reputable dental college, duly authorized by the laws of this State, in which there was, at the time of the issue of the diploma to relator, as hereinafter mentioned, annually delivered a full course of lectures and instructions in dental surgery, not less than *five* months in length.

Relator further shows, that he attended, regularly and faithfully, said last mentioned college, as a student therein, during the one full, regular course of instruction held and given in said last mentioned college during the years 1*885* and 1*886*, which course was of not less than *five* months duration; that relator thus completed two regular, full *five*-months courses of instruction in the practice of dentistry and dental surgery, one in each of said colleges, said courses being had in separate years, with practical instructions intervening between the two courses.

Relator further shows, that on certification and proof of the above facts, the said *Northwestern College of Dental Surgery* graduated your petitioner in due form on the *third* day of *April*, 1*886*, and thereupon, to wit, on the day and year last aforesaid, a diploma was issued to your petitioner by the faculty of the said *Northwestern College of Dental Surgery*, duly certified by the signatures of the members of the faculty of said college, and the officers thereof, conferring upon petitioner the title and degree of *doctor of dental surgery*.

Relator further shows, that the said *Northwestern College of Dental Surgery* has in all respects complied with the requirements of the laws of the State relating to and regulating the practice of dentistry in the State of *Illinois*, and has in all respects complied with the rules and regulations adopted and established by the *State Board of Dental Examiners* of the State of *Illinois*, and is in all respects a reputable dental college, and has been decided to be entitled to be recognized as reputable by the said *State Board of Dental Examiners*, by strictly complying with the standing rule of said *State Board of Dental Examiners*, which was adopted by said board in *September*, 1*884*, and has been since *June*, 1*885*, and still is, the rule of said board for the recognition of dental colleges as reputable, which rule is as follows: (*Here was set out a copy of the rule.*)[1]

Relator avers that the said *Northwestern College of Dental Surgery* has, from its organization and during the time your relator was a student therein, strictly and entirely complied with all and each of the requirements of said rule, and was so complying with the same at the time the diploma was issued to relator, and that by virtue of

1. **The rule** was as follows: "Resolved, that after June, 1885, the Illinois State Board of Dental Examiners will recognize as reputable only such dental colleges as require, as a requisite for graduation, attendance upon two full, regular courses of lectures and practical instruction, which courses shall each be of not less than five months duration, and shall be held in separate years, with practical instructions intervening between the courses. Such colleges must also require a preliminary examination before admitting students to matriculation, providing that no certificate from a high or normal school or other literary institution is presented by the candidate."

said compliance, and by virtue of the terms of said standing rule, the said college has been recognized by the said *State Board of Dental Examiners* as a reputable dental college, and was so recognized at the time of the presentation to said board of the diploma of relator, as hereinafter set forth, and is still so recognized.

Relator further shows to the court, that desiring to engage in the practice of his profession of dentistry, he afterward, to wit, on or about the *11th* day of *May*, 1*886*, presented his said diploma so received from the faculty of the said *Northwestern College of Dental Surgery*, duly authorized, to the *Illinois State Board of Dental Examiners* at a regular meeting of said board, held in the city of *Rock Island*, *Illinois*, on or about the *11th* day of *May*, 1*886*, and tendered to the said board a fee of *one* dollar, as provided by law, and demanded that said board issue to him, the relator, a license to practice dentistry in the State of *Illinois*, as provided by law.

Relator further shows to the court, that it was the duty of the said *Board of Dental Examiners*, upon the presentation of said diploma and the tender of the fee of *one* dollar, as aforesaid, to said board by said relator, and the demand as aforesaid, to ascertain, if it was not already informed, whether the said *Northwestern College of Dental Surgery* had complied with the above mentioned rule of said board as to recognition, as being reputable, and finding that it had so complied, and was under said rule to be recognized by said board as reputable, as aforesaid, to issue to relator a license to practice dentistry in the said State of *Illinois*, but that said *Board of Dental Examiners*, not regarding their duty in this behalf, thereupon, to wit, on the day and year last aforesaid, refused and neglected to issue to relator, a license to practice dentistry in this State, and have continually refused, and still do refuse, to issue to relator such license.

Your relator further shows, that after waiting for his license for a reasonable time after making application therefor in the manner aforesaid, he afterward, to wit, on the *25th* day of *May*, 1*886*, wrote to *George H. Cushing*, secretary of the said *Illinois State Board of Dental Examiners*, and inquired why his license had not been issued, to which inquiry he received reply, of which the following is a copy: (*Here was set out a copy of the letter.*)[1]

Relator shows that the said *Board of Dental Examiners* not only refused to issue to him the license to which he was entitled, and returned to him the dollar paid by him to said board for such license, as required by law, but voluntarily assumed to refer the application of relator to a so-called *National Association of Dental Examiners* for decision, as to whether relator could have license to practice den-

1. **The letter** was as follows:
"Illinois State Board of Dental Examiners.

Chicago, May 26, 1886.

Dr. J. M. Cooper,

Dear Sir: In reply to y'rs of 25th, I would say that the matter of issuing a license on your diploma from the Northwestern College of Dental Examiners was referred to the National Association of Dental Examiners, which will meet in August. Until their decision, I cannot issue any license.

Respt'y y'rs,
George H. Cushing,
Sect. Ill. St. Bd. Den. Exs.

P. S. I return herewith the one dollar.—G. H. C."

tistry in the State of *Illinois*, which he has, by law, a right to; thus unlawfully, wilfully and designedly, usurping powers not given said board by law, and neglecting, failing and refusing to perform the duty imposed by law upon said board, in reckless disregard of the rights of relator, and of their obligations to the people of the whole state.

Relator further shows, that the said so called *National Association of Dental Examiners* is, as your relator is informed and believes, a mere voluntary association of men, who meet in convention at *Saratoga*, in the State of *New York*, in *August next*; that it is composed mostly of men residing outside of the State of *Illinois*, and is clothed with no executive or legal power to decide upon the rights of relator, or any one else, to a license to practice dentistry in the State of *Illinois*; that in pretending and assuming to refer the question to a voluntary and irresponsible body of men outside the State of *Illinois*, clothed with no legal power, said *State Board of Dental Examiners* refused to perform the functions of the office for which said board was created, and for which said board was constituted and appointed.

Relator further shows, that after the above described action was taken by the board, he employed an attorney to bring suit for mandamus against said *Board of Dental Examiners*, to compel them to issue to your relator his license to practice dentistry in the State of *Illinois*, which he was entitled to by law, and that his attorney was preparing a petition for that purpose, when the *State Board of Dental Examiners*, by and through a written official communication signed by the secretary of said board, notified relator's attorney that if he would wait before commencing a suit for mandamus a reasonable time, the said board would call a meeting as soon as practicable, and would issue to relator a license to practice dentistry in the State of *Illinois*, as aforesaid, and repeated said promise to issue said license as soon as they could have a meeting, both to relator and his attorney; and that relator's attorney did wait, as requested by said board, for it to have a meeting and issue said license, as the board had promised and were required by law to do, and that said board held a meeting as promised, in the city of *Chicago*, in said State, on the *24th* and *25th* of *June*, A. D. 1*886*, and instead of issuing said license to relator, as promised, the said board refused to issue such license to relator, and falsely and fraudulently pretended then to find that said *Northwestern College of Dental Surgery* was not a reputable college.

And relator avers, that said last mentioned action of the board was not taken as the deliberate judgment of the board, after due inquiry as to whether said dental college was reputable or not, and was not based upon proper evidence to that effect, but such action was taken arbitrarily, with the wicked and malicious design, solely, of depriving relator of the license and right to practice dentistry in the State of *Illinois*, on account of the malice of the members of said board toward the relator, because he had left the said *Chicago College of Dental Surgery*, after attendance there of one course, and had graduated at the said *Northwestern College of Dental Surgery*, and for the further wicked and malicious design of injuring the said *Northwestern Col-*

lege of Dental Surgery, and preventing it from getting patronage, by arbitrarily and wickedly refusing to license its graduates, because of such malice and hatred of said *Board of Dental Examiners*, being hereafter fully set forth.

Relator further shows, that at the time of refusal of said board to issue license to relator, the said board well knew that the said *Northwestern College of Dental Surgery* was a reputable dental college, duly organized under the laws of the State of *Illinois*, and well knew that said college had fully complied with the rule adopted by said board for the recognition of dental colleges as reputable by said board, and well knew that said board had already recognized said dental college as being reputable.

Relator further shows, that the said *State Board of Dental Examiners* consists by law of *five* persons, and that the persons composing said board at the time of refusing to issue said license, and now, were and are as follows: *G. V. Black*, *A. W. Harlan*, *Homer Judd*, *C. A. Kitchen*, and *George H. Cushing*, and that *four* of the *five* members of the said board, to wit, *G. V. Black*, *A. W. Harlan*, *George H. Cushing* and *C. A. Kitchen*, are interested in and connected with the said *Chicago College of Dental Surgery*, either as members of the faculty of or instructors in the same; that the said *Chicago College of Dental Surgery* is an older dental college in the city of *Chicago* than the said *Northwestern College of Dental Surgery*, from which petitioner graduated and received his said diploma, the said last mentioned college having organized as such only in 1885; that the two colleges aforesaid are rivals and competitors for patronage of students, and reputation as institutions for teaching dentistry and dental surgery, and that the said *State Board of Dental Examiners* is entirely under the control of the said *Chicago College of Dental Surgery*, and *four-fifths* of said board belonging to said *Chicago* college, the said board is determined, if possible, to cripple and destroy the said *Northwestern* college, and for that reason are willing to abuse, and in the acts above mentioned have shamefully abused, their power as such officers and members of such State board, to protect the college to which they belong from competition, and to destroy and cripple a rival.

And relator charges the fact to be, that the said *State Board of Dental Examiners*, controlled by the said *Chicago College of Dental Surgery*, intend and design, by their action in refusing a license to relator, not only to prevent relator from practicing his profession, for which he has, at great expense of time and money, fitted himself, and which he is lawfully entitled to practice, but also to hinder, cripple and destroy the successful operation of the said *Northwestern College of Dental Surgery*, by unlawfully and maliciously withholding from its graduates license to practice dentistry in the State of *Illinois*, thus deliberately abusing the powers in them vested, and prostituting them to the malicious design and purpose, as relator verily believes, of destroying and crushing out an honorable rival, which, in all its appointments and requirements for dental education, is just as reputable and complete as is the *Chicago College of Dental Surgery*, which the said board is thus wrongfully endeavoring to protect, — all of which the said board and the members thereof well know.

Relator therefore distinctly charges, that said *State Board of Dental Examiners*, in total and reckless disregard of the duties of their office, refuse to perform the duties which they are required by law to perform; that they have, so far as relator's rights are concerned, endeavored to evade the performance of their duties by pretending to shift the performance of those duties upon a voluntary association outside the State, and that the said board has, in the actions aforesaid, deliberately, wantonly and recklessly and maliciously abused the power and discretion in it vested by law, and still continues so to do, in flagrant and outrageous disregard of relator's rights, and the rights of the People of the State.

Relator further shows, that he has, at great expense and in the manner aforesaid, qualified himself for the practice of said profession; that he has spent much time and money in such preparation, and desires to make it his life profession, and that he depends upon the same for a living, and that by the failure and refusal of said *Board of Dental Examiners* to so issue and grant relator a license to practice dentistry, as aforesaid, he, the relator, has been prevented from practicing dentistry in this State, as he is lawfully and by right entitled to do, and still is so prevented; that he is a citizen and resident of, and desires to remain in, the State, and follow the practice of dentistry for which he has prepared himself.

Relator further shows, that the questions here presented not only involve the individual rights of relator, which are of grave importance to him, but the right of dental colleges other than the said *Chicago College of Dental Surgery*, to which *four* out of *five* of said board belong, to exist and be recognized as reputable, after complying with all the provisions of the law of the State and the rules established by the said State board and also the right of the whole State to have the said *State Board of Dental Examiners* perform their duties and issue license to applicants who come within the law and the rules established by said board, without arbitrarily, unlawfully and maliciously referring the rights of citizens to irresponsible, self-constituted associations outside of the State, and unknown to any of the provisions of our laws.

Wherefore, being without other adequate legal remedy, relator makes the said *Illinois State Board of Dental Examiners* and each member thereof, to wit, *G. V. Black*, *A. W. Harlan*, *Homer Judd*, *C. A. Kitchen* and *George H. Cushing*, parties defendant to this petition, and prays for the People's writ of mandamus, directed to said board and each member thereof commanding them to forthwith receive from relator the fee of *one* dollar, which is hereby tendered as required by law, and upon proof of the diploma of relator being presented to the said board, to issue to relator a license in the usual form, to practice dentistry and dental surgery in the State of *Illinois*.

John M. Cooper.

[(*Verification.*)][1]

1. For form of verification see the title VERIFICATIONS.

3. To Compel Reissuance of Certificate.[1]

Form No. 7225.[2]

To the Honorable *Superior* Court now in session at *Hartford*, comes *John Doe* of *Hartford*, and shows to said court:

1. That the *State Dental Commissioners* are *five* in number, and that the persons who were at the time of the things herein complained of, and now are, such commissioners, are as follows: *Richard Roe*, *Daniel Webster*, *Abraham Kent*, *John Jones* and *James Smith*.

2. That on the *first* day of *August*, 1893, said *State Dental Commissioners* issued to the relator a license to practice dentistry within the state of *Connecticut*.

3. That on the *first* day of *September*, 1893, the said *State Dental Commissioners* met in the city of *Hartford*, and a majority of them voted to revoke the license of this relator to practice dentistry in the state of *Connecticut*, and this relator's license was then and there revoked.

4. That this action of said *Dental Commissioners* in revoking the license of the relator was taken without the relator's being notified to appear before them and show cause why his license should not be revoked, and no notice of any meeting of said *Dental Commissioners* was left at the relator's place of business or residence, nor was any mailed to him, although the location of his said place of business and of his said residence was well known to said *Dental Commissioners*.[3]

5. Said *John Doe* moves this honorable court to issue a writ of mandamus directed to said *State Dental Commissioners*, and each one of them, to wit, *Richard Roe*, *Daniel Webster*, *Abraham Kent*, *John Jones* and *James Smith*,[4] requiring them to revoke their decision and reissue to your relator a license to practice dentistry in the state of *Connecticut*, or to show cause to the contrary thereof to this court, to be holden at *Hartford*, on the *second Tuesday* of *October*, 1893.

Dated at *Hartford* this *fourth* day of *September*, 1893.

John Doe.

II. PROCEEDINGS AGAINST.

1. For Malpractice.

1. Mandamus for Reissuance of Certificate. — In *Connecticut* and *New Jersey*, a dentist may secure review of action of board in revoking his license by same procedure as where license is refused. See *supra*, note 2, p. 474.

In *Kentucky*, *Montana*, *Ohio*, *Oregon*, *Rhode Island*, *South Carolina*, *Washington* and *West Virginia*, the procedure by a physician to secure review in case his license is revoked is the same as in the case of refusal. See *supra*, note 2, p. 474.

2. This form is drawn under Conn. Laws (1893), c. 130.

3. As to what notice is necessary, see Conn. Laws (1893), c. 130, § 13.

4. The writ must be directed only to those who are to obey it. If an act commanded is to be done by a select body, then the writ should be directed to the select body. Doolittle *v.* Branford, 59 Conn. 402; Farrell *v.* King, 41 Conn. 448. The law under which the Dental Commissioners are bound in *Connecticut* is nearly identical with that under which the Board of Examiners was formed in *Illinois*. See Starr & C. Anno. Stat. Ill. (1896), p. 2709, par. 38; Conn. Laws (1893), c. 130, § 1. In the case of State Board of Dental Examiners *v.* People, 123 Ill. 227 (see *supra*, Form No. 7224), the writ was directed as prayed for in the text.

a. Complaint, Declaration or Petition.[1]

Form No. 7226.

State of *Indiana*, } ss. *Union Circuit* Court.
Union County. } *February* Term, 1*880*.

John Doe, plaintiff,
against
Richard Roe, defendant.

Said plaintiff complains of said defendant, and says that on the *sixteenth* day of *September*, 1*879*, at the county of *Union*, and state of *Indiana*, the plaintiff, at the request of the defendant, retained and employed the defendant as a dentist to attend upon the plaintiff and to treat and fill the right eye-tooth of the plaintiff for reward. And the defendant then and there being in the practice of dentistry undertook and promised the plaintiff, in consideration of said reward thereafter to be paid him, to faithfully, skilfully and carefully treat and fill the right eye-tooth of the plaintiff then rotten and decayed. But plaintiff avers that in violation of his duty and his said promise, the said defendant conducted himself in and about his endeavoring to treat and fill said right eye-tooth so unskilfully, negligently and unprofessionally, that, without any fault on the part of the plaintiff, the instrument with which said defendant was boring out the said right eye-tooth, preparatory to the filling of the same, slipped and penetrated the gum on the upper jaw of this plaintiff.[2] Said instrument was unclean and unfit for use, and by reason of its penetrating his said gum the blood of the plaintiff was poisoned and his jaw was caused to become swollen, inflamed and diseased: whereby the plaintiff was greatly injured in his health and constitution and made to suffer much pain and caused to be, from the time said injury occurred to the time of the beginning of this suit, an invalid and to require constant nursing and medical attendance, and prevented from attending to his ordinary business, to the damage of the plaintiff in the sum of *three thousand* dollars.

Wherefore the plaintiff demands judgment for *three thousand* dollars.

Daniel Webster, Attorney for Plaintiff.

Form No. 7227.

The *Circuit* Court for the County of *Wayne*.

County of *Wayne*, ss. *John Doe*, plaintiff in this suit, by *Daniel Webster*, his attorney, complains of *Richard Roe*, defendant in this suit, the said *Richard Roe* having been duly summoned to answer the said plaintiff of a plea of trespass on the case, for that whereas, before and at the time of the commitment of the grievances by the said defendant, as hereinafter mentioned, the said defendant was and is, and for many years last past has been, holding himself out to

1. **For the formal parts** of a complaint, petition or declaration in a particular jurisdiction consult the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

2. A complaint for malpractice should allege specifically the things concerning which negligence is imputed. Hawley *v.* Williams, 90 Ind. 160.

the public as a dentist, skilled in his profession, and during all the time aforesaid has exercised and is exercising and carrying on the art, mystery and profession of a dentist at the city of *Detroit* aforesaid; and while the defendant so carried on and practiced the said art, mystery and profession of a dentist, to wit, on the *eighteenth* day of *September*, 1*880*, at the city of *Detroit* aforesaid, and being such dentist as aforesaid, the said defendant was employed,[1] for a reasonable reward to be therefor paid, to skilfully and carefully treat and fill the right eye-tooth of the said *John Doe*, which had become rotten and decayed, and did, to wit, on the *eighteenth* day of *September*, A. D. 1*880*, at the city of *Detroit* aforesaid, agree and undertake to skilfully and carefully treat and fill the tooth of the said plaintiff, rotten and decayed as aforesaid, as was the duty of the defendant to this plaintiff; yet the said defendant then and there not regarding his duty, so negligently, carelessly and unskilfully behaved and governed himself in and about the care of said plaintiff, and in and about the treating and filling of this plaintiff's right eye-tooth, that while the said defendant was boring into the said eye-tooth, preparatory to the filling of the said eye-tooth, the instrument with which said defendant was boring into the said tooth was so negligently, unskilfully and carelessly used that the said instrument slipped and penetrated the gum of this plaintiff's upper jaw; and that said instrument was unclean and not fit for use, and caused the blood of this plaintiff to be poisoned. That by and through the neglect, carelessness and unskilfulness of the said defendant as such dentist, the said plaintiff was and is still caused to suffer great and excruciating pain in his said jaw, and his said jaw was caused to become swollen, inflamed and diseased, and does still remain so, and the general health of the said plaintiff greatly impaired and weakened to such an extent that he has been unable to do any kind of labor and unable to move said upper jaw without pain and suffering from the said *eighteenth* day of *September*, 1*880*, to the time of filing this his declaration.

And for that whereas, the said plaintiff, at the time of said injury to his said upper jaw by the instrument of the defendant, was a reasonably strong and robust man, in good health, able to and did work at daily labor, erecting and repairing houses and buildings, thereby earning from *three* to *five* dollars a day. And whereas, the defendant aforesaid as such dentist, and holding himself out to the public as one skilled in his art, mystery and profession, did undertake to treat and fill the right eye-tooth for the plaintiff, rotten and decayed, in a careful and skilful manner, yet the said defendant did so negligently, unskilfully and carelessly treat the said plaintiff that by reason of the neglect, unskilfulness and carelessness the gum of the upper jaw of the plaintiff was penetrated by the instrument of the defendant, and the blood of this plaintiff poisoned, by reason of which blood-poisoning the health of said plaintiff has become greatly injured, weakened and reduced, and will ever remain so, and from the date of said injury to the present time the said plaintiff, by

1. It is sufficient allegation of defendant's duty if his professional character, and that he was as such employed by the plaintiff, is averred. Hanselman *v.* Carstens, 60 Mich. 187.

reason of his ill health, pain and suffering from his said jaw, has been unable to attend to the duties of his trade of erecting and repairing houses and buildings, and has been unable to earn anything by his daily labor, and has been caused to suffer and still suffers great pain and agony.

Wherefore the plaintiff says he is injured and has sustained damages to the amount of *ten thousand* dollars, and therefore he brings this suit.

Daniel Webster, Plaintiff's Attorney.

b. Answer Setting Up Plaintiff's Negligence.[1]

Form No. 7228.

In the *Superior* Court of the *City and* County of *San Francisco*, State of *California*.

John Doe, plaintiff,
against
Richard Roe, defendant. } Answer of Defendant.

The defendant answers the complaint of plaintiff and alleges, that the defendant used due care and skill in the treating and filling of the right upper bicuspid tooth of plaintiff herein at the time mentioned in the complaint, and that the instrument which the defendant used was in a fit and proper condition, and that the injury received by the plaintiff was not due to the defendant's negligence, but was owing to the negligence and fault of the plaintiff himself, in that prior to and before commencing to bore into said tooth with said instrument this defendant informed the plaintiff that the nerve in said tooth was exposed, and that the use of said instrument by this defendant would be attended with great pain to the plaintiff, and warned and admonished the said plaintiff while the said boring was being done in no event to move or seize the hand of the defendant which held said instrument; yet in disregard of said warning and admonishment, the said plaintiff did, while the said instrument was being used upon said right upper bicuspid tooth, jump and seize the hand of the defendant which held and was using the said instrument.[2] That this act of the plaintiff, and not any negligence or lack of skill on the part of this defendant, caused the injury in said plaintiff's complaint set forth.

Daniel Webster, Attorney for Defendant.

(*Verification.*)[3]

2. For Practicing Without Certificate.[4]

1. For matters relating to plea of contributory negligence, generally, see the title CONTRIBUTORY NEGLIGENCE, vol. 5, p. 458.

2. It must appear from the facts averred that the negligence caused or contributed to the injury, and it is not sufficient merely to aver that the injury was caused by reason of negligence if no fact is stated showing how the injury occurred. Smith *v.* Buttner, 90 Cal. 95.

3. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

4. **Indictment, etc., Requisites**—*Generally.* — The indictment, information or criminal complaint should state specifi

Form No. 7229.[1]

The State of *Indiana*, }
Posey County. } ss.

Before me, *Abraham Kent*, a justice of the peace for the said county, came *John Doe*, who being duly sworn according to law, deposeth and saith that on or about the *first* day of *May*, in the year 1*898*, at the county of *Posey* and state of *Indiana*, one *Richard Roe*,

cally the essential facts constituting the criminal charge. O'Connor *v.* State, 46 Neb. 157. For statutes prescribing a penalty for practicing without a certificate see as follows:

Alabama. — Crim. Code (1886), § 4079.
Arkansas. — Sand. & H. Dig. (1894), § 4980.
California. — Gen. Laws (1897), p. 258, § 6.
Colorado. — Laws (1897), c. 43, § 7.
Connecticut. — Laws (1893), c. 130, § 19.
Delaware. — Rev. Stat. (1893), p. 367, c. 496, § 6.
Florida. — Rev. Stat. (1892), §§ 832, 2676.
Georgia. — 3 Code (1895), § 488.
Illinois. — Starr & C. Anno. Stat. (1896), p. 2710, par. 44.
Indiana. — Horner's Stat. (1896), § 4257*a*.
Iowa. — Code (1897), §§ 2597–2600.
Kansas. — Gen. Stat. (1897), p. 855, § 8.
Kentucky. — Stat. (1894), § 2642.
Louisiana. — Laws (1894), p. 36, § 7.
Maine. — Laws (1891), c. 43, § 1.
Maryland. — Laws (1896), c. 378, § 11.
Massachusetts. — Pub. Stat. (Supp. 1888), p. 493, § 8.
Michigan. — How. Anno. Stat. (Supp. 1890), § 2287*b*1.
Minnesota. — Stat. (1894), § 7914.
Mississippi. — Anno Code (1892,) § 1258.
Missouri. — Laws (1897), p. 169, § 11.
Montana. — Pol. Code (1895), § 631.
Nebraska. — Comp. Stat. (1897), § 3718.
Nevada. — Laws (1895), p. 86, § 9.
New Hampshire. — Laws (1891), c. 43, § 7.
New Jersey. — Gen. Stat. (1895), p. 1192, § 12.
New York. — Laws (1895), c. 626, § 164.
North Carolina. — Code (1883), § 3154.
North Dakota. — Rev. Codes (1895), § 299.
Ohio. — Bates' Anno. Stat. (1897), § 6991, sub. 2.
Oklahoma. — Stat. (1893), § 2705.
Oregon. — Hill's Anno. Laws (1892), § 3348.
Pennsylvania. — Laws (1897), p. 211, § 13.
Rhode Island. — Gen. Laws (1896), c. 155, § 6.
South Carolina. — Crim. Stat. (1893), § 261.
Tennessee. — Code (1896), § 3634.
Texas. — Pen. Code (1895), art. 451.
Utah. — Laws (1894), c. 52, § 6.
Vermont. — Stat. (1894), § 4648.
Virginia. — Acts (1893–4), c. 552, § 1772.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 3029.
West Virginia. — Code (1887), p. 919.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 1410*v*.
Wyoming. — Laws (1893), c. 28, § 5.

Practicing for Fee. — Under some of the statutes cited *supra*, it is necessary that the acts performed should be done for a fee or reward in order to constitute a violation of the statute, and in such case the indictment, information or criminal complaint should charge that the act was done for a fee or reward. Derrick *v.* State, 34 Tex. Crim. Rep. 21.

Failure to Obtain License. — The information must allege that the accused engaged in practice without first having obtained a license from any board of examiners authorized to issue a license to practice dentistry within the state. Derrick *v.* State, 34 Tex. Crim. Rep. 21.

Number of Acts. — In *Texas*, under a statute relating to the practice of medicine, it has been held sufficient to allege one single act. Antle *v.* State, 6 Tex. App. 202.

For the formal parts of a criminal complaint, indictment or information in a particular jurisdiction consult the titles CRIMINAL COMPLAINTS, vol 5, p. 930; INDICTMENTS; INFORMATIONS.

1. *Indiana.* — Horner's Stat. (1896), § 4257*a* For other statu tes see *supra*, note 4, p. 484.

late of said county, then and there unlawfully engaged in the practice of dentistry by then and there filling the right upper bicuspid tooth of one *Samuel Short*, and by then and there extracting the teeth of divers other persons to the said *John Doe* unknown, without being then and there registered as a dentist and possessing the certificate of registration, nor the permit to practice dentistry issued by the *Board of Examining Dentists* of said state of *Indiana* by any member or members thereof, and he the said *Richard Roe* not then and there being a lawfully registered surgeon or physician, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Indiana.*

John Doe.

Subscribed and sworn to before me this *twentieth* day of *May*, 1*898*. *Abraham Kent*, J. P. (SEAL)

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By Thomas E. O'Brien.

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CROSS-REFERENCES.

For Forms relating to Depositions in Admiralty, see the title ADMIRALTY, vol. 1, *Forms Nos. 586–590.*

For Forms relating to Interrogatories in Equity, see the title ANSWERS IN EQUITY, vol. 1, *Forms Nos. 1509–1511.*

For Forms relating to Depositions Taken Before Committing Magistrates, see the title CRIMINAL COMPLAINTS, vol. 5, *Form No. 6663.*

For Forms relating to Discovery, see the title DISCOVERY, ETC.

For Forms relating to Examination of Parties Before Trial, see the title EXAMINATION OF PARTIES BEFORE TRIAL.

For other Forms relating to the Taking of Depositions, see the titles BILLS DE BENE ESSE, vol. 3, p. 406; *PERPETUATION OF TESTIMONY; PROBATE AND ADMINISTRATION.*

For matters of Procedure relating to this subject, generally, see 6 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 471.

I. AGREEMENT OR STIPULATION.[1]

1. To Take.

1. **Statutory provisions** regulating the taking of depositions in the various jurisdictions are as follows:

Alabama. — Civ. Code (1886), §§ 2801–2812, 3463–3474; Ch. Rules, Nos. 51–66. Crim. Code (1886), §§ 4465–4469.

Arizona. — Rev. Stat. (1887), §§ 1833–1859; Pen. Code (1887), §§ 2065–2075; 2085–2098.

Arkansas. — Sand. & H. Dig. (1894), §§ 2977–3016; Laws (1895), c. 83, § 3.

California. — Code Civ. Proc. (1897), §§ 2006, 2019–2038; Pen. Code (1897), §§ 1335–1359.

Colorado. — Mills' Anno. Code (1896), §§ 341–351.

Connecticut. — Gen. Stat. (1888), §§ 1068–1077, 1626, 3209.

Form No. 7230.[1]

(*Title of court and cause as in Form No. 7235.*) } Agreement for Depositions.

We agree, that depositions may be taken in this case on behalf of the *plaintiff* at *the office of Norton Porter*, No. *120 Laurel avenue*, in

Delaware. — Laws (1893), c. 99, § 40.
District of Columbia. — Comp. Stat. (1894), p. 563, § 33, p. 568, § 19.
Florida. — Rev. Stat. (1892), §§ 1123–1137, 1142, 2912 *et seq.*
Georgia. — 2 Code (1895), §§ 3287, 4566, 5297–5322.
Idaho. — Rev. Stat. (1887), §§ 8160–8186; Laws (1893), p. 132.
Illinois. — Starr & C. Anno. Stat. (1896), c. 46, par. 104 (election cases), par. 111, c. 51, par. 24 *et seq.*, c. 69, par. 19, c. 79, par. 66, c. 101, par. 2, c. 148, par. 4.
Indiana. — Horner's Stat. (1896), §§ 418–449, 1400, 1481, 1805.
Iowa. — Code (1897), §§ 1209, (contested elections), 3173, 4605, 4671, 4672, 4684–4712, 5498.
Kansas. — Gen. Stat. (1897), c. 95, §§ 357–373.
Kentucky. — Bullitt's Civ. Code (1895), §§ 565–591; Appendix, §§ 25, 26; Crim. Code, § 153.
Maine. — Rev. Stat. (1883), c. 107, §§ 1–21; Laws (1885), c. 306, 307.
Maryland. — Pub. Gen. Laws (1888), art. 35, § 15 *et seq.*
Massachusetts. — Pub. Stat. (1882), c. 169, §§ 23–44, c. 212, §§ 40, 41, c. 213, §§ 41, 42; Pub. Stat. (1888), c. 188; Pub. Stat. (1895), c. 197, c. 396, § 65.
Michigan. — Laws (1895), No. 180, pp. 334–338.
Minnesota. — Stat. (1894), §§ 1377, 1380, 2271, 2276, 4728, 5003–5008, 5645, 5648, 5667, 5691.
Mississippi. — Anno. Code (1892), §§ 1747–1765, 3677 (contested elections), 4467.
Missouri. — Burns' Anno. Pr. Code (1896), §§ 1293–1323.
Montana. — Code Civ. Proc. (1895), §§ 3324, 3330, 3340–3342, 3350–3354, 3360, 3361; Pen. Code (1895), §§ 2480–2485, 2488, 2489, 2491, 2500, 2502–2510.
Nebraska. — Comp. Stat. (1897), §§ 1537, 2477, 2757, 5946–5966, 6492, 7187, 7188.
Nevada. — Gen. Stat. (1885), §§ 3429–3437, §§ 4430–4450 (criminal cases).
New Hampshire. — Pub. Stat. (1891), c. 18, §§ 2, 12, 13, c. 182, § 22, c. 225, §§ 1–8.
New Jersey. — Gen. Stat. (1895), pp. 1402–1405, §§ 25–44, pp. 1410, 1411, §§ 66, 67.
New Mexico. — Comp. Laws (1897), §§ 2017–2020, 3036–3045.
New York. — Code Civ. Proc., §§ 870–920 (Birds. Rev. Stat. (1896), p. 854 *et seq.*); Code Crim. Proc., §§ 620–657 (Birds. Rev. Stat. (1896), p. 866 *et seq.*).
North Carolina. — Code (1883), §§ 1357–1362, 1371.
North Dakota. — Rev. Codes (1895), §§ 5671–5689 (criminal cases), §§ 8374–8397.
Ohio. — Bates' Anno. Stat. (1897), §§ 5265–5285, 7294.
Oklahoma. — Stat. (1893), §§ 4236–4249, 5348–5371.
Oregon. — Hills' Anno. Laws (1892), §§ 812–829.
Pennsylvania. — Bright. Pur. Dig. (1894), p. 310, § 8, p. 638, § 51, p. 819, § 42, p. 820, §§ 43, 46, p. 1135, §§ 68–75; Laws (1895), p. 279.
Rhode Island. — Gen. Laws (1896), c. 240, § 21, c. 244, §§ 20–30.
South Carolina. — 1 Rev. Stat. (1893), §§ 581, 787, 891, 2332–2347.
South Dakota. — Dak. Comp. Laws (1887), §§ 5283–5301, §§ 7540–7563 (criminal cases).
Tennessee. — Code (1896), §§ 5624–5668, 5683–5693, 6274, 6279, 6280.
Texas. — Rev. Stat. (1895), arts. 2273–2298; Code Crim. Proc. (1895), arts. 797–814 (criminal cases).
Utah. — Rev. Stat. (1898), §§ 3449–3465, 5027 *et seq.*, 5038 *et seq.*
Vermont. — Stat. (1894), §§ 153–156 (contested elections), 1256–1273, 1280–1282, 1917, 2343, 2685.
Virginia. — Code (1887), §§ 2537, 3359–3368.
Washington. — Ballinger's Anno. Codes & Stat. (1897), §§ 6017–6030, 6101.
West Virginia. — Code (1891), p. 663, § 27, pp. 828, 829, §§ 33–38.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 175, 886, 2817, 3787, 3788, 3942, 4052, 4086–4134.
Wyoming. — Rev. Stat. (1887), §§ 2613, 2620, 2623, 2624, 2627, 2628, 2632, 2633; Laws (1893), c. 29, §§ 1, 2; Laws (1895), c. 96, p. 222.
Federal Courts. — U. S. Rev. Stat. (2d ed. 1878), § 863 *et seq.*

1. Other forms of such stipulations are as follows:

(*Title of court and cause as in Form No.*

the city of *Topeka*, state of *Kansas*, before any officer, state or federal, authorized by law to take depositions, without any commission or rule of court, between the hours of *nine* A. M. and *four* P. M., on the *tenth* day of *May*, 1*898*, to be continued, if need be, at the same place and between the same hours, from day to day, until the depositions are completed, the opposite party being allowed to take depositions at the same place and time.

This *second* day of *May*, 1*898*.

Jeremiah Mason, Attorney for Plaintiff.
Oliver Ellsworth, Attorney for Defendant.

7236, infra.) "Stipulation to take deposition. It is hereby stipulated and agreed by and between the respective parties to the above entitled cause that the deposition and testimony of *William West*, residing in the *city and* county of *Sacramento*, in the state of *California*, a witness on the part of the *defendant* in said cause, be taken before *Abraham Kent*, a *justice of the peace* in and for the said county of *Sacramento*, on *Tuesday*, the *fifth* day of *July*, 1*898*, at *ten* o'clock *a.* m., and continuing from time to time thereafter until completed, that the testimony may be written down in short-hand by a short-hand reporter, and thereafter written out in long-hand, and after being so written out in long-hand, may be read to and corrected by the witness, and that said deposition and testimony when taken, be read and used in evidence in said cause, on any trial thereof or proceeding therein, subject to the same objections and exceptions, as if said witness were personally present on the stand, but without objection or exception to the time, place or manner of taking the same, and the form of the question, unless noted at the time." (*Date and signatures as in Form No. 7230, supra.*)

(*Venue and title of court and cause as in Form No. 7237.* "Stipulation for taking testimony: It is hereby stipulated by and between the parties, plaintiff and defendant in the above entitled action, that the deposition and testimony of *William West*, residing at *Lansing*, in the state of *Michigan*, witness on behalf of said *John Doe*, shall be taken by and before any *notary public*, residing at said *Lansing*, whose official character as such *notary public* shall be sufficiently proven by his official seal, and an impression thereof affixed to or stamped upon his return hereto; and such *notary public* is hereby agreed upon and appointed to take the deposition of said witness *William West*. And the interrogatories and cross-interrogatories (if any) hereto attached shall go out with this stipulation, to be propounded to said witness after said witness is produced and sworn to testify the whole truth and nothing but the truth relative to said cause; and said parties hereby waive any and all objections to such deposition, and waive the issuing of any commission from said court herein, and hereby agree that said deposition of said witness *William West* shall have the same force and effect as if taken upon commission duly issued herein; and said parties waive any and all notices and prerequisite forms required by law or rules of court for the taking of depositions; but said parties reserve to themselves the right to object to the competency and admissibility of said interrogatories and cross-interrogatories, and to any of the same and to any of the answers thereto respectively, in like manner and upon the same grounds as if said witness were present and orally examined in open court upon the trial of this cause, which is in said court pending." (*Date and signatures as in Form No. 7230, supra.*)

(*Title of court and cause as in Form No. 7240, infra.*) "It is agreed by the parties to the suit above entitled that the deposition of *William West* may be taken on the interrogatories and cross-interrogatories hereto annexed before *James Hallett*, who is agreed upon as a commissioner for that purpose, at *Stanton*, in the county of *Stanton*, in the state of *Nebraska*, on the *twentieth* day of *September*, 1897, or on any day or days between the day last named and the *second* day of *October*, 1897, said deposition to be used on the trial of the above cause by the *plaintiff*. The notice, and copy of interrogatories and suing out a commission as required by law is hereby waived; but said deposition to be subject to all just exceptions not herein waived." (*Date and signatures as in Form No. 7230, supra.*)

Form No. 7231.

(Precedent in Sargent *v.* Collins, 3 Nev. 268.)

[(*Venue and title of court and cause as in Form No. 5924.*)][1]

It is hereby stipulated and agreed by and between the parties plaintiff and defendant in this action, that the deposition of defendant *S. W. Collins* be taken at the city of *San Francisco*, in the State of *California*, before *F. J. Thibault*, *notary public*, on the ——— day of *November*, 1866, waiving hereby all preliminary notice, commission, and other forms. This deposition to be used by either party on said trial.

[*Wells & Kennedy*, Attorneys for *Plaintiff*.
Robert M. Clark, *W. M. Gates*, } Attorneys for *Defendants*.][1]

2. That Order to Take be Entered.

Form No. 7232.[2]

(*Title of court and cause as in Form No. 6954.*) It is hereby stipulated and agreed by and between the respective parties to the above entitled cause, that an order[3] of the *Supreme* Court may be entered * directing that the deposition of *William West*, residing at *Hartford*, in the county of *Hartford*, in the state of *Connecticut*, a witness on behalf of the *defendant* in the above entitled action, shall be taken by and before *James Hallett*, of *Hartford*, in said state of *Connecticut*, on or before the *tenth* day of *June*, 1898, and the *plaintiff* in the above action may join in said commission; said deposition to be returned to the said court through the post-office (*or in such manner as may be agreed upon by the parties*);[4] the proceedings in the above action to be stayed until the return of said deposition.

Dated the *twentieth* day of *May*, 1898.

Oliver Ellsworth, *Defendant's* Attorney,[5]
101 State Street, *Albany*, *New York*.[6]

Jeremiah Mason, *Plaintiff's* Attorney,[5]
20 Wall Street, *New York*, *N. Y.*[6]

3. That Commission Issue.

Form No. 7233.[7]

(*Commencing as in Form No. 7232, and continuing down to* *) directing that a commission issue in the above entitled action directed to *James Hallett*, of *Hartford*, in the county of *Hartford*, in the state of

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. *New York.* — Code Civ. Proc., § 908 (Birds. Rev. Stat. (1896), p. 863, § 38).

3. **An order must be entered** before commission can issue. N. Y. Code Civ. Proc., § 908 (Birds. Rev. Stat. (1896), p. 863, § 38).

4. **Manner of execution and return** may be stipulated by the parties. N. Y. Code Civ. Proc. § 908 (Birds. Rev. Stat. (1896), p. 863, § 38).

5. **Must be signed by attorneys** for parties. N. Y. Code Civ. Proc., § 908 (Birds. Rev. Stat. (1896), p. 863, § 38).

6. Hun's N. Y. Ct. Rules (1896), No. 2.

7. See annotations to Form No. 7232.

Connecticut, to examine *William West*, a witness on behalf of the above named defendant, residing at said *Hartford*, upon interrogatories to be annexed to the said commission (or, if agreement is for open commission, say: *to examine any witness who may be produced by either party on or before the tenth day of June, 1898, upon oral questions to be put to the witness when he is produced*), to take and certify the deposition of each witness so examined, and return the same and the commission immediately after the expiration of the time limited for the production of witnesses, according to the directions given in or with the commission. Said commission to be executed as prescribed in the code of civil procedure (*or state manner of execution agreed upon and conclude as in Form No. 7232*).

II. NOTICE TO TAKE.[1]

1. By Party or Attorney.

a. In General.

Form No. 7234.

(*Statement of venue and title of court and cause.*)[2] } Notice of Taking Depositions.

You are hereby notified that the depositions of [*William West* and *Samuel Short*, necessary and material] witnesses[3] on behalf of the

1. **Notice to take depositions is regulated by statute or rule** in the following states: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming; and also by Federal Statutes. See list of statutes cited *supra*, note 1, p. 488.

For formal parts of notices in general consult the title NOTICES.

Must be in Writing. — See list of statutes cited *supra*, note 1, p. 488.

For forms of interrogatories to be attached to the notice see *infra*, Forms Nos. 7271 to 7283.

2. **A slight error in the title** of the cause will not invalidate the notice. Mills *v.* Dunlap, 3 Cal. 94.

3. **Names of the witnesses** to be examined must, in many jurisdictions, be stated in the notice. See list of statutes cited *supra*, note 1, p. 488. See also

Idaho. — Laws (1893), p. 132, § 2, subs. 3.

Illinois. — A notice to take the depositions of "certain named witnesses and others" is sufficient to authorize the taking of depositions of additional witnesses not specifically named in the notice. Independent Dryer Co. *v.* Livermore Foundry, etc., Co., 60 Ill. App. 390.

Iowa. — The names of the witnesses should be set out in the notice or in some other manner sufficiently identified. Strayer *v.* Wilson, 54 Iowa 565; Pilmer *v.* Branch of State Bank, 16 Iowa 321.

Minnesota. — Thompson *v.* St. Paul City R. Co., 45 Minn. 13.

Nebraska. — Miller *v.* Frey, 49 Neb. 472.

North Carolina. — Notice that the deposition of A, B, C and others will be taken is sufficient. McDugald *v.* Smith, 11 Ired. L. (33 N. Car.) 576.

South Dakota. — No deposition taken out of the county shall be read upon the trial of the action, unless the notice upon which the same was taken shall

plaintiff (or *defendant*) in the above entitled action[1] to be used upon the trial thereof will be taken before *Norton Porter*, Esq.,[2] a notary public (*or other officer, as the case may be*) in and for the county of (*naming the county*) in the state of (*naming the state*), in *his office*, at No. *102 Blank* street in the city (or *town* or *village*) of (*naming the city, town or village*) in the county of (*naming the county*) in the state of (*naming the state*),[3] on the *tenth* day of *June*, A. D. 1*898*, between the hours of *ten* o'clock in the *fore*noon and *four* o'clock in the *after*noon

specify the names of the witnesses to be examined. S. Dak. Cir. Ct. Rules (6th Jud. Cir.), No. 15.

Tennessee. — Robertson *v.* Campbell, 1 Overt. (Tenn.) 172.

Residence of the witness need not be stated in the notice. Hays *v.* Borders, 6 Ill. 46.

1. Must specify the action or proceeding in which the deposition is to be taken and used. See list of statutes cited *supra*, note 1, p. 488; Atchison, etc., R. Co. *v.* Meek, 49 Neb. 295; Bowyer *v.* Knapp, W. Va. 277.

2. Before whom may be taken, see list of statutes cited *supra*, note 1, p. 488.

Name of officer before whom to be taken must be designated in some jurisdictions. See list of statutes cited *supra*, note 1, p. 488. But see

Connecticut. — Name of officer need not be stated in the notice. Daggett *v.* Tallman, 8 Conn. 168.

Illinois. — Name of officer need not be stated, if the time and place of taking the deposition is correctly stated. Patterson *v.* Hubbard, 30 Ill. 201.

Indiana. — Officer before whom the deposition will be taken need not be specified. Harvey *v.* Osborn, 55 Ind. 535.

3. Place of taking must be specified. See list of statutes cited *supra*, note 1, p. 488.

Arkansas. — At the town of Memphis is sufficient notice to take the deposition at the city of Memphis. Reardon *v* Farrington, 7 Ark. 364.

California. — Should specify the place of taking the deposition, and where the notice stated that the deposition would be taken in the city of San Francisco, before a notary public, naming him, without designating the office or place of business of the notary, was held insufficient. Lucas *v.* Richardson, 68 Cal. 618.

Illinois. — In Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19, it was held that a notice having the venue Ford county, though suit was originally brought in Champaign county, notifying the defendant that the deposition would be taken at the residence of the plaintiff, in Champaign City, Illinois, on a day named, sufficiently complied with the statute, as it gave the time and place. The court stated that as the action was brought in Champaign county the inference would be fair that that was the county of plaintiff's residence, and was a county different from that in which the suit was pending.

Indiana. — Notice is sufficiently certain which states that the "deposition will be taken at *the general post-office* in the city of *Washington, District of Columbia.*" Bulla *v.* Morrison, 1 Blackf. (Ind.) 521.

"Depositions will be taken at *the Post Office* in the town of *America*, in *Kansas Territory*," is sufficient, where it is not shown that there is another town of that name in the territory. Hobbs *v.* Godlove, 17 Ind. 359.

Kentucky. — Certainty to a common intent only is required; and where all the parties reside in the county, a notice to take a deposition at the court-house is sufficiently certain. Barbour *v.* Whitlock, 4 T. B. Mon. (Ky.) 180.

A notice that a deposition be taken at a particular tavern in a city named in the notice is sufficient, without stating the christian name of the tavern keeper, unless it is shown that there are two tavern keepers with the same surname in the city. Overstreet *v.* Philips, 1 Litt. (Ky.) 122.

A notice of taking depositions in the town of Elizabeth, without mentioning at what house or place in the town, is insufficient. Crozier *v.* Gano, 1 Bibb (Ky.) 258.

North Carolina. — The house where a certain individual lives has been held to be a description sufficiently definite to identify the place. Owens *v.* Kinsey, 6 Jones L. (51 N. Car.) 38.

Virginia and West Virginia. — Hunter *v.* Fulcher, 5 Rand. (Va.) 126. Bowyer *v.* Knapp, 15 W. Va. 277.

of that day, commencing at *ten* o'clock in the *fore*noon of said day,[1] and if not completed on said *tenth* day of *June*, A. D. 1*898*, will be continued from day to day successively thereafter [and over Sundays, if necessary,] until completed, at the same place and between the same hours.

Dated the *tenth* day of *June*, A. D. 1*898*.

Jeremiah Mason, Attorney for *Plaintiff* (or *Defendant*).[2]

To *Oliver Ellsworth*, Attorney for *Defendant* (or *Plaintiff*).[3]

1. Time of taking must be specified. See list of statutes cited *supra*, note 1, p. 488; Atchison, etc., R. Co. *v.* Meek, 49 Neb. 295. But in McGinley *v.* McLaughlin, 2 B. Mon. (Ky.) 302, it was held that the hour need not be specified.

The time stated must be specific, and a notice to take depositions "on the *fifteenth*, *sixteenth*, *seventeenth* and *eighteenth* days of *October*, A. D. 18*45*, or on either of said days," does not comply with the statute. Reardon *v.* Farrington, 7 Ark. 364; Samuel *v.* Cravens, 10 Ark. 380; Caldwell *v.* McVicar, 9 Ark. 418.

Must specify the day upon which the taking will begin, and a notice that they will be taken "on the *24th* day of *June*, between hours specified, on the *25th*, on the *27th*, and on the *28th* of the same month at the same hours," etc., is bad. Benton *v.* Craig, 2 Mo. 198.

But a notice was held sufficient which stated: "That I shall, on the *15th*, *16th*, and *17th* days of *May*, 186*2*, commencing at *9* o'clock *a.* m. of each of said days, at the office of *Samuel McCreary*, in the town of *Rushville*, in the county of *Schuyler* and state of *Illinois*, take the depositions," etc. Patterson *v.* Hubbard, 30 Ill. 201.

2. Must be signed by the party or his attorney, see list of statutes cited *supra*, note 1, p. 488; Bohn *v.* Devlin, 28 Mo. 319.

3. Must be addressed to and served upon the adverse party or his attorney. See list of statutes cited *supra*, note 1, p. 488. See also on this point the following:

Arkansas. — Trapnall *v.* State Bank, 18 Ark. 53; Samuel *v.* Cravens, 10 Ark. 380; Caldwell *v.* McVickar, 9 Ark. 418. The fact that the attorney cannot conveniently attend the examination does not affect the sufficieney of the notice. Bailey *v.* Wright, 24 Ark. 73.

California. — Lucas *v.* Richardson, 68 Cal. 618; Ellis *v.* Jaszynsky, 5 Cal. 444.

Colorado. — Glenn *v* Brush, 3 Colo. 26; Jones *v.* Carruthers, 1 Colo. 291.

Connecticut. — Sing Cheong Co. *v.* Yung Wing, 59 Conn. 535; Daggett *v.* Tallman, 8 Conn. 169.

Illinois. — Independent Dryer Co. *v.* Livermore Foundry, etc., Co., 60 Ill. App. 390; Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19; Patterson *v.* Hubbard, 30 Ill. 201.

Indiana. — Harvey *v.* Osborn, 55 Ind. 535; Hobbs *v.* Godlove, 17 Ind. 359.

Iowa. — Kennedy *v.* Rosier, 71 Iowa 671; Strayer *v.* Wilson, 54 Iowa 565.

Kansas. — Atchison, etc., R. Co. *v.* Sage, 49 Kan. 524.

Kentucky. — Barbour *v.* Whitlock, 4 T. B. Mon. (Ky.) 180; Williams *v.* Gilchrist, 3 Bibb (Ky.) 50.

Maine. — Harris *v.* Brown, 63 Me. 51; Brown *v.* Ford, 52 Me. 479; Allan *v.* Doyle, 33 Me. 420.

Massachusetts. — Davis *v.* Allan, 14 Pick. (Mass.) 313; Bryant *v.* Commonwealth Ins. Co., 9 Pick. (Mass.) 485.

Michigan. — Brown *v.* Watson, 66 Mich. 223; Patterson *v.* Wabash, etc., R. Co., 54 Mich. 91.

Minnesota. — Thompson *v.* St. Paul City, etc., R. Co., 45 Minn. 13.

Mississippi. — Gordon *v.* Warfield, 74 Miss. 553; Daily *v.* Johnson, 48 Miss. 246; Pickett *v.* Ford, 4 How. (Miss.) 246.

Missouri. — Bohn *v.* Devlin, 28 Mo. 319.

Nebraska. — Atchison, etc., R. Co. *v.* Meek, 49 Neb. 295; Miller *v.* Frey, 49 Neb. 472.

New Hampshire. — Deming *v.* Foster, 42 N. H. 165; Bundy *v.* Hyde, 50 N. H. 116; Cater *v.* McDaniel, 21 N. H. 231.

New Jersey. — Parker *v.* Hayes, 23 N. J. Eq. 186; Hendricks *v.* Craig, 5 N. J. L. 654; Den *v.* Farley, 4 N. J. L. 138.

North Carolina. — Bryan *v.* Jeffreys, 104 N. Car. 242; Sloan *v.* Williford, 3 Ired. L. (25 N. Car.) 307.

(*Affidavit of reason for taking deposition.*)[1]
(*Acknowledgment of, or affidavit of, service.*)[2]

North Dakota. — Ashe *v.* Beasley, 6 N. Dak. 191.

Ohio. — Houpt *v.* Houpt, Wright (Ohio) 156.

Pennsylvania. — Vincent *v.* Huff, 4 S. & R. (Pa.) 298; Sheeler *v.* Speer, 3 Binn. (Pa.) 130.

South Dakota. — J. I. Case Threshing Mach. Co. *v.* Pederson, 6 S. Dak. 140.

Tennessee. — Robertson *v.* Campbell, 1 Overt. (Tenn.) 172; Wilson *v.* Drake, 5 Hayw. (Tenn.) 108.

Utah. — Newton *v.* Brown, 1 Utah 287.

Vermont. — Kimpton *v.* Glover, 41 Vt. 283; Hopkinson *v.* Watson, 17 Vt. 91.

Virginia. — Steptoe *v.* Read, 19 Gratt. (Va.) 1; Unis *v.* Charlton, 12 Gratt. (Va.) 484.

West Virginia. — Buster *v.* Holland, 27 W. Va. 511; Bowyer *v.* Knapp, 15 W. Va. 277.

Federal Courts. — Dunlop *v.* Munroe, 1 Cranch (C. C.) 536.

1. Accompanying Affidavit. — In some jurisdictions, the notice must be accompanied by an affidavit, or a copy of the same, showing the existence of a reason for taking depositions. Cal. Code Civ. Proc. (1897), § 2031, and list of statutes cited *supra*, note 1, p. 488.

The form of this affidavit may be as follows:

(*Title of court and cause as in the notice to take depositions.*)

"State of (*naming state*).
[City and] County of (*naming county*). } ss.

Richard Roe being duly sworn upon his oath according to law, says that he is the defendant in the above entitled action; that the summons in said action has been duly issued and served; that *William West* is a necessary and material witness on the part of the affiant, the said *Richard Roe*, the said defendant, on the trial of said action; and that the said witness, the said *William West* (*setting out facts showing cause for taking witness's deposition*).

Richard Roe."

(*Jurat as in Forms Nos. 763 to 808, as the case may be.*)

Reason for taking the deposition is required to be stated in the notice, in many jurisdictions. Harris *v.* Wall, 7 How. (U. S.) 693; see also list of statutes cited *supra*, note 1, p. 488.

2. Service of notice, generally, see list of statutes cited *supra*, note 1, p. 488; also the title SERVICE OF WRITS AND PAPERS.

Simply reading the notice is not sufficient. Williams *v.* Brummel, 4 Ark. 129; Woodruff *v.* Laflin, 4 Ark. 527.

Service by one other than an officer must be verified by an affidavit. Bell *v.* Fry, 5 Dana (Ky.) 341. And this rule applies to service by clerk of court. Hyde *v.* Benson, 6 Ark. 396. For form of affidavits of this character see the title SERVICE OF WRITS AND PAPERS. For forms of affidavits or acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS.

Acknowledgment of service may be as follows: "Service of the above notice admitted this *second* day of *August*, A. D. 1898." Or, "Service of the above notice by receiving a copy thereof, on this *twenty-first* day of *July*, 1898, is admitted." Or, "Received copy of the above notice this *first* day of *May*, A. D. 1898." Or, "We acknowledge service of the above notice and waive dedimus and service of official character of officer before whom said depositions are taken, this *first* day of *August*, 1898." Or, "We hereby waive all objections to the official character of the officer and acknowledge service of the above notice, this *tenth* day of *August*, 1898." Which acknowledgment must be signed by the adverse party or his attorney.

For forms of acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS.

Time of Notice. — The provision of the code that the notice to take depositions shall be five days, when served on the party within the county, means the county in which the deposition is to be taken. Kennedy *v.* Rosier, 71 Iowa 671.

Order Shortening Time of Notice. — Where an order is granted shortening the time of notice as provided by § 2031 of the Code of Civil Procedure, it should state a definite time of notice. Howell *v.* Howell, 66 Cal. 390.

Form No. 7235.[1]

(Sand. & H. Ark. Dig. (1894), p. 1631.)

John Doe, plaintiff, against *Richard Roe*, defendant.	In *Sebastian Circuit* Court, *Fort Smith* District. Notice.

To *Richard Roe*, the above-named defendant: You are hereby notified that the depositions of witnesses to be read in evidence on behalf of the *plaintiff* will be taken at the office of *Norton Porter*, at No. *10 Markham* street, in the city of *Little Rock*, county of *Pulaski*, state of *Arkansas*, on the *tenth* day of *May*, 1*898*, between the hours of *eight* o'clock in the *fore*noon and *six* o'clock in the *after*noon; and that the taking of said depositions, if not completed on said day, will be continued from day to day until completed, at the same place and between the same hours. (*Date and signature of attorney as in Form No. 7234.*)

Form No. 7236.[2]

(*Venue, title of court and cause as in Forms Nos. 5908, 5910, 5924, 5931, 5935, as the case may be.*)	Notice of taking depositions of witness*es*, and time and place of examination.

State of (*naming state*),
[City and] County of (*naming county*). } ss.

Take notice, that the depositions of *William West* and *Samuel Short*, witnesses on behalf of the *defendant* in the above entitled action, to be used upon the trial thereof, will be taken before *Norton Porter*, Esq., a *notary public* in and for the county of *Sacramento* in the state of *California*, at *his office*, No. *10 West* street in the city of *Sacramento*, in the county of *Sacramento*,[2] on the *tenth* day of *June*, 1*898*, between the hours of *ten A.* M. and *four P.* M. on that day, commencing at *ten* o'clock *A.* M., and if not completed on that day, the taking thereof will be continued from day to day until completed.*

And the annexed is a copy of an affidavit of *Richard Roe*, the defendant above named, showing that this case is one mentioned in which depositions may be taken.[3]

(*Date, signature and address as in Form No. 7234.*)

Form No. 7237.[3]

(*Venue and title of court and cause as in Form No. 5911.*)

1. *Arkansas.*—Sand. & H. Dig. (1894), § 2987.

Missouri.—Burns' Anno. Pr. Code (1896), § 1299 *et seq.*

See also list of statutes cited *supra*, note 1, p. 488. Consult also Form No. 7234, *supra*, and the notes thereto.

Conditional Notice. — Depositions in chancery can be taken absolutely only, and a notice that a deposition will be taken conditionally is unavailing. Crittenden *v.* Woodruff, 11 Ark. 82.

No affidavit is required to accompany the notice. Sand. & H. Dig. Ark. (1894), § 2987.

2. This form of notice may be used in the following states:

Arizona.—Rev. Stat. (1887), § 1835.

California.—Code Civ. Proc. (1897), § 2031.

Nevada.—Gen. Stat. (1885), § 3430.

Oregon.—Hill's Anno. Laws (1892), §§ 816–823.

Utah.—Rev. Stat. (1898), § 3456.

Consult also Form No. 7234, *supra*, and the notes thereto.

3. This form of notice may be used in the following states:

Colorado.—Mills' Anno. Code (1896), § 342.

To the above named *John Doe* or his attorney:

Please take notice, that on the *ninth* day of *August*, A. D. 1897, at *ten* o'clock *A.* M., and to continue from day to day, if necessary, at *the office of Norton Porter, 10 Markham* street, in the city of *Pueblo*, in the county of *Pueblo* and state of *Colorado*, before *Norton Porter*, a *notary public*, or some other officer authorized by law to take depositions in such cases, I shall proceed to cause to be taken the deposition of *William West*, of said *Pueblo* county, to be read in evidence on the trial of the above entitled cause, on the part of said *defendant*, when and where you may attend and cross-examine the said witness, if you shall see fit so to do. (*Date and signature of attorney as in Form No. 7234.*)

Form No. 7238.[1]

John Doe against *Richard Roe.* } *Hartford* County. *Superior* Court.

To the *plaintiff* in the above entitled action and to *Jeremiah Mason*, Esq., his attorney.

Illinois. — Starr & C. Anno. Stat. (1896), c. 51, §§ 24, 25.

Mississippi. — Anno. Code (1892), §§ 1749, 1750.

Consult also Form No. 7234, *supra*, and the notes thereto.

Notice of Taking Must be Given. — Gordon *v.* Warfield, 74 Miss. 553; Daily *v.* Johnson, 48 Miss. 246.

In Illinois, the caption of the notice may be as follows:

"In the *Greene Circuit* Court, State of *Illinois.*

John Doe against *Richard Roe.* } Assumpsit.

To the above named *Richard Roe*, defendant:"

In Mississippi, the caption of the notice may be as follows:

"State of *Mississippi*, County of *Sunflower.* } In the *Circuit* Court.

John Doe against *Richard Roe.*

To the above named *Richard Roe*, defendant:"

1. *Connecticut.* — Gen. Stat. (1888), § 1068. See also list of statutes cited *supra*, note 1, p. 488. Consult also Form No. 7234, *supra*, and the notes thereto.

Deposition of witness in military or naval service may be taken by interrogatories, a copy of which shall be served with the notice on the adverse party. Conn. Gen. Stat. (1888), § 1074.

Precedent. — In Sing Cheong Co. *v.* Yung Wing, 59 Conn. 535, it was held that the notices were insufficient in respect to the time allowed and the depositions were suppressed. The decision was rendered under § 1068, Gen. Stat. (1888), requiring that reasonable notice shall be given. The court held that what constituted reasonable notice must be governed, to a certain extent, by the circumstances in the particular case, and that it may properly be left to the wise legal discretion of the trial court. The notices in that case were as follows: "*Sing Cheong Co.* v. *Yung Wing.* State of *Connecticut, Superior* Court, *Hartford* county: The *defendant* in the above entitled cause will take notice that the *plaintiff* therein will take the depositions of *Ching Wing Nam* and others, to be used in the trial thereof, on the *17th* day of *May*, 1889, at *ten* o'clock *a.* m., before *J. D. Kennedy, Consul-General* of the *United States* at *Shanghi China*, or other competent authority, at the *United States Consulate* at *Shanghi, China.* Dated *New Haven* this *sixteenth* day of *March*, 1889. *Wm. H. Law*, Attorney for *Plaintiff.* To *Henry C. Robinson*, Attorney for *Yung Wing.*"

The other notice in the reported case is as follows: "*Sing Cheong Co.* v. *Yung Wing.* State of *Connecticut, Hartford* County, *Superior* Court, *October* term, 1889. To the *defendant* in the above-entitled action, and to *Henry C. Robinson*, his attorney: You are hereby notified that the further depositions of *Yung Wing Nam* and *Li Pak Hin*, and the depositions of sundry witnesses, to

You are hereby notified, that the depositions of sundry witnesses, to be used on the trial of the above entitled action, will be taken by the *defendant* therein on the *tenth* day of *August*, A. D. 1*898*, at *ten* o'clock in the *fore*noon, at *the office of Norton Porter*, No. *20 State* street, in the town of *New Haven*, in the county of *New Haven* and state of *Connecticut*, before some proper authority, and at such time and place as such authority shall fix by adjournment.

You will be present and put interrogatories, if you see fit.

Dated at *Hartford* this *first* day of *August*, 1*898*.

Oliver Ellsworth, Attorney for *Defendant*.

Form No. 7239.[1]

(*Venue and title of court and cause as in Form No. 5915.*) } No. *102*. Complaint to recover $*500 for value of goods sold and delivered to defendant by plaintiff*.

The *defendant* in the above entitled cause is hereby notified that on the *tenth* day of *August*, 1*898*, at *the office of Norton Porter*, No. *20 Bond* street, in the city of *South Bend*, in the county of *St. Joseph* and state of *Indiana*, between the hours of *eight* o'clock *A.* M. and *six* o'clock *P.* M. of said day, before some officer authorized to take depositions, the *plaintiff* will proceed to take the depositions of *William West* and *Samuel Short*, witnesses to be used in evidence on the trial of said cause, and will, if necessary, continue said taking from day to day until said depositions are completed.* (*Date, and signature of attorney as in Form No. 7234.*)

Form No. 7240.[2]

(*Venue and title of court and cause as in Forms Nos. 5916, 5927, 5932, as the case may be.*) } Notice.

To (*Oliver Ellsworth, attorney for*) *John Doe*, plaintiff above named:

You are hereby notified that the defendant above named will on the *tenth* day of *June*, 1*898*, at *the office of Norton Porter*, No. *10 West*

be used on the trial of the above-entitled action, will be taken by the plaintiffs therein on the *30th* day of *November*, 1*889*, at *eleven* o'clock in the *fore*noon, at the office of the *United States Consulate* at *Shanghi*, *China*, before *J. D. Kennedy*, Esq., *Consul-general*, or other proper authority, at such times and places as such authority shall fix by adjournment. You shall be present and put in interrogatories if you see fit. Dated at *Hartford* this *18th* day of *October*, 1*889*. *Sing Cheong Co.* by *Wm. H. Law*, its Attorney."

The acceptance of notice was as follows: "We accept service of this notice so far as we can without waiving rights to the substance of the notice itself. All formalities are waived. *H. C. & L. F. Robinson*, for *Yung Wing*."

1. *Indiana.* — Horner's Stat. (1896), §§ 419–433. See also list of statutes cited *supra*, note 1, p. 488.

Consult also Form No. 7234, *supra*, and the notes thereto.

2. This form of notice may be used in the following states:

Iowa. — Code (1897), § 4685.

North Carolina. — Code (1883), § 1357.

South Carolina. — Rev. Stat. (1893), §§ 2342–2345.

Consult also Form No. 7234, *supra*, and the notes thereto.

Within the state, depositions may be taken upon notice. Iowa Code (1897), § 4685. See also list of statutes cited *supra*, note 1, p. 488.

Within the county, deposition must be taken upon notice. Fabian *v.* Davis, 5 Iowa 456.

street in the township of *Waukon*, in the county of *Allamakee* and state of *Iowa*, proceed to take the deposition of *William West*, of said *Waukon*, to be read as evidence in the trial of the above entitled cause.

The taking of said deposition will be commenced at *ten* o'clock *A.* M. of said day, and will be continued from day to day until completed. (*Date, and signature of attorney as in Form No. 7234.*)

Form No. 7241.[1]

(*Venue and title of court and cause as in Form No. 5917.*) } Notice to Take Depositions.

To *Richard Roe*, the above-named defendant:

You are hereby notified, that the depositions of *William West*, *Samuel Short*, and other witnesses, to be used as evidence on the trial of the above-entitled action, in behalf of the *plaintiff*, will be taken at *the office of Norton Porter*, No. *80 Lind* street, in the city of *Atchison*, in the county of *Atchison*, in the state of *Kansas*, on *Wednesday*, the *twenty-fourth* day of *August*, 1*898*, between the hours of *eight* o'clock *A.* M. and *six* o'clock *P.* M., and that the taking of the same will be adjourned from day to day, between the same hours, until said depositions are completed. (*Date, and signature of attorney as in Form No. 7234.*)

Form No. 7242.[2]

(Bullitt's Civ. Code Ky. (1895), p. 723.)

John Doe, plaintiff, against *Richard Roe*, defendant. } *Bourbon Circuit* Court. Notice of Taking Deposition.

Mr. *Richard Roe*: Take notice, that at the residence of *Samuel Short*[2] in *Kenton* county (or *at the office of Daniel Webster, in the town of Visalia, in Kenton county*, or *at the court-house in Kenton county*), in the state of *Kentucky*, on the *tenth* day of *May*, 1*898*, I will take the deposition of *William West* (or *of a witness*), to be read as evidence in an action pending in the *Bourbon Circuit* Court in which I am *plaintiff* and you are *defendant*. (*Date, and signature of attorney as in Form No. 7234.*)

Form No. 7243.[3]

John Doe against *Richard Roe.* } In the *Superior* Court of *Baltimore* City.

To *Oliver Ellsworth*, attorney for *Richard Roe*, in the above entitled cause:

Without the county, but within the state, deposition may be taken upon notice or commission. Fabian *v.* Davis, 5 Iowa 456.

1. *Kansas.* — Gen. Stat. (1897), c. 95, § 363. Consult also Form No. 7234, *supra*, and the notes thereto.

2. *Kentucky.* — Bullitt's Civ. Code (1895), § 565. See also list of statutes cited *supra*, note 1, p. 488. Consult also Form No. 7234, *supra*, and the notes thereto.

3. *Maryland.* — Pub. Gen. Laws (1888), art. 35, § 16. See also list of statutes cited *supra*, note 1, p. 488. Consult also Form No. 7234, *supra*, and the notes thereto.

Depositions of nonresident witnesses may be taken by either party to any case in any court in this state or before any justice of the peace upon giving notice of not less than five days to the opposite party. Md. Pub. Gen. Laws (1888), art. 35, § 16.

Notice is hereby given, under section 16 of article 35 of the Maryland Code of Public General Laws, that the deposition of the witness hereinafter named will be taken by the *plaintiff* before *James Hallett*, a *commissioner of deeds* for the state of *Maryland* within and for the state of *New York* (or *a notary public* or *justice of the peace*), at *his office*, No. *102 William* street in the city of *New York*, in the state of *New York*, on the *tenth* day of *August*, 1*898*, at *ten* o'clock A. M., to be used in the above entitled cause.

Name of witness:

Samuel Short. (*Date, and signature of attorney as in Form No. 7234.*)

Form No. 7244.[1]

State of *Michigan.*

In the *Circuit* Court for the County of *Montcalm.*

John Doe
against
Richard Roe.

Please take notice, that the testimony of *William West*, a necessary and material witness on behalf of the *plaintiff* in the above entitled cause, will be taken by deposition, *de bene esse*, before *Norton Porter*, a *notary public*, and authorized under the laws of the state of *Michigan* to administer oaths, at *the court-house* in the city of *Vandalia*, county of *Cass* and state of *Michigan*, on the *tenth* day of *May*, 1*898*, at *ten* o'clock in the *fore*noon, at which time and place you are hereby notified to attend. This testimony is to be so taken for the reason that (*stating reason for taking the deposition*). (*Date, signature of attorney, and address as in Form No. 7234.*)

Form No. 7245.[2]

(*Venue and title of court and cause as in Form No. 5920.*)

You will please to take notice, that the deposition of *William West*, a witness for the *plaintiff* in the above entitled action, will be taken by *Norton Porter*, Esq., a *notary public*, duly authorized by the laws of the state of *Idaho* to administer oaths therein, at *his office* in the *town of Murray* in the county of *Shoshone* and state of *Idaho*, on the *tenth* day of *May*, 1*898*, at *ten* o'clock in the *fore*noon of that day, and said examination may be adjourned from day to day until the same is closed. Said deposition to be used upon the trial of said action. (*Date, signature of attorney, and address as in Form No. 7234.*)

Form No. 7246.[3]

(*Venue and title of court and cause as in Forms Nos. 5923, 5928, 5929, 5930, 5933, 5938, as the case may be.*) Notice to Take Depositions.

The above named *defendant Richard Roe* will take notice, that on

1. *Michigan.*— Pub. Acts (1895), No. 180, § 1. See also list of statutes cited *supra*, note 1, p. 488. Consult also Form No. 7234, *supra*, and the notes thereto.

2. *Minnesota.* — Stat. (1894), § 5688. See also list of statutes cited *supra*, note 1, p. 488. Consult also Form No. 7234, *supra*, and the notes thereto.

3. This form of notice may be used in the following states:

Nebraska.—Comp. Stat. (1897), § 5952.

Wednesday, the *eleventh* day of *May*, 1*898*, the said *plaintiff* will take the depositions of *William West*, *Samuel Short* and *Francis Fern*, all of *Albion*, in the county of *Boone* in the state of *Nebraska*, sundry witnesses to be used as evidence on the trial of the above entitled cause, before competent authority, at *the law office of Daniel Webster*, No. *10 Front* street in the *city* of *Albion*, county of *Boone* and state of *Nebraska*, at the hour of *ten* o'clock *A.* M., with authority to adjourn from day to day until all such depositions shall have been taken. (*Date, and signature of attorney as in Form No. 7234.*)

Form No. 7247.[1]

John Doe, plaintiff, against *Richard Roe*, defendant. } *Hudson Circuit* Court. *On Contract.*

To *Oliver Ellsworth*, Esq., attorney of the defendant *Richard Roe.*

Take notice of the examination on *Tuesday*, the *second* day of *August*, 1*898*, at *ten* o'clock in the *fore*noon, of *William West*, a material witness on behalf of the *plaintiff* in this action, residing in the state of *Minnesota*, before *James Hallett*, Esq., a *commissioner of deeds*, appointed by the governor of the state of *New Jersey* and residing in the said state of *Minnesota*, at *his office*, No. *20 State* street, in the city of *Minneapolis*, in the state of *Minnesota*, at which time and place you may be present and put interrogatories, if you see fit. (*Date, and signature of attorney as in Form No. 7234.*)

Form No. 7248.[2]

(*Title of court and cause as in Form No. 6947.*)

To the Prothonotary of said *Common Pleas.*

Sir: Enter rule to take depositions on the part of the above *defendant* of aged, infirm and going witnesses, on *forty-eight hours*,[3] notice to *plaintiff* or his attorney.

Oliver Ellsworth, *Defendant's* Attorney.

To *John Doe*, plaintiff.[4]

Sir: You are hereby notified that depositions will be taken pursuant to the above rule on *Thursday*, the *twenty-fourth* day of *March*,

North Dakota. — Rev. Codes (1895), § 5677.

Ohio. — Bates' Anno. Stat. (1897), § 5273.

Oklahoma. — Stat. (1893), § 4242.

South Dakota. — Dak. Comp. Laws (1887), § 5289.

Wyoming. — Rev. Stat. (1887), § 2621.

Consult also Form No. 7234, *supra*, and the notes thereto.

1. *New Jersey.* — Gen. Stat. (1895), p. 1410, § 66. Consult also Form No. 7234, *supra*, and the notes thereto.

Witness Residing Out of State. — Any party in a civil cause may take the testimony of a witness who resides out of the state, *de bene esse*, upon notice, instead of by commission. N. J. Gen. Stat. (1895), p. 1410, § 66.

2. **Rule to take depositions** of an infirm and going witness to be read in evidence on the usual terms is of course, and can be entered by either party stipulating forty-eight hours' notice to the adversary, but the court may order shorter notice in any case when the exigency thereof may require it. Pa. Ct. Com. Pl. Rules, No. 17, § 50.

3. **Pennsylvania Court of Common Pleas Rules No. 17, Section 52,** provides that a rule may in like manner be entered by either party to take the depositions of witnesses without regard to the circumstances of their being aged, infirm, or going witnesses. In such cases, eight days' notice must be given to the adverse party.

4. **Notice must be given** to the adverse

1898, at *ten* o'clock in the *fore*noon, before *James Hallett*, Esq., at *the office of Oliver Ellsworth*, No. *10 Market* street in the city of *Philadelphia.*

Oliver Ellsworth, Defendant's Attorney.[1]

March 22, 1898.

Form No. 7249.[2]

Notice.

John Doe against *Richard Roe.* } In the *Circuit* Court of *Shelby* County, *Tennessee.*

Mr. *John Doe*: You are hereby notified that I will take the deposition of *William West* at *the law office of Daniel Webster*, in *Columbia*, in *Maury* county in the state of *Tennessee*, on *Thursday*, the *tenth* day of *June*, 1898, beginning at *ten* o'clock *A.* M., and continue the same from day to day until completed, to be read as evidence on the trial of the above named suit, now pending in the *Circuit* Court of *Shelby* county, *Tennessee*, wherein *John Doe* is plaintiff and *Richard Roe* is defendant. (*Date and signature as in Form No. 7234.*)

Form No. 7250.[3]

To *John Doe*: Take notice, that I shall, on the *tenth* day of *June*, 1898, at *the office of Norton Porter*, in *Charlottesville*, *Albemarle* county, between the hours of *ten A.* M. and *four P.* M. on that day, proceed

party where deposition is taken under a rule of court. Vincent *v.* Huff, 4 S. & R. (Pa.) 298.

Service must be made upon party where the rule so directs. Snyder *v.* Wilt, 15 Pa. St. 59; Gracy *v.* Bailee, 16 S. & R. (Pa.) 126; Cunningham *v.* Jordan, 1 Pa. St. 442; Nash *v.* Gilkeson, 5 S. & R. (Pa.) 352. But in Newlin *v.* Newlin, 8 S. & R. (Pa.) 41, it was held that service upon the attorney is good, unless objection is made.

1. **Notice Must be Signed.** — M'Donald *v.* Adams, 7 W. & S. (Pa.) 371.

Where a rule is desired in less time than that allowed by court, the form should be as follows:

(*Title of court and cause as in Form No. 6947.*) "And now, this *twenty-second* day of *March*, 1898, on motion of *Oliver Ellsworth*, *defendant's* attorney, a rule is granted by the court that the deposition of a going (or *state other reason for taking deposition on less time than allowed by the rule*) witness, on the part of the *defendant*, before any magistrate, commissioner or notary public, in the county of *Philadelphia*, on *ten* (or *state number*) hours' notice to *plaintiff* or his attorney. *J. M.*, J. C. *C. P.*"

Affidavit setting forth the facts which require that the deposition should be taken on less time than allowed by the rules of court should be attached to the special rule. Brewst. Pr. (Pa.), § 2469.

2. *Tennessee.* — Code (1896), § 5636. See also list of statutes cited *supra*, note 1, p. 488. Consult also Form No. 7234, *supra*, and the notes thereto.

Service of notice may be made by leaving same at the residence of the adverse party, if he be in the house concealing himself, or if he be in the neighborhood; but if he be absent, or in another state, service must be made on his attorney, and by leaving a notice at his place of residence also. The affidavit to prove notice must state his concealment, or being in the neighborhood, at the time of leaving a copy of the notice at his place of residence; and when served on his attorney, the affidavit must state the fact of the party being out of the state. Wilson *v.* Drake, 5 Hayw. (Tenn.) 108. For forms of affidavits or acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS.

3. This form of notice may be used in the following states:

Virginia. — Code (1887), §§ 3361, 3362.

West Virginia. — Code (1891), c. 130, §§ 33-35.

Consult also Form No. 7234, *supra*, and the notes thereto.

to take the depositions of *William West* and otners, to be read in evidence in my behalf, in a certain action at law (or *suit in equity*) depending in the *Circuit* Court for the county of *Albemarle*, wherein you are *plaintiff* and I am *defendant*; and if, from any cause, the taking of the said depositions be not commenced on that day, or, if commenced, be not concluded on that day, the taking of the same will be adjourned and continued from day to day, or from time to time, at the same place and between the same hours, until the same shall be completed. (*Date and signature as in Form No. 7234.*)

Form No. 7251.[1]

(*Venue and title of court and cause as in Forms Nos. 5914, 5936, as the case may be.*) (*Continuing as in Form No. 7236, down to *; then proceed thus:*) and that said deposition will be read in evidence upon the trial of the above entitled cause. The reason for taking said deposition is that said witness (*setting out reason for taking the deposition*). (*Date, and signature of attorney and address as in Form No. 7234.*)

Form No. 7252.[2]

(*Title of court and cause as in Form No. 5937.*)

To *Oliver Ellsworth*, attorney for the *defendant* above named:

Sir: Please take notice, that the deposition of *William West*, of *Minneapolis*, in the county of *Hennepin* and state of *Minnesota*, a witness to be produced, sworn and examined on behalf of the *plaintiff* above named, will be taken at the instance and on behalf of said *plaintiff* before *Norton Porter*, a *notary public* in and for the county of *Hennepin* in the state of *Minnesota*, and a person by law authorized to take depositions, at *his office*, No. *10 Markham* street, in the city of *Minneapolis*, county of *Hennepin* and state of *Minnesota*; that the taking of said deposition will be begun before said officer on the *tenth* day of *June*, A. D. 1*898*, at *ten* o'clock *A. M.*, and will be continued at such other time or times as the taking of said deposition shall be adjourned to, by the order of the aforesaid officer, or by consent of the parties hereto, until completed; that you are hereby notified and requested to appear before the said officer at the place and on the day and hour above named, and cross-examine said witness (*or any of them*) in such manner, or take such other proceedings

1. This form of notice may be used in the following states:

Idaho.— Laws (1893), p. 132, § 1 *et seq.*

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 6019.

Consult also Form No. 7234, *supra*, and the notes thereto.

2. *Wisconsin.* — Sanb. & B. Anno. Stat. (1889), § 4102, applying to witnesses within state. See also list of statutes cited *supra*, note 1, p. 488. Consult also Form No. 7234, *supra*, and the notes thereto.

Witnesses Without the State. — The deposition of any witness without the state to be used in an action or proceeding in a court of record may be taken in the same manner and under the same provisions of law as witnesses residing within the state, except that the notice of taking the same shall be at least ten days and one day additional for every one hundred miles between place of notice and that where deposition is taken. Sanb. & B. Anno. Stat. Wis. (1889), § 4112. See also list of statutes cited *supra*, note 1, p. 488. This section applies only to depositions taken upon notice and has no reference to depositions taken without the state upon commission. Cross *v.* Barnett, 61 Wis. 650.

as you shall deem proper. You are hereby further notified that the deposition of said witness is wanted by the said *plaintiff* for use in a civil action now pending in the state of *Wisconsin*, to wit, in the *Circuit* Court of *Vernon* county, wherein *John Doe* is plaintiff and *Richard Roe* is defendant; that said witness lives more than *thirty* miles from the place of trial of said action in which the testimony of said witness is wanted (or *lives beyond the reach of the subpœna of said court* or *is so sick, or infirm, or aged, as to make it probable that he will not be able to attend at the trial of said action*); and that the above is the reason for taking the deposition of said witness and that said *plaintiff* will claim the right to use the said deposition when taken, on any trial that may be had of said action, subject only to such legal objections as may be made to the competency, relevancy or materialty of the evidence therein contained. (*Date, and signature of attorney as in Form No. 7234.*)

Form No. 7253.[1]

In the *Circuit* Court of the United States for the District of *Nebraska.*

John Doe, plaintiff,
against
Richard Roe, defendant. } Deposition *de bene esse.*

Please take notice, that the deposition, *de bene esse*, of *William West*, of *Chicago*, in the county of *Cook* in the state of *Illinois*, will be taken to be read in evidence at the trial of said cause, on the part of the *plaintiff* therein, before competent authority, at *the office of Norton Porter*, No. *20 State* street in *Chicago*, in the county of *Cook* and state of *Illinois*, commencing on the *tenth* day of *August*, 1*898*, at the hour of *ten* o'clock in the *fore*noon of said day, with authority to adjourn from day to day, until such deposition shall have been completed, at which time and place you are hereby notified to be present and put interrogatories to the said witness, if you shall think fit. The reason for taking the deposition is that said witness lives at a greater distance than *one hundred* miles from *Omaha*, *Nebraska*, the place of trial of this action (or *state other cause, as the case may be*). (*Date, signature and address as in Form No. 7234.*)

1. **Depositions de bene esse** may be taken, first, when the witness lives at a greater distance from the place of trial than one hundred miles; second, or is bound on a voyage to sea; third, or is about to go out of the United States; fourth, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial before the time of trial; fifth, or that he is ancient or infirm. U. S. Rev. Stat. (2d ed. 1878), § 863.

See also list of statutes cited *supra*, note 1, p. 488.

Notice must be given to adverse party or his attorney by the party or his attorney. U. S. Rev. Stat. (2d ed. 1878), § 863. Consult also Form No. 7234 *supra*. and the notes thereto.

Another form of such a notice is as follows, omitting formal parts: "To the above named *Richard Roe* or *Oliver Ellsworth*, his attorney. Gentlemen:—You will please to take notice that *William West*, a witness, whose testimony is necessary in this cause, and who resides at *Topeka* in the state of *Kansas*, will be examined, *de bene esse*, on the part of the *plaintiff*, before *Norton Porter*, Esq., a *notary public*, residing at said *Topeka*, at *his office*, No. *105 Laurel avenue* in said *Topeka*, on the *fourteenth* day of *June*, A. D. 1*898*, at *ten* o'clock in the *fore*noon, according to the rules of this court and the acts

b. In Chancery.

Form No. 7254.[1]

In *Chancery of New Jersey.*

Between John Doe, complainant, and *Richard Roe*, defendant. } On Bill, etc.

Take notice, that the examination of witnesses, etc., will be taken in this cause, on behalf of the *complainant*, before *James Hallett*, Esq., one of the masters and examiners of this court, at *the office of Oliver Ellsworth*, No. *110 Williams* street, in the city of *Trenton*, in the state of *New Jersey*, on the *twentieth* day of *April*, 1*898*, at the hour of *ten* in the *fore*noon.

Oliver Ellsworth,
Solicitor for *John Doe.*

Dated the *tenth* day of *April*, 1*898*.
To *Jeremiah Mason*, Esq.,
Solicitor for *Richard Roe.*[2]

2. By Magistrate.[3]

Form No. 7255.[4]

(Maine Rev. Stat. (1883), c. 107, § 9.)

Oxford, ss. To *Richard Roe*, of *Bethel*, in the county of *Oxford*, Greeting: Whereas, *John Doe*, of said *Bethel*, has requested that the deposition of *William West*, of *Gorham*, in the county of *York*,

of congress in such case provided; at which time and place you are notified to appear and take such part in said examination as you may be advised, and as shall be fit and proper."

1. When any cause shall be at issue and the interrogatories exhibited to complainant, if any, answered, the complainant first and then the defendant shall proceed to take and complete the testimony on his part before an examiner on ten days' notice of the place of commencing the same. N. J. Ch. Ct. Rules, No. 78.

Adjournment. — When examination is adjourned without consent of parties, a new notice must be served, and the adjournment does not take the place of this notice. Parker *v.* Hayes, 23 N. J. Eq. 186.

2. **Must be addressed** and served upon adverse party. Parker *v.* Hayes, 23 N. J. Eq. 186.

Another form of such a notice, for use in *Delaware*, may be as follows:

"*John Doe* against *Richard Roe.* } In *Chancery.* *Kent* County, ss.

Sir: Take notice, that witnesses will be examined on behalf of the above *complainant*, before *James Hallett*, Esq., an examiner appointed by the *chancellor*, at *his office* in *Laurel.* Such examination to commence on the *tenth* day of *May*, 1*898*, at *ten* o'clock in the *fore*noon, and to proceed as shall be ordered by the examiner." (*Date, signature and address as in Form No. 7234.*)

3. **Witness Within State.** — N. J. Gen. Stat. (1895), p. 1402, § 25. See also list of statutes cited *supra*, note 1, p. 488.

In criminal cases, in *Colorado*, the notice should emanate from the magistrate, and the time and place should be designated by him. Ryan *v.* People, 21 Colo. 119.

4. *Maine.* — Rev. Stat. (1883), c. 107, § 5. Consult also Form No. 7234, *supra*, and the notes thereto.

Substantial compliance with statute is sufficient, and it is not necessary that the form therein given should be exactly pursued. Dorrance *v.* Hutchinson, 22 Me. 357.

Where there are several adverse parties, notice to one or more of them is sufficient. Chase *v.* Hathorn, 61 Me. 505.

may be taken to be used in an action of debt, pending between you and the said *John Doe*, at *the office of Norton Porter* in said *Gorham*, on the *tenth* day of *August*, 1*898*, at *ten* o'clock in the *fore*noon, at the place and time appointed therefor; you are hereby notified to be present to put such questions as you think fit. Dated this *third* day of *August*, 1*898*.

Abraham Kent, Justice of the Peace.

Form No. 7256.[1]

John Doe, plaintiff, against *Richard Roe*, defendant.	Before *Abraham Kent*, a *justice of the peace* within and for *De Soto* county, *Mississippi*.

To *Richard Roe*, defendant, in the above entitled cause: Take notice, that pursuant to a commission to me directed by the aforesaid justice, *Abraham Kent*, the undersigned *justice of the peace* within and for the county of *Alcorn* in said state of *Mississippi*, on *Wednesday*, the *tenth* day of *August*, 1*898*, at *ten* o'clock in the *fore*noon, at *the law office of Oliver Ellsworth*, in *Corinth*, in said county of *Alcorn*, will proceed, as in the aforesaid commission directed, to take the deposition of *William West*, a witness on the part of the *plaintiff* in the above cause, said deposition to be used upon the trial of said cause, at which time you may attend and cross-examine, if you see fit.

Given under my hand this *twenty-seventh* day of *July*, 1*898*.

James L. Smith, Justice of the Peace.

Form No. 7257.[2]

To *John Doe*, of *Keene* in the county of *Cheshire*:

You are hereby notified that depositions will be taken at *the office of Oliver Ellsworth* in *Walpole*, in said county of *Cheshire*, on the *tenth* day of *August*, 1*897*, at *ten* o'clock[3] in the *fore*noon, to be used in an action to be heard and tried at the *Supreme* Court to be holden at *Keene*, in said county of *Cheshire*, on the *third Tuesday* of *October next*,[4] in

1. *Mississippi.* — Anno. Code (1892), § 1748, providing for taking of depositions for use in justices' courts, where witness resides in a different county from that of the justice of the peace. In all other instances, depositions of witnesses for use in justices' courts may be taken under the same circumstances as in circuit courts. See *supra*, Form No. 7237, and notes thereto.

Consult also Form No. 7234, *supra*, and the notes thereto.

2. *New Hampshire.* — Pub. Stat. (1891), c. 225, § 4, provides that a notice in writing, signed by a justice or notary, stating the day, hour and place of taking the deposition, shall be delivered to the adverse party, or one of them, or left at his abode, if either of such parties resides in the state and within twenty miles of the place of taking, or of the party taking the same, a reasonable time before the taking thereof.

Consult also Form No. 7234, *supra*, and the notes thereto.

Service may be upon attorney or agent of the party, where the party resides out of the state or more than twenty miles from the place of taking the deposition. N. H. Pub. Stat. (1891), c. 225, § 5.

3. **The day and hour of taking** must be stated. Cater *v.* McDaniel, 21 N. H. 231; Shepherd *v.* Thompson, 4 N. H. 213.

4. **The action** must be plainly designated. Kingsbury *v.* Smith, 13 N. H. 109.

Nature of the plea, action or issue need not be stated. Bundy *v.* Hyde, 50 N. H. 116.

Time of holding court where the action is pending need not be stated. Great Falls Mfg. Co. *v.* Mathes, 5 N. H. 574.

which action you are plaintiff and *Richard Roe* of *Walpole*, in said county of *Cheshire*, is defendant.[1] Dated at said *Walpole* this *twentieth* day of *July*, 1897.

Abraham Kent, Justice of the Peace.

Form No. 7258.[2]

Providence, Sc.

State of *Rhode Island and Providence Plantations.*

To the Sheriff, his Deputy, or to either of the Town Sergeants or Constables of the County of *Providence*, Greeting.[3]

Request having been made to me by *Richard Roe* to take the deposition of *William West*, to be used in the trial of an action now pending in the *District* Court of the *Twelfth* Judicial District next to be holden in *Woonsocket* within and for the said county of *Providence* on the *first Wednesday* of *June* next ensuing, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, and whereas *my office*, No. *10 Washington* street in the city of *Woonsocket*, in said county of *Providence*, is by me appointed the place, and the *twenty-sixth* day of *May* A. D. 1*898*, at *ten* o'clock *A.* M., the time of taking the same. You are therefore hereby required to notify the said *John Doe* of the place and time aforesaid, at least *twenty-four* hours before said time, that he may attend and put interrogatories to the said deponent; and also to notify the said *William West* of the place and time aforesaid, that he is required then and there to attend and give testimony of what he knows relative to the said matter in controversy.

Hereof fail not, and true return make of this writ.

Given under my hand and seal, this *twenty-first* day of *May*, A. D. eighteen hundred and *ninety-eight*.

(SEAL) *Abraham Kent*, Justice Peace.

Form No. 7259.[4]

State of *Vermont*, County of *Chittenden*, ss. } To any Sheriff or Constable in the State, Greeting.

By the authority of the state of *Vermont* you are hereby commanded to notify *Richard Roe*, of *Rutland*, in *Rutland* county, to appear before

1. **Parties to the action** must be designated. Kingsbury *v.* Smith, 13 N. H. 109.

When taken by order of the court, the notice required by the statute cannot be dispensed with. Deming *v.* Foster, 42 N. H. 165.

2. *Rhode Island.* — Previous to the taking of a deposition, the official authorized to take the same shall in all cases cause the adverse party or his attorney of record to be notified of the time and place appointed for taking such deposition, so that he may attend and put interrogatories to the deponent, if he think fit. Gen. Laws (1896), c. 244, § 21.

Consult also Form No. 7234, *supra*, and the notes thereto.

3. **Shall be directed to any proper officer** or to any impartial or disinterested person, and shall be served a reasonable time not less than twenty-four hours, exclusive of Sundays and holidays, before the time of taking the deposition. R. I. Gen. Laws (1896), c. 244, § 22.

4. *Vermont.* — Stat. (1894), § 1264, provides that a notice shall be given, by the magistrate taking the deposition, to the adverse party, or by a citation signed by a justice, notary public or master in chancery, served like a writ of summons on the adverse party, or, if he resides out of the state, on his attorney.

Consult also Form No. 7234, *supra*, and the notes thereto.

Norton Porter, a *notary public*,[1] *at the office of Jeremiah Mason*, in said *Rutland*, at *ten* o'clock in the *fore*noon on the *tenth* day of *August*, A. D. 1*898*,[2] to be present at the taking of the deposition of *William West*, of said *Rutland*, to be used in a cause to be heard and tried by the *County* Court at the next term to be holden within and for the county of *Chittenden* at *Burlington*, in said county, in which cause *John Doe* is plaintiff and *Richard Roe* is defendant.

Fail not, but make service and return according to law.

Dated at *Burlington*, in the county of *Chittenden*, the *fifth* day of *August*, A. D. 1*898*.

Abraham Kent, Justice of the Peace.

III. APPLICATION FOR ORDER[3] OR COMMISSION.

1. The Affidavit.[4]

a. By Party.

Form No. 7260.

(*Title of court and cause*[5] *and statement of venue.*)[6]

John Doe (or *Richard Roe*),[7] being first duly sworn according to law, upon his oath says:

Notice is not required when party is a nonresident and has no attorney in the state. Vt. Stat. (1894), § 1265.

1. The name of the magistrate must be stated in the citation. Barber *v.* Bennett, 58 Vt. 476; Davis *v.* Davis, 48 Vt. 502; St. Johnsbury *v.* Goodenough, 44 Vt. 662; Vt. Stat. (1894), § 1264.

2. Time and place of taking must be stated. Vt. Stat. (1894), § 1264.

3. For forms of orders to take depositions see *infra*, Forms Nos. 7293 to 7303.

For forms of commissions to take depositions see *infra*, Forms Nos. 7305 to 7335.

4. For the formal parts of an affidavit in any particular jurisdiction consult the title AFFIDAVITS, vol. 1, p. 548.

Affidavit must be filed before commission can issue to take deposition of witness out of the state. Hendricks *v.* Craig, 5 N. J. L. 654.

Notice that affidavit will be made has been held not to be required. Den *v.* Wood, 10 N. J. L. 62.

If open commission is desired, the affidavit should state in addition: "That said *John Doe* (or *Richard Roe*), the said plaintiff (or *defendant*), is of full age."

In criminal cases, when witness is within the state, see *Examination of Witnesses Conditionally*, *infra*, p. 616.

When witness resides without the state, the affidavit must state —

1. The nature of the offense charged.

2. The state of the proceedings in the action and that an issue of fact has been joined therein.

3. The name of the witness and that his testimony is material to the defense of the action.

4. That the witness resides out of the state.

Arizona. — Pen. Code (1887), § 2088.
California.—Pen. Code (1897), § 1352.
Idaho. — Rev. Stat. (1887), § 8179.
Montana. — Pen. Code (1895), § 2503.
Nevada. — Gen. Stat. (1885), § 4434.
New York. — Code Crim. Proc., § 639 (Birds. Rev. Stat. (1896), p. 868, § 70).
North Dakota. — Rev. Codes (1895), § 8387.
Oklahoma. — Stat. (1893), § 5361.
South Dakota. — Dak. Comp. Laws (1887), § 7553.
Utah. — Rev. Stat. (1898), § 5041.

5. For title of court and cause see Forms Nos. 810 to 884, 5907 to 5939, 7234 to 7254.

6. Statement of venue, see the title AFFIDAVITS, vol. 1, p. 548.

7. Party, his agent or attorney may make the affidavit. See list of statutes cited *supra*, note 1, p. 488.

Party applicant should make the affidavit or an excuse for not doing so should be given. Eaton *v.* North, 7 Barb. (N. Y.) 631.

Attorney may make the affidavit in absence of the party applicant. Deshay

I. That he is the plaintiff (or *defendant*) in the above entitled action.

II. That this is an action (or *proceeding*) brought (or *instituted*) to (or *for the purpose of*) (*stating the general nature of the action or proceeding*).[1]

III. That summons in said action has been duly issued and served (*or otherwise, stating the condition of the cause*).[2]

v. Persse, 9 Abb. Pr. (N. Y. C. Pl.) 289; Reese *v.* Beck, 24 Ala. 659; Brahan *v.* Debrell, 1 Stew. (Ala.) 14.

Agent having conduct of the suit may make the affidavit without giving reason why the party applicant does not make it. Murray *v.* Kirkpatrick, 1 Cow. (N. Y.) 210.

Any person acquainted with the facts may make the affidavit, where no stay of proceedings is asked. Demar *v.* Van Zandt, 2 Johns. Cas. (N. Y.) 69.

1. If the witness be a prisoner, confined in a jail or prison within this state, the affidavit must show the nature of the action or proceeding, the testimony expected from the witness, and its materiality. Cal. Code Civ. Proc. (1897), §§ 1995, 1996.

2. Statement of Condition of Cause — *Generally.*— Instead of paragraph III as given in the text, the following paragraphs may be substituted to fit the facts of the particular case: "III. That the above entitled action is now pending in the said court (*naming court*) in said county of (*naming county*), in said state of (*naming state*)."

After Issue Joined. — "III. That said action is now pending in the *Supreme* Court in said county; that the issue of fact in said action has been joined by the service of defendant's answer, said service having been made on the *tenth* day of *August*, 1897; that said action has been noticed for trial at the trial term of said *Supreme* Court, to be held at said *Albany*, on the *fifth* day of *November*, 1897." N. Y. Code Civ. Proc. § 887, subd. 5 (Birds. Rev. Stat. (1896), p. 858, § 17); also list of statutes cited *supra*, note 1, p. 488.

Affidavit for a commission to take testimony of witnesses must state that the issue is joined in the cause, or some special circumstance showing the necessity of the commission before issue in the cause. Allen *v.* Hendree, 6 Cow. (N. Y.) 400.

Where Party is in Default.—"III. That the summons and complaint in the above entitled action were served upon the defendant on the *tenth* day of *August*, 1897; that no appearance or answer has been served upon the plaintiff's attorney, and that the said defendant is in default for want of appearance or answer." N. Y. Code Civ. Proc., § 888, subd. 1 (Birds. Rev. Stat. (1896), p. 859, § 18); also list of statutes cited *supra*, note 1, p. 488.

Commission may be issued to take the testimony of witnesses when the party is in default for want of an appearance or pleading, and the testimony is required upon the assessment of damages by a writ of inquiry, or upon a reference or otherwise, to enable the court to render a proper final judgment. N. Y. Code Civ. Proc., § 888, subd. 1 (Birds. Rev. Stat. (1896), p. 859, § 18); also list of statutes cited *supra*, note 1, p. 488.

After Judgment Rendered. — "III. That final judgment has been rendered against the defendant in the above entitled action by the *Supreme* Court of *Albany* county, a copy of which judgment is hereto annexed."

Where final judgment has been rendered against the adverse party in action brought in a court of record, and testimony is required in order to carry the judgment into effect, a commission may be issued upon affidavit. N. Y. Code Civ. Proc., § 888, subd. 2 (Birds. Rev. Stat. (1896), p. 859, § 18); also list of statutes cited *supra*, note 1, p. 488.

On Appeal or on Motion for a New Trial. — "III. That an appeal from the final judgment rendered in the *Supreme* Court of *Albany* county has been taken by the *plaintiff* (or *that a motion for a new trial has been made by the plaintiff in the above entitled action, which motion is pending in the Supreme Court of Albany county*)."

Where an appeal from a final judgment rendered in the supreme court, the superior court, the city court, the marine court of the city of New York, or a county court, or a motion for a new trial in either of these courts, is pending, and the testimony will be material and necessary to the appli-

[IV. That the county of *Albany* is the place of trial of this action, as named and stated in the said summons and complaint herein.]

V. That *William West* is a necessary and material witness for the said plaintiff (or *defendant*) on the trial of the said action, whose testimony is necessary and material to affiant (or *deponent*) in the prosecution (or *defense*) of said action. (*Here may be set out facts showing that witness is necessary and material.*)[1]

[VI. That the said plaintiff (or *defendant*) cannot safely proceed to a trial of said action without the testimony of the said *William West.*][2]

VII. That [said plaintiff (or *defendant*) is informed and believes that] (*stating facts showing the existence of a reason for taking deposition of witness*).[3]

cant in the prosecution or defense of the action, if a new trial is granted, a commission may be issued to take the testimony of such witness. N. Y. Code Civ. Proc., § 888, subd. 3 (Birds. Rev. Stat. (1896), p. 859, § 18); also list of statutes cited *supra*, note 1, p. 488.

Before Issue Joined. — "III. That issue has not yet been joined in the above entitled action, and there is reason to apprehend that before issue is joined and an application for a commission can thereafter be made, the witness hereinafter named will die, or become unable to give his testimony, or remove so that his testimony cannot be taken, as appears from the following facts hereinafter set out, namely, (*setting out causes of apprehension*)."

A commission may be issued to take the testimony of a witness when it appears by affidavit that there is reason to apprehend that before issue is joined and an application for a commission can thereafter be made, the witness will die, or become unable to give his testimony, or remove, so that his testimony cannot be taken. N. Y. Code Civ. Proc., § 888, subd. 4 (Birds. Rev. Stat. (1896), p. 859, § 18, subd. 4); also list of statutes cited *supra*, note 1, p. 488.

To be Used on Motion. — "III. That the said plaintiff (or *defendant*) intends to make a motion in the *Supreme* Court in this cause." Or, "III. That the said plaintiff (or *defendant*) intends to oppose a motion, notice of which has been given by the plaintiff (or *defendant*) in the above entitled cause, to be made in the *Supreme* Court on the part of the plaintiff (or *defendant*) for (*stating nature of the motion*)." N. Y. Code Civ. Proc., § 885 (Birds. Rev. Stat. (1896), p. 858, § 15).

1. That testimony of witness is material must be stated. See list of statutes cited *supra*, note 1, p. 488. Bogia *v.* Darden, 45 Ala. 269.

Stating that testimony of witness is material to the affiant, and that the affiant has been informed and believes that the witness is unable to attend court because of sickness and great bodily infirmity, is sufficient. Reese *v.* Beck, 24 Ala. 651.

To be Used on Motion. — Instead of paragraph V, as in the text, insert the following: "V. That the deposition of *William West* is necessary for the said defendant to use upon the said action as to the following facts (*setting out facts claimed to be within the knowledge of the witness bearing upon the merits of the motion*)." N. Y. Code Civ. Proc., § 885 (Birds. Rev. Stat. (1896), p. 858, § 15).

The subject upon which the witness was requested to depose to the facts claimed by the party to be within the knowledge of such witness, and bearing upon the merits of the motion desired to be made, should be specified. Dauchy *v.* Miller, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 100.

2. Need not state that without the testimony of the witness the party cannot safely proceed to trial. Brackett *v.* Dudley, 1 Cow. (N. Y.) 209.

3. Cause for taking such deposition must be stated. See list of statutes cited *supra*, note 1, p. 488, in which statutes are enumerated the cases in which and the causes for which depositions may be taken. Worsham *v.* Goar, 4 Port. (Ala.) 441. As that witnesses are not within the state at the time of the application. Apollinaris Co. *v.* Venable, (Supreme Ct.) 32 N. Y. St. Rep. 210. Or, "That said witness is about to leave the state

VIII. That *Oliver Ellsworth*, who resides at *110 State* street, *Albany*, *New York*, is counsel for the plaintiff (or *defendant*) in this action, and that the plaintiff (or *defendant*) has fully and fairly stated the case to his said counsel, *Oliver Ellsworth*, and fully and fairly disclosed to his said counsel the facts he expects to prove by the said witness, *William West*,* and that he, the said affiant (or *deponent*), the said plaintiff (or *defendant*), has a good and substantial defense on the merits to this action, as he is advised by his said counsel after said statement and verily believes to be true.[1]

of *Alabama* and will probably not return until after the trial of said action;" or, "That the attendance of said witness cannot be obtained on the trial of this cause for the reason that the witness is a nonresident of this state;" or, "That said witness resides in the city of *Chicago*, in the county of *Cook*, in the state of *Illinois*, and is out of this state, and will continue absent when his testimony is required;" or, "That the said witness, the said *William West*, is not within the state of *New York*, but is now at the city of *Boston*, in the *commonwealth* of *Massachusetts*."

Sufficient affidavit that a witness resided in the city of New York sufficiently shows the witness to be a nonresident, and the city of New York will be presumed to be in the state of New York. Boardman *v.* Ewing, 3 Stew. & P. (Ala.) 293.

In McDonald *v.* Jacobs, 77 Ala. 524, it was held that an affidavit describing the cause as a cause now pending in said Probate Court, in the matter of the final settlement of the estate of Simon Jacobs, deceased, was sufficiently certain to identify the cause for the final settlement, accounts and vouchers of James H. Moore, deceased, as administrator of the estate of Simon Jacobs, deceased, pending between A. J. McDonald, as administrator of said Moore's estate, and Henry G. Jacobs, as administrator *de bonis non* of said Simon's estate, especially when no other cause was shown to have been pending in the court with which this would be confounded.

To be Used on Motion. — Instead of paragraph VI, as in the text, insert the following: "VII. That the said *William West* has refused to make an affidavit of said facts which the affiant verily believes are within his knowledge, although so requested to do by the affiant (or *deponent*), the said plaintiff (or *defendant*).

VII*a*. That the said *William West*, the said witness, does not reside within the state of *New York* (or *resides in*, stating place of residence)." N. Y. Code Civ. Proc., § 885 (Birds. Rev. Stat. (1896), p. 858, § 15).

1. Affidavit of merits is necessary only when the party asks for a stay of proceedings until the return of the commission. Warner *v.* Harvey, 9 Wend. (N. Y.) 444.

Name of counsel and his place of residence must be given. N. Y. Gen. Rules of Pr., No. 23 (Hun's Ct. Rules (1896), No. 23).

That party has fully and fairly stated his case to his counsel must be shown by the affidavit. Seymour *v.* Strong, 19 Wend. (N. Y.) 98.

That party has disclosed to his counsel the facts which he expects to prove by the witness must be shown by the affidavit. Seymour *v.* Strong, 19 Wend. (N. Y.) 98.

Precedent. — In Brown *v.* Seys, 2 How. Pr. (N. Y.) 276, defendant's affidavit relating to the advice of counsel as to the materiality of the witness was as follows: "And this deponent further says that *John Dikeman*, of the city of *Brooklyn*, in the said county of *Kings*, is this deponent's counsel in this cause; that this deponent has fully and fairly stated his case in this cause to his said counsel, and that he, the deponent, has a good and substantial defense on the merits in this cause, as he is advised by his said counsel and verily believes. And deponent further says (*naming the witnesses*) are each and every of them material witnesses for this deponent to his defense in this cause, as he is advised by his said counsel and verily believes; that this deponent hath disclosed to his said counsel the facts which he expects to be able to prove by each and every of his said witnesses, and that, without the benefit of the testimony of each and every of the said witnesses, he, the deponent, cannot safely proceed to

IX. That no application has previously been made in this action for such order.[1]

[Wherefore, your affiant (or *deponent*), the said plaintiff (or *defendant*) requests that a commission issue to take the testimony of the said witness, *William West.*] (*Signature and jurat.*)[2]

b. By Attorney.[3]

the trial of this cause, as he is also advised by his said counsel and verily believes to be true." Held that this affidavit was sufficient and fairly imported that the advice was given at the proper time, the court holding that it was not necessary that the deposition of counsel as to the materiality of the witness should be given after defendant had stated his case.

Before Issue Joined. — Instead of paragraph VIII as in the text, after the * add the following: "and that he the said affiant (or *deponent*), the said plaintiff (or *defendant*), is advised by his said counsel after such statement and verily believes that the testimony of *William West* is required by deponent upon the assessment of damages, by writ of inquiry or reference, or otherwise, to enable the court to render judgment in said action."

On Appeal or on Motion for a New Trial. — Instead of paragraph VIII as in the text, after the * add the following: "and that he the said affiant (or *deponent*), the said plaintiff (or *defendant*), is advised by his said counsel after such statement and verily believes that the testimony of *William West* will be material and necessary to the deponent in the defense of this action if a new trial is granted."

To Carry into Effect Judgment Already Rendered. — Instead of paragraph VIII as in the text, after the * add the following: "and that he the said affiant (or *deponent*), the said plaintiff (or *defendant*), is advised by his said counsel after such statement and verily believes that the testimony of said *William West* is required in order to carry said judgment into effect."

Where Defendant is in Default. — Instead of paragraph VIII as in the text, after the * add the following: "and that he, the said affiant (or *deponent*), the said plaintiff (or *defendant*), is advised by his said counsel after such statement and verily believes that the testimony of *William West* is required by the affiant (or *deponent*) upon the assessment of damages, by a writ of inquiry, or upon a reference, or otherwise, to enable the court to render final judgmen in this action."

1. Or, if previous application has been made, state to what court or judge, and what order or decision was made thereon, and what new facts, if any, are claimed to be shown.

Paragraph IX is necessary only when application is made *ex parte.* N. Y. Gen. Rules of Pr., No. 25 (Hun's Ct. Rules (1896), No. 25).

Where Witness Does Not Understand the English Language. — Where application is made for a commission to be issued to a foreign country, if it satisfactorily appears by affidavit that the witness does not understand the English language, the order for the commission may, in the discretion of the court or judge, direct that written interrogatories annexed thereto by way of direct and cross examination, be framed in the English language and also in a foreign language. N. Y. Code Civ. Proc., § 912 (Birds. Rev. Stat. (1896), p. 864, § 42). In such a case, the affidavit should contain the following clause: "That the said witness, the said *William West*, is by birth (*Here state the nationality of the witness*) and does not understand the *English* language, but understands the *French* language (*or other foreign language, as the case may be*)."

2. Signature and Jurat. — See Forms Nos. 763 to 808, 810 to 884.

May be made before clerk of the court in which the action is pending. Wolfe *v.* Parham, 18 Ala. 441.

3. The attorney or agent of the party may make the affidavit. Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199; Eaton *v.* North, 7 Barb. (N. Y.) 631. See also *supra*, note 7, p. 508.

Affidavit by attorney for a commission to examine a witness out of the state made on information and belief must state that he believes the evidence of the witness is necessary for his client in the prosecution or defense of the action. Clark *v.* Sullivan, (Supreme Ct.) 28 N. Y. St. Rep. 596; N. Y. Gen. Rules of Pr., No. 24) (Hun's Ct. Rules (1896), No. 24).

Form No. 7261.

(Precedent in Laidley *v.* Rogers, 23 Civ. Proc. Rep. (N. Y. Supreme Ct.) 110.)[1]

[(*Title of court and cause and statement of venue.*)][2] *Thomas Cantwell*, being duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled action. That this action is brought to recover the sum of $*3,754* from the defendants for the work and labor of *Martin T. Lally* in constructing a section of the *St. Lawrence & Adirondack Railroad.* That said *Lally* made a general assignment to plaintiff. [That][2] *Franklin* county is the place of trial. That defendants in the answer allege that they do not owe the plaintiff anything, and that they have paid said *Lally* and his creditors for all work performed. * * * That said *Martin T. Lally* has died since the commencement of this action. * * * That *William A. Dafter*, who resides at *Swan River*, in the state of *Minnesota*, and *Joseph Lally*, who resides at *Detroit*, *Michigan*, are necessary and material witnesses for the plaintiff, on the trial of this action, and each of them is a necessary and material witness on this trial on the following questions, to wit: Upon the amount of work and labor performed by said *Lally*, and upon the amount of payments which the defendants made to said *Lally*, and upon the damages which said *Lally* suffered from the unreasonable delays of the defendants. That said *Dafter* is a civil engineer, and acted as the engineer of the said *Martin T. Lally* in the construction of said railroad, and in making the estimates of the amount of work performed, and said *Joseph P. Lally* was the brother of said *Martin*, and acted as his confidential man and helper in said work, and said *Dafter* and said *Joseph P. Lally* talked with deponent at *Malone* before they went away, and told deponent what they could swear to, and that they would and could testify as to the amount of work performed by said *Lally*, and also as to the said delays and damages, all of which are in controversy in this action. That each of said witnesses is a necessary and material witness for the plaintiff on the trial of said action, as deponent has advised the plaintiff, after such statement of said witnesses, and verily believes to be true, and that without the testimony of said witnesses and each of them the plaintiff cannot safely proceed to the trial of this action, as deponent has also advised the plaintiff, after such statement, and verily believes. That neither of said witnesses is now within the state of *New York*, but the said *William A. Dafter* is now at or near *Swan River* aforesaid, and that deponent had a letter from him at that place recently. That said *Joseph P. Lally* resides at *76 Windsor* street, *Detroit*, *Michigan*, and is not now in the state of *New York*, as deponent verily believes, because this deponent had a letter from said *Joseph P. Lally*, dated and postmarked at *Detroit* not long ago. [(*Signature and jurat.*)[3]][2]

1. **An order was made that two commissions issue** in this case to examine two witnesses, and denying defendant's request to have a provision inserted in the order that they be allowed an oral cross-examination of said witnesses. On appeal, the order was sustained with the modification that the commissions issue in the usual form, and that the defendants be permitted to cross-examine the witnesses orally.

2. See *supra*, note 5, p. 508. The words to be supplied in [ ] are not in the reported case, but should be added to complete the form.

3. See *supra*, note 2, p. 512.

2. The Notice.

a. Generally.

Form No. 7262.[1]

(*Venue and title of court and cause.*)[2] Notice of Suing Out Commission to Take Depositions.

To the above named *plaintiff*, *John Doe*, or his attorney:

Take notice, that on the *tenth* day of *August*, A. D. 1897, the above named *defendant* will sue out from the clerk's office of the said court a dedimus potestatem, or commission pursuant to the statute, to take the deposition of *William West*,[3] residing in the town of *Elizabethtown* in the county of *Denton*, in the state of *Texas*, to be read in evidence on the part of the *defendant* upon the trial of the above entitled cause. The said dedimus potestatem, or commission, to be directed to *James Hallett*,[4] Esquire, of the town of *Elizabethtown* in said county and state. The interrogatories to be propounded to the said *William West* in this behalf, on the part of the *defendant*, are hereunto subjoined; and you can file cross-interrogatories and join in such commission, if you shall see fit so to do. (*Date and signature as in Form No. 7234.*)

(*Service of Notice.*)[5] (*Interrogatories.*)[6]

Form No. 7263.[7]

(*Venue and title of court and cause.*)[8]

To *John Doe*, the above named *plaintiff*: You are hereby notified that the undersigned *defendant*, *Richard Roe*, will apply to the above

1. *Colorado.* — Mills' Anno. Code (1896), § 349; also list of statutes cited *supra*, note 1, p. 488.

2. **For formal parts of notices** in general consult the title NOTICES. And see *supra*, note 5, p. 508.

The place where the deposition is to be taken need not be stated in the notice. Glenn *v.* Brush, 3 Colo. 26.

3. **Names of Witnesses Must be Stated.** — Iowa Code (1897), § 4689. Pilmer *v.* Branch of State Bank, 16 Iowa 321. See also list of statutes cited *supra*, note 1, p. 488.

4. **The Officer or Person to Whom Commission is to be Issued Must be Named.** — Iowa Code (1897), § 4689. See also list of statutes cited *supra*, note 1, p. 488. But in *Illinois* it has been held that the name of commissioner need not be stated in a notice to sue out a dedimus. Cole *v.* Choteau, 18 Ill. 439.

5. **Service of Notice.** — For forms of affidavits or acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS; also *supra*, note 2, p. 495.

6. **Must be Accompanied by Interrogatories.** — See list of statutes cited *supra*, note 1, p. 488. And must be given to the adverse party ten days before the dedimus potestatem is sued out. An affidavit that notice and copy of the interrogatories was given to the adverse party ten days before a specified day is insufficient. Corgan *v.* Anderson, 30 Ill 95.

For form of interrogatories to be attached to notice see *infra*, Forms Nos. 7271 to 7283.

7. *Minnesota.* — Whenever an issue of fact is joined in any action before a justice, and it appears, on the application of either party, that any witness not residing within the state where such action is pending is material in the prosecution or defense of such action, the justice may award a commission to one or more competent persons authorizing them, or any one of them, to examine such witness on oath upon interrogatories, settled and proved by the justice, or by the written agreement or consent of the parties annexed to such commission. Minn. Stat. (1894), § 5006. See also list of statutes cited *supra*, note 1, p. 488.

8. See *supra*, note 5, p. 508.

named justice, *Abraham Kent*, Esq., before whom the above entitled cause is pending, at *his office*, on the *tenth* day of *May*, A. D. 1898, at *ten* o'clock *A.* M., for a commission to be directed to *Norton Porter*, Esq., a *notary public* within and for the county of *Cook*, in the state of *Illinois*, authorizing the said *Norton Porter* to examine *William West*, of said county of *Cook*, who is a necessary and material witness on behalf of the *defendant* in the above entitled action, upon interrogatories to be annexed to such commission. (*Date and signature as in Form No. 7234.*)

(*Service of notice.*)[1]

Form No. 7264.[2]

(*Title of court and cause, and address as in Form No. 7247.*) You are hereby notified that the *defendant* in the above entitled action will apply to the Hon. *John Marshall*, judge of said court, at *the court-house*, in the city of *New Barbadoes*, on *Tuesday*, the *twenty-first* day of *September*, 1897, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, for an order directing a commission to be issued to examine *William West*,[3] a material witness in the above action, residing at *Minneapolis*, in the state of *Minnesota*, and that the *defendant* intends to nominate as a commissioner to whom said commission shall be directed, *James Hallett*, Esq.,[4] of No. *10 West* street, in said city of *Minneapolis*, and you are further notified that a copy of the interrogatories intended to be annexed to the said commission is herewith served upon you.[5] (*Date and signature as in Form No. 7234.*)

(*Service of notice.*)[6]

Form No. 7265.[7]

(*Commencing as in Form No. 6954, and continuing to *; then proceed thus:*) that a commission be issued in this action, directed to *James Hallett*, of *Hartford*, in the county of *Hartford*, in the state of

1. **Service of Notice.** — Proof that due notice of the application was served on the adverse party at least two days before the time of making such application must be made. Minn. Stat. (1894), § 5007. See also *supra*, note 1, p. 488.

For forms of proof of service, generally, see the title SERVICE OF WRITS AND PAPERS.

2. *New Jersey.* — Gen. Stat. (1895), p. 1403, § 31. See also list of statutes cited *supra*, note 1, p. 488.

Must be Given. — Notice of the application must be given. Ogden *v.* Robertson, 15 N. J. L. 124; Ludlam *v.* Broderick, 15 N. J. L. 269.

3. **Requisites of Notice.**— Shall contain the name of the witness and the place of his, her or their residence. N. J. Gen. Stat. (1895), p. 1403, § 31. See also list of statutes cited *supra*, note 2, p. 495.

4. **Commissioner's Name.** — Name or names of person or persons whom party applying intends to nominate for commissioner or commissioners must be stated in the notice. N. J. Gen Stat. (1895), p. 1403, § 31, See also list of statutes cited *supra*, note 1, p. 488.

5. **Copy of the interrogatories** intended to be annexed to the said commission shall be served with the notice. N. J. Gen. Stat. (1895), p. 1403, § 31. See also list of statutes cited *supra*, note 1, p. 488.

6. **When party appears by attorney** or solicitor, notice shall be served upon the attorney or solicitor of the party. N. J. Gen. Stat. (1895), p. 1403, § 31. See also *supra*, note 1, p. 488.

7. *New York.* — Code Civ. Proc., § 889 (Birds. Rev. Stat. (1896), p. 859, § 19). See also list of statutes cited *supra*, note 1, p. 488.

Connecticut, to examine *William West*, of said *Hartford*, upon interrogatories to be annexed to the said commission, in which interrogatories you may join if you see fit, and that the trial of this action be stayed until the return of said commission, and for such other and further relief as may be just. (*Signature, date and address as in Form No. 6954.*)

Form No. 7266.[1]

(*Venue and title of court and cause as in Form No. 5929.*) } Notice of Application for Commission.

You will take notice, that on the *tenth* day of *August*, A. D. 1*898*, at *ten* o'clock *A.* M., the above named *defendant*, *Richard Roe*, will make application to the Hon. *John Marshall*, one of the judges of the above named court, at *his office* in *Cleveland*, in the county of *Cuyahoga*, for the granting of a commission directed to *James Hallett*, of *Chicago*, in the county of *Cook*, in the state of *Illinois*, authorizing him to take the deposition of *William West*, to be used on the part of the *defendant* on the trial of the above action. (*Signature, date and address as in Form No. 7234.*)

(*Service of notice.*)[2]

1. *Ohio.* — Bates' Anno. Stat. (1897), § 5272.

Nebraska. — Comp. Stat. (1897), § 5951.

Oklahoma. — Stat. (1893), § 4241.

Wyoming. — Rev. Stat. (1887), § 2620.

See also list of statutes cited *supra*, note ——, p. ——.

Must be Given to the Adverse Party. — *Nebraska.* — Comp. Stat. (1897), § 5951; § 7187 (criminal cases).

North Dakota. — Rev. Codes (1895), § 5676; § 8389 *et seq.* (criminal cases).

Ohio. — Bates' Anno. Stat. (1897), § 5272; § 7293 (criminal cases).

Oklahoma. — Stat. (1893), § 4241; § 5363 (criminal cases).

South Dakota. — Dak. Comp. Laws (1887), § 5288; § 7555 *et seq.* (criminal cases).

Wyoming. — Rev. Stat. (1887), § 2620.

2. **Service of Notice.** — For forms of affidavits or acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS.

Motion and Order for Commission. — Under the *Nebraska*, *Ohio*, *Oklahoma* and *Wyoming* statutes last above cited, the motion, omitting the formal parts, may be as follows:

"Comes now *John Doe* (or *Richard Roe*), the plaintiff (or *defendant*) in this cause, by his attorney, *Oliver Ellsworth* (or *Jeremiah Mason*), and moves the court here to grant a commission to *James Hallett*, of *Chicago*, in the county of *Cook*, state of *Illinois*, to take the deposition of *William West*, of said county of *Cook*, to be used as evidence on the part of the said plaintiff (or *defendant*) upon the trial of the above entitled cause."

Likewise, the order, omitting the formal parts, may be as follows: "And now, on motion of *Richard Roe*, by his attorney, *Oliver Ellsworth*, it is hereby ordered that a commission issue to take the deposition of *William West*, a witness on the part of said *defendant*, at *Chicago*, in the county of *Cook* and state of *Illinois*, to be read in evidence on the part of said *defendant* on the trial of the above entitled cause. And it is further ordered that *James Hallett*, of *Chicago*, in the county of *Cook* and state of *Illinois*, be appointed commissioner to take the deposition of said witness, and return the same to the clerk of this court. And it is further ordered that written interrogatories be filed by the respective parties in said cause with the clerk of this court, and that the same be forwarded by him to the said commissioner on or before the *twenty-seventh* day of *August*, A. D. 1*898*. And it is further ordered that said deposition be filed in this court on or before the *seventh* day of *September*, A. D. 1*898*."

For the formal parts of motions and orders, generally, see the titles MOTIONS and ORDERS.

Form No. 7267.[1]

(*Venue and title of court and cause.*)[2] Take notice, that on the *tenth* day of *June*, A. D. 1898, at *ten* o'clock in the *fore*noon of said day, the *plaintiff* in the above entitled action will apply to *Calvin Clark*, county clerk of said county of *Multnomah* and ex-officio clerk of said *Circuit* Court, at *his office in the court-house*, in the city of *Portland*, in said county and state, for a commission to be issued out of and under the seal of said *Circuit* Court, directed to and authorizing some suitable and qualified person residing in the city of *Chicago*, in the county of *Cook* and state of *Illinois*, to take the deposition of *William West*, a witness on behalf of the *plaintiff* in the above entitled *action*, to be used upon the trial thereof; and that, at the same time and place, said *plaintiff* will present to said clerk the attached direct interrogatories to be settled by him, and you can, at said time and place, interpose cross-interrogatories, if you see proper.

(*Signature, date and address as in Form No. 7234.*)

(*Service of notice.*)[3]

Form No. 7268.[4]

John Doe, plaintiff, No. *100*. against *Richard Roe*, defendant.[5]	Suit pending in the *District* Court of *Freestone* County, *Texas*.

Sir: You will take notice, that *five* days after the service hereof I shall apply to the clerk of the *District* Court, in and for *Freestone* county, state of *Texas*, for a commission to take the depositions of *William West*, *Samuel Short* and *Francis Fern*, who reside in *Atlanta*, in *Fulton* county, state of *Georgia*,[6] in answer to the following interrogatories, to be read as evidence in behalf of the *plaintiff* on the trial of said cause. (*Date and signature as in Form No. 7234.*)

(*Interrogatories.*)[7] (*Service of notice.*)[8]

1. *Oregon.*— Hill's Anno. Laws (1892), § 817. See also list of statutes cited *supra*, note 1, p. 488.

2. See *supra*, note 5, p. 508.

3. **Service of Notice.** — For forms of affidavits or acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS.

4. *Texas.* — Rev. Stat. (1895), art. 2274; Code Crim. Proc. (1895), art. 802.

Arizona. — Rev. Stat. (1887), § 1834.

New Mexico. — Comp. Laws (1897), § 3037.

See also list of statutes cited *supra*, note 1, p. 488.

5. **Suit in which deposition is to be used** must be stated. See list of statutes cited *supra*, note 1, p. 488.

6. **Names and residence of witness,** or the place where he is to be found, must be stated. See list of statutes cited *supra*, note 1, p. 488.

7. **Copy of interrogatories** shall be served with the notice. See list of statutes cited *supra*, note 1, p. 488.

8. **The form of precept to serve notice** and interrogatories in such cases is as follows: (*Title of court and cause as in Form No. 7268, supra*). "The State of *Texas*, To the Sheriff or any Constable of *Freestone* County, Greeting: You are hereby commanded, that you serve *John Doe*, the *plaintiff* in the above stated cause, or *Jeremiah Mason*, his attorney of record, with the accompanying certified copy of notice and interrogatories propounded by the *defendant* in said cause, to *William West*, who resides in the county of *Hill*, in the state of *Texas*. Herein fail not, but of this writ, and how you have executed the same, make due return within *five* days after service. Witness, *Calvin Clark*, clerk of the *District* Court of *Freestone* county. Given under my hand and the seal of said court, at *office in Fairfield*, this the *tenth* day of *June*, A. D. 1898. (SEAL) *Calvin Clark*, Clerk, *District* Court, *Freestone* County."

See *supra*, note 3.

Form No. 7269.[1]

(*Title of court and cause.*) } Notice of Motion for Commission to Examine Witness Out of the State.

Take notice, that upon the affidavit of *Richard Roe* served with this notice, and upon the complaint and papers filed in the above entitled action, the defendant will apply to the Honorable *John Marshall*, judge of this court, at *the court-room* in the *city and* county of *San Francisco*, on the *tenth* day of *June*, 1*898*, at the opening of said court, on that day, at the hour of *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, for an order directing a commission to issue out of and under the seal of this court, to take the testimony of *William West*, a witness residing out of this state, directed to some proper person residing at the city of *Chicago*, in the state of *Illinois*, then and there to be selected and appointed by the judge of this court. (*Signature, date and address as in Form No. 7234.*) (*Service of notice.*)[2]

In Criminal Cases — *Texas.* — When the defendant, in a criminal case, desires to take the deposition of a witness at any other time than before the examining court, he shall, by himself or counsel, file with the clerk of the court in which the case is pending a statement on oath setting forth the facts necessary to constitute a good cause for taking the same, and, in addition thereto, state in his affidavit that he has no other witness, whose attendance on the trial can be procured, by whom he can prove the facts he desires to establish by the deposition. Code Crim. Proc. (1895), art. 804. The form of affidavit may be as follows: (*Title of court and cause as in Form No. 7268, supra.*)

"The State of *Texas*, }
County of *Hill*. }

Before me, *Calvin Clark*, clerk of the *District* Court in and for the said county, state of *Texas*, this day personally came and appeared *John Doe*, to me well known, who after being by me duly sworn did depose and say that he is the defendant in the above entitled and numbered cause; that *William West* is a material witness for the deponent in his defense in this cause; that the said *William West* resides out of the state of *Texas*, and resides at *Lamar*, in the county of *Barton*, in the state of *Missouri* (or *here set out other facts necessary to constitute a good reason for taking the deposition of the witness*); and that the defendant has no other witness, whose attendance on the trial can be procured, by whom he can prove the facts he desires to establish by the deposition of the said *William West*. Written interrogatories are herewith filed by the defendant to the said *William West*, and the defendant requests that the necessary notice thereof be given, and that a commission issue out of this court to take the deposition of the said *William West*." (*Signature and jurat as in Form No. 870.*)

1. *Utah.* — Rev. Stat. (1898), § 3450.
Nevada. — Gen. Stat. (1885), § 3434.
Montana. — Code Civ. Proc. (1895), § 3350.
California. — Code Civ. Proc. (1897), § 2024.
See also list of statutes cited *supra*, note, 1, p. 488.

In criminal cases, must be given to the district attorney.
Arizona. — Pen. Code (1887), §§ 2067, 2089.
California. — Pen. Code (1897), §§ 1338, 1353.
Idaho. — Rev. Stat. (1887), §§ 8163, 8180.
Montana. — Pen. Code (1895), §§ 2483, 2504.
Nevada. — Gen. Stat. (1885), § 4435.
North Dakota. — Rev. Codes (1895), §§ 8377, 8388.
Oklahoma. — Stat. (1893), §§ 5351, 5362.
South Dakota. — Dak. Comp. Laws (1887), §§ 7543, 7554.
Utah. — Rev. Stat. (1898), §§ 5030, 5042.
See also *supra*, note 4, p. 508.

2. **Service of Notice.** — For forms of affidavits or acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS.

b. Of Entering Rule.

Form No. 7270.[1]

(*Title of court and cause as in Form No. 6947.*)

And now, this *twenty-second* day of *March*, A. D. 1*898*, comes the *defendant*, *Richard Roe*, and enters a rule for a commission to be issued to *James Hallett*, Esq., in *Minneapolis*, in the state of *Minnesota*, to take the testimony of witnesses on the interrogatories hereto annexed, said testimony to be read in evidence on the part of the *defendant* on the trial of the above entitled action.

(*Interrogatories.*)[2]

Sir: You are hereby notified that rule has this day been entered for a commission on the part of the *defendant*, to *Minneapolis*, in the state of *Minnesota*, on *fifteen* days' notice to the *plaintiff* or his attorney. (*Signature, date and address as in Form No. 7234.*) (*Service of notice.*)[3]

IV. INTERROGATORIES.[4]

1. *Pennsylvania.* — Pa. Ct. Com. Pl. Rules, No. XVII, § 51; Laws (1895), p. 279.

The names of witnesses need not be stated, usually, it being a matter entirely within the discretion of the court. Heaton *v.* Findlay, 12 Pa. St. 310.

2. **For form of interrogatories** see *infra*, Form No. 7279.

3. **Service of Notice.** — For forms of affidavits or acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS.

4. **Provision by statute or rule of court** for the service and filing of interrogatories exist in the following states:

Alabama. — Civ. Code (1886), § 2803. In Chancery: Civ. Code (1886), § 3463.

Arizona. — Rev. Stat. (1887), §§ 1835–1840.

Arkansas. — Sand. & H. Dig. (1894), § 2999.

Colorado. — Mills' Anno. Code (1896), § 349.

Connecticut. — Gen. Stat. (1888), § 1626.

District of Columbia. — Supreme Ct. Rules, § 115; ch. cas., Comp. Stat. (1894), c. 10; § 40; Supreme Ct. Rules, § 65.

Florida. — Rev. Stat. (1892), § 1125.

Georgia. — 2 Code (1895), § 5299.

Idaho. — Laws (1893), p. 138, § 31.

Illinois. — Starr & C. Anno. Stat. (1896), c. 51, § 26.

Indiana. — Horner's Stat. (1896), § 449.

Iowa. — Code (1897), §§ 4689–4692.

Kentucky. — Bullitt's Civ. Code (1895), § 575; Laws (1892), § 25.

Maryland. — Pub. Gen. Laws (1888), art. 35, §§ 15, 16, 227 *et seq.*; Billingslea *v.* Smith, 77 Md. 504, referring to rules of court.

Massachusetts. — Supreme Jud. Ct. Rules, No. 19.

Minnesota. — Stat. (1894), § 5686.

Mississippi. — Anno. Code (1892), § 1751.

New Jersey. — Gen. Stat. (1895), p. 1403, §§ 30, 31.

New Mexico. — Comp. Laws (1897), §§ 3037–3039.

New York. — Code Civ. Proc., § 891 *et seq.*

Pennsylvania. — Ct. of Com. Pl. Rules, No. 27, § 51.

Rhode Island. — Gen. Laws (1896), c. 240, § 21.

South Dakota. — Cir. Ct. Rules (6th Jud. Cir.), No. 14.

Tennessee. — Code (1896), § 5645.

Texas. — Rev. Stat. (1895), art. 2274; Pen. Code (1895), art. 802.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4114.

Illustrations of Interrogatories. — The following are among the usual interrogatories propounded:

"1. State your name, age, occupation, and place of residence."

"2. What has been your place of residence since the *first* day of *May*, 1*896*?"

"3. Are you acquainted with the parties to this action, or either of them; and if so, how long have you known them, or either of them, respectively?"

"4. Are all of your statements in the foregoing answers made from personal knowledge; if not, which of them are

1. Direct Interrogatories.

Form No. 7271.

(*Venue and title of court and cause.*)[1]

Direct interrogatories to be propounded (or *administered*) to and answered by *Samuel Short*, at (*name of city, town or village*) in the county of (*name of county*), state of (*name of state*), a necessary and material witness for and on behalf of *John Doe* (or *Richard Roe*), the plaintiff (or *defendant*) in the above entitled cause, to be produced, sworn and examined on the part of and on behalf of the said *John Doe* (or *Richard Roe*), plaintiff (or *defendant*) in the above entitled cause, under and by virtue of a commission [hereto annexed] issued, or to be issued, by the (*name of court, judge or justice issuing the commission*) to (*name of person or officer to whom commission runs*), to be used in the above entitled cause now pending in (*name of court*) court of the county of (*name of county*) in the state of (*name of state*), wherein *John Doe* is plaintiff and *Richard Roe* is defendant:

1. (*Set out the interrogatories in numbered paragraphs.*)[2]

Oliver Ellsworth (or *Jeremiah Mason*), Attorney for the Plaintiff (or *Defendant*).

made from information and belief, and state particularly the source of your information or the foundation of your belief?"

"5. State whether you have any interest in this action, direct or indirect; and if any, state it."

"6. Have you stated all you know concerning this action? If not, state what you have omitted."

"7. Do you know anything concerning the matters in question that may tend to the benefit and advantage of the defendant or the plaintiff? If so, declare the same fully and at large, as though you had been particularly interrogated concerning the same."

"8. Do you know, or can you set forth, any other matter or thing which may be of benefit or advantage to the parties at issue in this case, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer." U. S. Eq. Ct. Rules, No. 71; Dist of Col. Supreme Ct. Eq. Rules, § 69.

For forms of notice to take depositions to which interrogatories must be attached or annexed see *supra*, Forms Nos. 7234 to 7253.

For forms of application for orders or commission to take depositions to which interrogatories must be attached see *supra*, Forms Nos. 7262, 7264, 7267, 7268, 7270.

Interrogatories should be filed in the clerk's office. Saunders *v.* Erwin, 2 How. (Miss.) 732. See also list of statutes cited *supra*, note 1, p. 519.

Supplementary interrogatories, or questions not sent with the commission, are not regular unless the party against whom the answers are to be used had notice, or unless propounded with his assent, or allowed by the terms of the commission. Matthews *v.* Dare, 20 Md. 248.

Second Commission. — Where, upon due notice and service of the interrogatories upon the opposite party, the commission to take a deposition is sued out, but for any cause the deposition is not taken under it, it is competent for the party to have another commission issue without new notice or interrogatories to the other party. Copeland *v.* Mears, 2 Smed. & M. (Miss.) 519.

Retaking Deposition. — When the deposition of a witness has once been taken upon interrogatories, all the efficacy of such interrogatories and notice is exhausted, and the party has no right to retake the depositions for any cause without refiling the original or additional interrogatories and giving the opposite party notice, as required by the code. Foster *v.* Smith, 2 Coldw. (Tenn.) 474.

1. See *supra*, note 5, p. 508.

2. **For particular illustrations** of interrogatories see *supra*, note 4, p. 519.

Form No. 7272.[1]

(Precedent in Spaids *v.* Cooley, 113 U. S. 283.)

In the *Supreme* Court of the *District of Columbia.*

Chauncey D. Spaids v. *Dennis N. Cooley.* } At law. No. *16,894.*

Interrogatories to be propounded to *Joseph E. Spaids*, a witness on behalf of the *plaintiff* in the above-entitled case, by *John M. Robertson*, Esq., justice of the peace, a commissioner appointed by the said court for that purpose: (*Here were set out interrogatories in numbered paragraphs.*)[2]

Form No. 7273.[3]

Georgia, *Bibb* County.

John Doe against *Richard Roe.* } *Superior* Court. *September* Term, 1897.

Interrogatories to be propounded to and answered by *William West*, at *Atlanta*, in the county of *Fulton*, in the state of *Georgia*, a material witness for the *defendant* in the above entitled cause.

1. (*Set out in numbered paragraphs the interrogatories*).[4]

Oliver Ellsworth, *Defendant's* Attorney.

Form No. 7274.[5]

(*Attached or annexed to the notice the following:*)

Interrogatories referred to in the foregoing notice, and to be answered by *William West*, of *Minneapolis*, in the county of *Hennepin*, in the state of *Minnesota*, a witness to be produced, sworn and examined, under and by virtue of the annexed commission, before *James Hallett*, Esq., or any judge, master in chancery, notary public or justice of the peace of the county and state last mentioned in the

1. *District of Columbia.*— Supreme Ct. Com. L. Rules (1898), § 115; Supreme Ct. Eq. Rules (1898), § 65; Comp. Stat. (1894), c. 10, § 40. See also list of statutes cited *supra*, note 4, p. 519.

2. **Interrogatories referred to** in the text were as follows:

"1. What is your name, age, and place of residence?

2. Of what relation are you to the plaintiff?

3. Are you acquainted with the defendant *Dennis N. Cooley*?

4. When and under what circumstances and where did you first meet him? What took place between you at that time?

5. When and under what circumstances and where did you next see him?

6. State fully and particularly the conversation which took place between your father, the plaintiff, and the defendant *Cooley* at that time?"

Form of Last Interrogatory. — See eighth interrogatory, *supra*, p. 520, note.

For illustrations of forms of interrogatories see *supra*, note 4, p. 519.

3. *Georgia.* — 2 Code (1895), § 5299. See also list of statutes cited *supra*, note 4, p. 519.

Residence of witness must be stated. 2 Ga. Code (1895), § 5299. See also list of statutes cited *supra*, note 1, p. 519. To same effect also McWilliams *v.* McWilliams, 68 Ga. 459.

Use party intends to make of answer need not be stated in the interrogatories. Head *v.* Bridges, 67 Ga. 227.

4. **For illustrations** of forms of interrogatories see *supra*, note 4, p. 519.

5. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 51, § 26.

Colorado. — Mills' Anno. Code (1896), §§ 346, 349.

See also list of statutes cited *supra*, note 4, p. 519.

within notice, in the cause therein mentioned and referred to, and now pending in the *Circuit* Court of *Cook* county, state of *Illinois*, wherein *John Doe* is plaintiff and *Richard Roe* defendant, on the part and behalf of said defendant as follows, to wit:

Interrogatory First. (*Set out in numbered paragraphs the interrogatories.*)[1]

Form No. 7275.[2]

(*Venue and title of court and cause as in Form No. 5915.*)

Pursuant to the accompanying notice the following interrogatories, numbered from *one* to *twenty-five*, to be propounded on the part of the defendant, to the witness, *William West*, at the taking of his deposition in the above entitled action, are herewith submitted. (*Set out interrogatories in numbered paragraphs.*)[1]

Oliver Ellsworth, Attorney for Defendant.

Form No. 7276.[3]

(Bullitt's Civ. Code Ky. (1895), p. 724.)

Bourbon Circuit Court.

John Doe, plaintiff, against *Richard Roe*, defendant. } *Plaintiff's* Interrogatories to *William West*,[4] who resides in *Covington*, *Kenton* County, *Kentucky*.[5]

I. State your name, age, and place of residence.

II. State (*continuing thus, numbering each question in order*).[1]

Jeremiah Mason, Attorney.

Form No. 7277.[6]

Interrogatories to be administered to *Samuel Short*, a witness to be produced, sworn and examined upon the part of and on behalf of *John Doe*, the plaintiff in a certain action now pending in the *Hudson Circuit* Court, in the state of *New Jersey*, at *Jersey City*, between the said *John Doe*, plaintiff, and *Richard Roe*, defendant, before *Charles Carroll*, appointed in that behalf, pursuant to a rule of said *Circuit* Court, made on the *fifth* day of *July*, A. D. 1898.

1. (*Set out interrogatories in numbered paragraphs.*)[1]

Oliver Ellsworth, Attorney for the Plaintiff.[7]

(*Approval indorsed.*)[8]

1. **For illustrations** of forms of interrogatories see *supra*, note 4, p. 519.

2. *Indiana.* — Horner's Stat. (1896), § 449.

Idaho. — Laws (1893), p. 138, § 31.

See also list of statutes cited *supra*, note 4, p. 519.

3. *Kentucky.* — Bullitt's Civ. Code (1895), § 575. See also list of statutes cited *supra*, note 4, p. 519.

4. **Name of witness** must be stated in the caption. Bullitt's Civ. Code Ky. (1895), § 575.

5. **Residence of witness** must be stated. Bullitt's Civ. Code Ky. (1895), § 575.

6. *New Jersey.* — Gen. Stat. (1895), p. 1403, §§ 30, 31.

Chancery Rule. — Copies of direct interrogatories should be submitted to the adverse party six days before the time of submitting the same to the chancellor for his approval. N. J. Ch. Rules, No. 98.

7. **Interrogatories must be signed** by the parties, their attorneys or counsel. N. J. Gen. Stat. (1895), p. 1403, § 30; Graham *v.* Whitely, 26 N. J. L. 254; Ludlam *v.* Broderick, 15 N. J. L. 269.

8. **Interrogatories must be approved** by the court and its approval indorsed thereon. N. J. Gen. Stat. (1895), p. 1403, § 30 *et seq.*

Form No. 7278.[1]

(*Title of court and cause as in Form No. 5926.*)

Interrogatories to be propounded to *William West*, of *Hartford*, in the county of *Hartford*, in the state of *Connecticut*, a witness on behalf of the defendant (or *plaintiff*) in the above entitled action, to be examined under the annexed commission.[2]

First. State your name, age, occupation, and place of residence.

Second. (*Set out interrogatories in numbered paragraphs.*)[3]

Lastly. Do you know of anything concerning the matter in question that may tend to the benefit and advantage of the defendant (or *plaintiff*); if so, declare the same fully and at large, as though you had been particularly interrogated concerning the same.[4]

Oliver Ellsworth, Attorney for the Defendant,
100 State Street, *Albany*, *New York*.[5]

Form No. 7279.[6]

(*Attached or annexed to the rule for a commission, the following:*)

Interrogatories to be exhibited to and answered by witnesses to be produced, sworn (or *affirmed*) and examined on the part of the defendant (or *plaintiff*) in the above entitled cause, before *James Hallett*, commissioner named in the above rule.[7]

First Interrogatory. (*Set out interrogatories in numbered paragraphs.*)[3]

Form No. 7280.[8]

John Doe against *Richard Roe.* } In *Chancery* Court, at *Nashville*, *Tennessee*.

Interrogatories to be propounded to *William West*, a witness for *defendant* in the above stated case, residing in the state of *Alabama* (or *more than one hundred and fifty miles from Nashville, the place of trial of the above cause*).

Interrogatory 1. (*Set out interrogatories in numbered paragraphs.*)[3]

Oliver Ellsworth, Solicitor for *Defendant*.

Form No. 7281.[9]

To *Richard Roe* or *Oliver Ellsworth*, his Attorney of Record.

1. *New York.* — Code Civ. Proc., §§ 891, 892 (Birds. Rev. Stat. (1896), p. 860, §§ 21, 22). See also list of statutes cited *supra*, note 4, p. 519.

2. **Must be annexed to commission** when settled. N. Y. Code Civ. Proc., § 892 (Birds. Rev. Stat. (1896), p. 860, § 22).

3. **For illustrations** of forms of interrogatories see *supra*, note 4, p. 519.

4. **As to the last interrogatory,** see Van Ness *v.* Bush, 14 Abb. Pr. (N. Y. Supreme Ct.) 33.

5. Hun's N. Y. Ct. Rules (1896), No. 2.

6. *Pennsylvania.* — Ct. of Com. Pl. Rules, No. XVII, § 51. See also list of statutes cited *supra*, note 4, p. 519.

In equity, the final interrogatory should be as follows:

"Do you know, or can you set forth, any other matter or thing which may be a benefit or an advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer." Pa. Eq. Ct. Rules, No. XI, § 57.

7. **For form of notice of rule** see *supra*, Form No. 7270.

8. *Tennessee.* — Code (1896), § 5645. See also list of statutes cited *supra*, note 4 p. 519.

9. *Texas.* — Rev. Stat. (1895), art. 2274; Pen. Code (1895), art. 802.

Interrogatories to be propounded to *William West*, *Samuel Short* and *Francis Fern*, witnesses for the *plaintiff*.

First Interrogatory. (*Set out interrogatories in numbered paragraphs.*)[1]

Form No. 7282.[2]

(*Title of court and cause as in Form No. 5937.*)

Interrogatories to be administered to *William West*, of the city of *Minneapolis*, county of *Hennepin* and state of *Minnesota*, a witness to be produced, sworn and examined on the part of the above named *defendant* under a commission to be issued out of and under the seal of the *Circuit* Court of *Vernon* county, and directed to *James Hallett*, of the city of *Minneapolis*, county of *Hennepin* and state of *Minnesota*, and to such other person as may be named commissioner on the part of the *plaintiff* above named.

First Interrogatory. (*Set out interrogatories in numbered paragraphs.*)[1]

2. Cross-interrogatories.[3]

1. **For illustrations** of forms of interrogatories see *supra*, note 4, p. 519.

2. *Wisconsin.* — Sanb. & B. Anno. Stat. (1889), § 4114. See also list of statutes cited *supra*, note 4, p. 519.

3. **Cross-interrogatories** may be filed by the opposite party. For the statutory provisions relating to such interrogatories see list of statutes cited *supra*, note 4, p. 519.

The heading of cross-interrogatories is in all material respects similar to that to the direct interrogatories, an example of which is given in Form No. 7283, *supra*. Other illustrations of such headings are as follows:

(*Title of court and cause as in Form No. 5915.*) "The following cross-interrogatories, numbered *one* to *twenty-five*, to be propounded to the witness, *William West*, at the taking of his deposition in the above entitled action, are herewith submitted on the part of the plaintiff (or *defendant*)."

(*Title of court and cause as in Form No. 5926.*) "Cross-interrogatories to be propounded on the part of the plaintiff (or *defendant*) to *William West*, of *Hartford*, in the county of *Hartford*, in the state of *Connecticut*, a witness on behalf of the defendant (or *plaintiff*) in the above entitled action, to be examined under the annexed commission."

(*Title of court and cause as in Form No. 6947.*) "Cross-interrogatories filed on the part of the plaintiff (or *defendant*) in the above cause, to be exhibited to witnesses to be produced, sworn (or *affirmed*) and examined on the part of the above named defendant under a commission to be issued out of said court to the state of *Minnesota*. The plaintiff, by *Jeremiah Mason*, his attorney, reserves all legal exceptions to the interrogatories in chief."

If no cross-interrogatories are filed, the clerk shall file the following:

"I. What is your age, occupation, and place of residence?

II. Are all of your statements in the foregoing answers made from your personal knowledge? If not, which of them are made from information and belief, and what is the source of your information or the foundation of your belief?

III. Have you any interest in this action, direct or indirect? If any, what is it?

IV. Have you stated all you know concerning this action? If not, state what you have omitted." Bullitt's Civ. Code Ky. (1895), § 575.

Or these:

"1. Are you directly or indirectly interested in this action? and, if interested, explain the interest you have.

2. Are all your statements in the foregoing answers made from your own personal knowledge? and, if not, do your answers show what are made upon your personal knowledge, what from information, and the source of that information?

3. State everything you know concerning the subject of this action favorable to either party." Sand. & H. Dig. Ark. (1894), § 2999; Iowa Code (1897), § 4692.

Form No. 7283.[1]

Cross-interrogatories to be administered (or *propounded*) to *Samuel Short*, a witness to be produced and examined upon the part and on behalf of *John Doe* (or *Richard Roe*), the plaintiff (or *defendant*) in the above entitled cause now pending in the (*name of court*) court, of the county of (*name of county*), in the state of (*name of state*), in which said cause *John Doe* is plaintiff and *Richard Roe* is defendant, by way of cross-examination to di ect interrogatories to be administered (or *propounded*) to the said witness, *Samuel Short*, upon the part and on beha. of the said *Richard Roe*, the said defendant, before (*naming officer appointed to take the deposition*) appo nted in that behalf, pursuant to an order of (*naming the court, justice or judge issuing the commission*) made in said cause, on the *second* day of *July*, 1898.

I. (*Set out in numbered paragraphs the cross-interrogatories in like manner as in case of the direct inte.rogatories.*)[2]

Jeremiah Mason, Attorney for the Plaintiff.

(*Approval indorsed.*)[3]

3. Notice of Filing.[4]

Refusal to File Cross-interrogatories. — In *Pennsylvania*, if the adverse party does not desire to file cross-interrogatories, he should file the following notice:

(*Title of court and cause as in Form No. 6947.*) "The plaintiff above named declines to file cross-interrogatories to *William West*, a witness to be examined on behalf of the defendant in the above cause, and hereby names as commissioner on his behalf *William Mason*, Esq., No. *100 L* street, in the city of *Minneapolis* in the county of *Hennepin* and state of *Minnesota*.

Jeremiah Mason, Attorney for Plaintiff.

Dated this *seventeenth* day of *August*, A. D. 1897.

To the Prothonotary of Common Pleas."

Oral Cross-examination. — If the party served with notice shall prefer to cross-examine the witness orally, he shall notify the opposite party of such election within three days after receiving notice. Horner's Ind. Stat. (1896), § 449. See also list of statutes cited *supra*, note 1, p. 488.

The following may serve as a form of such notice:

(*Title of court and cause as in Form No. 5915.*) "You are hereby notified that the *plaintiff* in the above entitled action proposes to examine orally the witness *William West*, whose deposition is to be taken in the above entitled cause, in preference to submitting to him cross-interrogatories." (*Date, signature and address as in Form No. 7234.*)

1. *New Jersey.* — Gen. Stat. (1895), p. 1403, § 30 *et seq.* See also list of statutes cited *supra*, note 4, p. 519.

2. **For Illustrations** of forms of interrogatories see *supra*, note 4, p. 519.

3. **Cross-interrogatories must be approved** by the court in like manner as direct interrogatories. N. J. Gen. Stat. (1895), p. 1403, § 30.

Chancery Rule. — Cross-interrogatories must be submitted to the opposite party two days before the time of submitting the same to the chancellor for his approval. N. J. Ch. Rules, No. 98.

4. **Statutory provisions** requiring notice of filing interrogatories to be given to the adverse party, his agent or attorney, if any of them reside in the same county, exist in the following states:

Alabama. — Civ. Code (1886), § 2803; Civ. Code, § 3471 (chancery).

Arkansas. — Sand. & H. Dig. (1894), § 2999.

Georgia. — 2 Code (1895), § 5299.

Iowa. — Code (1897), § 4689.

Kentucky. — Bullitt's Civ. Code (1895), § 575.

Massachusetts. — Supreme Jud. Ct. Rules, No. 19.

Mississippi. — Anno. Code (1892), § 1751.

Tennessee. — Code (1896), § 5645.

Form No. 7284.[1]

(*Venue and title of cause as in Form No. 5907.*) } *Circuit* Court of *Jefferson* County.

You are hereby notified that interrogatories have this day been filed in the office of the clerk of the above named court, to *William West*, witness for the *defendant* in the above stated cause. A copy of said interrogatories will accompany this notice, and you can file cross-interrogatories, if you think proper, within ten days after the service of this notice, at the expiration of which time a commission will issue to *James Hallett*, the proposed commissioner to take the deposition of said witness. The witness resides in *Atlanta*, in the county of *Fulton*, in the state of *Georgia*,[2] and the commissioner resides in *Atlanta*, in the county of *Fulton*, in the state of *Georgia*.[3] Witness my hand at *office in Birmingham*, this the *tenth* day of *July*, 1*898*. *Calvin Clark*, Clerk.

(*Address as in Form No. 7234.*)[4] (*Service of notice.*)[5]

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4114. See also list of statutes cited *supra*, note 1, p. 488.

Foreign Commissions. — *In Maryland*, notice must be given to the adverse party of the filing of interrogatories, but it is not required that notice of the time and place of the execution of the commission be given. Baltimore, etc., R. Co. *v.* State, 60 Md. 449.

Where there is no statutory provision, failure to serve interrogatories will not render the deposition inadmissible. Moore *v.* Willard, 30 S. Car. 615.

Copy of Interrogatories must be served upon adverse party or his attorney.

Alabama. — Civ. Code (1886), § 2803; Civ. Code (1886), § 3471, (chancery).

Florida. — Rev. Stat. (1892), § 1124.

Georgia. — 2 Code (1895), § 5299.

Idaho. — Laws (1893), p. 138, § 31.

Indiana. — Horner's Stat. (1896), § 449.

Kentucky. — Bullitt's Civ. Code (1895), § 575.

Minnesota. — Stat. (1894), § 5686.

Mississippi. — Anno. Code (1892), § 1751.

South Carolina. — Rev. Stat. (1893), § 2333.

Tennessee. — Code (1896), § 5645.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4114.

See also list of statutes cited *supra*, note 1, p. 488.

1. *Alabama.* — Code (1886), § 2803. See also list of statutes cited *supra*, note 4, p. 525.

Notice of day upon which commission will issue must be given at least ten days before the issuance of the commission. Saunders *v.* Erwin, 2 How. (Miss.) 732.

2. **Residence of witness** must be stated in the notice. Ala. Code (1886), § 2803. See also list of statutes cited *supra*, note 4, p. 525.

3. **Residence of commissioner** to be appointed must be stated in the notice. Ala. Civ. Code (1886), § 2803. See also list of statutes cited *supra*, note 4, p. 525.

4. **Notice to the attorney of record** sufficient. Huggins *v.* Carter, 7 Ala. 630; Ala. Civ. Code (1886), § 2803. See also list of statutes cited *supra*, note 4, p. 525.

Notice to Nonresident. — If the party resides out of, or is absent from, and has no attorney of record within, the county, notice may be given by filing the interrogatories in the office of the clerk for ten days. Ala. Civ. Code (1886), § 2804. See also list of statutes cited *supra*, note 4, p. 525.

Where notice is not given of the filing of interrogatories, it must be shown that the party entitled to notice is not a resident of, or is absent from, the county; and where the party is a corporation, it must be shown that its place of business is not in the county, and that it has no officer or agent or attorney of record in the county. Oxford Iron Co. *v.* Quinchett, 44 Ala. 487.

5. **Service of Notice.** — For forms of affidavits or acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS.

For form of affidavit required upon filing interrogatories see *supra*, Form No. 7260.

Form No. 7285.[1]

(*Venue and title of court and cause as in Form No. 2851.*)

You are hereby notified that on *Tuesday*, the *ninth* day of *November*, 1897, at *ten* o'clock in the *fore*noon,[2] an application will be made by the above named *defendant* to the above named court for a commission to take the testimony of *William West*, a witness on behalf of the *defendant* in the above entitled cause, upon interrogatories, a copy of which is herewith served upon you. The reason for taking said deposition is that the said witness, *William West*, is not a resident of the county of *Washington*, but resides in the city of *Tallahassee*, in the county of *Leon*, in the state of *Florida* (or *state other reason for taking the deposition*).[3] You are further notified, that the *defendant* will name as a commissioner on his part to take said deposition *James Hallett*, Esq., of No. *10 L* street, in the said city of *Tallahassee*.[4] (*Signature and date and address as in Form No. 7234.*) (*Service of notice.*)[5]

Form No. 7286.[6]

(*Venue and title of court and cause as in Form No. 7273.*)

You are hereby notified that the interrogatories to be propounded to *William West*, a copy of which is hereto annexed,[7] have this day been filed in the office of the clerk of the *Superior* Court of *Bibb* county. At the expiration of ten days a commission will issue for the examination of said witness upon such interrogatories. (*Signature, date and address as in Form No. 7234.*) (*Service of notice.*)[5]

Form No. 7287.[8]

(*Commencing as in Form No. 7239, and continuing to * ; then proceed thus:*) Copies of the interrogatories to be propounded to the said witness are hereby served upon you, and you are further notified that copies thereof will be filed with the clerk of the *Posey Circuit* Court. (*Date and signature as in Form No. 7234.*) (*Service of notice.*)[5]

Form No. 7288.[9]

(Bullitt's Civ. Code Ky. (1895), p. 724.)

(*Title of court and cause as in Form No. 7242.*)

Mr. *Richard Roe*: Take notice, that I have filed interrogatories in

1. *Florida.* — Rev. Stat. (1892), § 1124. See also list of statutes cited *supra*, note 4, p. 525.

2. **Time of application** for commission must be stated. Fla. Rev. Stat. (1892), § 1124.

3. **Reasons for taking deposition** must be stated. Fla. Rev. Stat. (1892), § 1124.

4. **Name of commissioner** to be appointed must be stated. Fla. Rev. Stat. (1892), § 1124.

5. **Service of Notice.** — For forms of affidavits or acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS.

6. *Georgia.* — 2 Ga. Code (1895), § 5299. See also list of statutes cited *supra*, note 4, p. 525.

If there are several parties and their interests are independent, copies must be served on each. 2 Ga. Code (1895), § 5301.

7. **For form of interrogatories** to accompany notice see *supra*, Form No. 7273.

8. *Indiana.* — Horner's Stat. (1896), § 449.

Idaho. — Laws (1893), p. 132, § 1 *et seq.* See also list of statutes cited *supra*, note 4, p. 525.

For form of interrogatories to accompany notice see *supra*, Form No. 7275.

9. *Kentucky.* — Bullitt's Civ. Code

the clerk's office of the *Bourbon Circuit* Court in my action therein against you. (*Date and signature as in Form No. 7234.*) (*Service of notice.*)[1]

Form No. 7289.[2]

(*Title of court and cause as in Form No. 7280.*)

You are hereby notified, that interrogatories[3] to be propounded to *William West*, a witness on behalf of the *defendant* in the above stated cause, have this day been filed by said *defendant* in the office of the clerk and master in the said chancery court. (*Signature, date and address as in Form No. 7234.*) (*Service of notice.*)[1]

Form No. 7290.[4]

(*Title of court and cause as in Form No. 5937.*)

To *Jeremiah Mason*, attorney for the *plaintiff* above named:

Sir: Please take notice, that the foregoing are direct interrogatories[5] to be propounded to *William West*, of the city of *Minneapolis*, county of *Hennepin* and state of *Minnesota*,[6] under a commission to be issued out of and under the seal of the *Circuit* Court of *Vernon* county in the above entitled action; that you are herewith served with a copy of such interrogatories; that after the expiration of ten days from the date of such service upon you a commission will be issued in said action according to law,[7] to take the deposition of said witness, *William West*, upon said interrogatories, and such cross-interrogatories as may be filed herein; that the cause or reason for which said deposition is to be taken is that the said *William West* is a necessary and material witness for said *defendant* on the trial of said action, and is not a resident of the state of *Wisconsin*, but resides in the city of *Minneapolis*, county of *Hennepin* and state of *Minnesota*.[8] (*Signature and date as in Form No. 7234.*) (*Service of notice.*)[1]

(1895), § 575. See also list of statutes cited *supra*, note 4, p. 525.

This is the proper form of notice that interrogatories have been filed in causes pending in circuit courts not having continuous sessions. Bullitt's Civ. Code Ky. (1895), p. 724.

For form of interrogatories to accompany notice see *supra*, Form No. 7276.

1. Service of Notice. — For forms of affidavits or acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS.

2. *Tennessee.* — Code (1896), § 5645. See also list of statutes cited *supra*, note 4, p. 525.

Clerk to give notice of filing interrogatories to the counsel of the opposite party. Tenn. Code (1896), § 5647.

When opposite party is a nonresident, or judgment by default or *pro confesso* has been taken for want of appearance and defense, depositions may be taken by filing with the clerk a copy of the interrogatories, with a memorandum of the time and place of taking the depositions, for twenty days before taking the same. Tenn. Code (1896), § 5646. See also list of statutes cited *supra*, note 4, p. 525.

3. For form of interrogatories to accompany notice see *supra*, Form No. 7280.

4. *Wisconsin.* — Sanb. & B. Anno. Stat. (1889), § 4114. See also list of statutes cited *supra*, note 4, p. 525.

5. For form of interrogatories to accompany notice see *supra*, Form No. 7282.

6. Residence of Witness. — If the residence of the witnesses is stated in the notice, though not stated in the caption of the interrogatories, it is a substantial compliance with the statute. Semmens *v.* Walters, 55 Wis. 675.

7. Must state time when commission will issue. Sanb. & B. Anno. Stat. Wis. (1889), § 4114. See also list of statutes cited *supra*, note 4, p. 525.

8. Reason for taking deposition must be specified. Sanb. & B. Anno Stat. Wis. (1889), § 4114. See also list of statutes cited *supra*, note 4, p. 525.

4. Notice of Settlement.

Form No. 7291.[1]

(*Title of court and cause as in Form No. 6954.*)

You are hereby notified, that interrogatories proposed by the defendant (or *the plaintiff*) which are to be annexed to the commission issued in the above action and a copy of which is hereunto annexed,[2] and also the cross-interrogatories of the plaintiff (or *defendant*), if any, will be settled by Hon. *John Marshall*, judge of the *County* Court,[3] at *his chambers in the court-house*, in the city of *Albany*, on the *fifteenth* day of *August*, 1*898*, at *ten* o'clock in the *fore*noon. (*Date, signature and address as in Form No. 6954*). (*Service of notice.*)[4]

5. Notice Requiring Deposition to be Taken upon.[5]

Form No. 7292.[6]

(Bullitt's Civ. Code Ky. (1895), p. 723.)

(*Title of court and cause as in Form No. 7242.*)

Mr. *John Doe* (or *Oliver Ellsworth*, attorney for *John Doe*): You are required to take, upon interrogatories, the deposition mentioned in your (or *in John Doe's*) notice to me dated the *fifth* day of *May*, 1*898*. *Richard Roe*, by *Daniel Webster*, Attorney.

Dated the *sixth* day of *May*, 1*898*.

(*Service of notice.*)[4]

1. Notice of Settlement. — Notice that the interrogatories to be annexed to the commission will be settled by a judge of the court, or in the supreme court, by the county judge of the county where the action is triable, as prescribed in the General Rules of Practice, must be served upon the adverse party. N. Y. Code Civ. Proc., § 891 (Birds. Rev. Stat. (1896), p. 860, § 21); Uline *v.* New York Cent., etc., R. Co., 79 N. Y. 175.

Montana. — Pen. Code (1895), § 2506.

South Dakota. — Cir. Ct. Rules (6th Jud. Dist.), No. 14.

Utah. — Rev. Stat. (1898). § 5044.

Notice of time and place of submitting the interrogatories shall be served with the interrogatories. N. J. Ch. Rules, No. 98.

2. For form of interrogatories to accompany notice, see *supra*, Form No. 7278.

3. By Whom Settled. — Where an action is pending in the supreme court, by the county judge of the county where the action is triable; if in any other court, by the judge of that court. N. Y. Code Civ. Proc., § 891 (Birds. Rev. Stat. (1896), p. 860, § 21). See also list of statutes cited *supra*, note 4, p. 519.

4. Service of Notice. — For forms of affidavits or acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS.

5. Notice of intention to be present, omitting formal parts, may be as follows:

"Take notice, that I intend to be present at the examination of the witness to whom you filed interrogatories on the *tenth* day of *May*, 1*898*, in your action against me in the *Bourbon Circuit* Court." Bullitt's Civ. Code Ky. (1895), p. 723. This is the proper form of notice in actions in circuit courts having continuous session. Bullitt's Civ. Code Ky. (1895), p. 723, note *g*.

Notice of taking deposition, on receipt of notice that adverse party will be present, omitting the formal parts, may be as follows: "Take notice, that I will take the deposition of the witness to whom I filed interrogatories on the *tenth* day of *May*, 1*898*, at *the court-house* in *Kenton* county, in the state of *Kentucky*, on the *fifteenth* day of *May*, 1*898*, to be read as evidence in an action pending in the *Bourbon Circuit* Court in which I am plaintiff and you are defendant." Bullitt's Civ. Code Ky. (1895), p. 723.

6. This form of notice is proper in actions in circuit courts having continous session. Bullitt's Civ. Code Ky. (1895), p. 723.

V. ORDER.[1]

1. For Taking Depositions.

a. In General.

Form No. 7293.[2]

(*Title of court and cause, and caption as in Form No. 6957.*)

Upon reading and filing the affidavit of *John Doe*,[3] the *plaintiff* in the above entitled action, bearing date the *tenth* day of *August*, 1897, and it appearing to the satisfaction of the court that *William West* and *Samuel Short* are material and necessary witnesses in the prosecution (or *defense*) of said action, and that the said *William West* and *Samuel Short* are not within this state, but are at *Hartford*, in the state of *Connecticut*, and upon hearing *Jeremiah Mason*, attorney for the above *plaintiff*, in support of said motion, and *Oliver Ellsworth*, attorney for *defendant* (or *no one appearing*), in opposition:

Ordered, that the depositions of the said *William West* and *Samuel Short* be taken on or before the *fifteenth* day of *October*, 1897,[4] before *James Hallett*, of *Hartford*,[5] in the said state of *Connecticut*, and that the depositions of the said witnesses, so taken, be returned by the said commissioner through the post-office, addressed to *Calvin Clark*, clerk of this court (*or in whatever manner the court may order*).[6]

1. **For formal parts** of an order in any jurisdiction consult the title ORDERS.

For forms of application for order to take testimony see *supra*, Forms Nos. 7262 to 7270.

2. *New York.* — Code Civ. Proc., § 894 (Birds. Rev. Stat (1896), p. 860, § 24). See also list of statutes cited *supra*, note 1, p. 488.

3. **For form of affidavit** upon which this order may be issued see *supra*, Form No. 7260.

4. **Time within which deposition must be taken** must be specified in the order. N. Y. Code Civ. Proc., § 898 (Birds. Rev. Stat. (1896), p. 861, § 28). See also list of statutes cited *supra*, note 1, p. 488.

5. **Who may be Authorized to Take Depositions.** — See N. Y. Code Civ. Proc., § 899 (Birds. Rev. Stat. (1896), p. 861, § 29). See also list of statutes cited *supra*, note 1, p. 488.

6. **Manner of return** must be stated in the order. N. Y. Code Civ. Proc., § 898 (Birds. Rev. Stat. (1896), p. 861, § 28). See also list of statutes cited *supra*, note 1, p. 488.

Time and Manner of Giving Notice. — Order may contain such additional directions, not inconsistent with the provisions of the code with respect to the time and manner of giving notice, as the court or judge may deem proper. N. Y. Code Civ. Proc., § 898 (Birds. Rev. Stat. (1896), p. 861, § 28. See also list of statutes cited *supra*, note 1, p. 488.

Additional directions, not inconsistent with the code with respect to the time and manner of giving notice, may be stated in the order. N. Y. Code Civ. Proc., § 898 (Birds. Rev. Stat. (1896), p. 861, § 28). See also list of statutes cited *supra*, note 1, p. 488.

Precedent of such an order appears in California *v.* Southern Pac. Co., 153 U. S. 239, which, omitting the formal parts, is as follows:

"The motion of the State of *California*, by its *Attorney General*, in this behalf, having been considered:

It is hereby ordered that depositions heretofore placed in the custody of the clerk of this court, as taken in this cause, may be opened and filed, together with the map exhibits therein referred to.

And it is further ordered that *William A. Maury*, Esq., of the *District of Columbia*, be and he is hereby designated and appointed a commissioner to take testimony herein, and he is hereby empowered and instructed to take and return such testimony as may be offered by either of the parties thereto, and to receive and return such documents and

Enter:[1] *John Marshall*, J. S. C.

Form No. 7294.[2]

(*Venue and title of court and cause as in Form No. 4315.*) } Order to Take Depositions.

And now come the above named parties; and it is ordered by the court of its own motion that the deposition of *William West*, a witness on the part of the defendant (or *the plaintiff*) in this cause, be taken before *Norton Porter*, a *notary public* within and for the county of *St. Joseph*, in the state of *Indiana*, at *the office of said Norton Porter*, number *10 West* street, in the city of *South Bend*, in said county of *St. Joseph*, on the *tenth* day of *November*, A. D. 1897; and it is further ordered that the clerk of this court issue a subpœna to the sheriff of this county for the appearance of the said *William West*, before the said *Norton Porter*, at the time and place aforesaid, that his deposition may be then and there taken.

b. To be Used on Motion.

Form No. 7295.[3]

(*Title of court and cause, and caption as in Form No. 6957.*)

It appearing to the satisfaction of this court by the affidavit of *Richard Roe*, the *defendant* in the above entitled action, bearing date the *tenth* day of *August*, 1897, that the said *defendant* intends to make a motion in the *Supreme* Court for (*Here state nature of motion*) (*or*

maps illustrative of the alleged title of the city of *Oakland* as said city may deem proper to offer, pursuant to the order of this court made herein on *March 12*, 1894.

It is further ordered that said commissioner notify the respective parties and the city of *Oakland* of his appointment; and, thereupon, within *ten* days thereafter, or as soon as convenient, he shall proceed to take such evidence as either of the parties hereto may produce, and he shall receive and take such documents and maps as may be offered by the city of *Oakland* under said order of *March 12*, 1894, as hereinbefore specified; and that the taking and receiving of said evidence, documents, and maps shall be completed and certified by said commissioner and forwarded to the clerk of this court on or before the *first Monday* of *September*, 1894; upon the receipt whereof the clerk is hereby instructed to open and file the same.

It is further ordered that in printing the record it shall not be necessary for the clerk to print copies of map exhibits; provided there shall be furnished to the court a sufficient number of map exhibits as required by the rules; and that the parties hereto, and the city of *Oakland*, are hereby permitted, during the vacation of this court, to file their briefs and points in said cause with the clerk without the further order of the court; and the question of setting said cause for hearing is hereby reserved until the next term. So ordered."

1. **Order Must be Entered in the Clerk's Office.** — N. Y. Code Civ. Proc., § 898 (Birds. Rev. Stat. (1896), p. 861, § 28). See also list of statutes cited *supra*, note 1, p. 488.

Certified copy of the order must be annexed to each deposition, or set of depositions. N. Y. Code Civ. Proc., § 898 (Birds. Rev. Stat. (1896), p. 861, § 28).

2. *Indiana.* — Horner's Stat. (1896), § 422. See also list of statutes cited *supra*, note 1, p. 488.

Continuance of Cause. — If necessary, the court may order a continuance until the next term. Horner's Stat. Ind. (1896), § 422. See also list of statutes cited *supra*, note 1, p. 488.

3. *New York.* — Where a party intends to make or oppose a motion in court, and it is necessary for him to have the affidavit or deposition of a person not a party, to use upon the

"that notice having been given of a motion in the *Supreme* Court on behalf of the above named *plaintiff* for (*stating nature of motion*), which motion the said *defendant* intends to oppose"), and that it is necessary for the said *defendant* to have the deposition (or *affidavit*) of *William West*, of *Hartford*, in the county of *Hartford*, in the state of *Connecticut*, to use upon the motion aforesaid, and that the said *William West* has refused to make an affidavit of the facts which said applicant verily believes to be within the knowledge of the said *William West*, and it appearing to this court that due notice of said motion has been served upon the said *William West*,[1] upon the motion of *Oliver Ellsworth*, attorney for the said *defendant*, and upon reading and filing (*Here specify papers, if any, filed in opposition to the motion*),[2] and upon hearing *Daniel Webster*, attorney for the aforesaid *William West* (or *no one appearing*), in opposition;

Ordered, that *James Hallett*, of *Hartford*, in the county of *Hartford*, in the state of *Connecticut*, be, and he hereby is, appointed a referee to take the deposition of the said *William West*.

Enter: *John Marshall*, J. *S.* C.

2. That Commission Issue.

a. In General.

Form No. 7296.[3]

In the *Superior* Court of the *City and* County of *San Francisco*, State of *California*.

April Term, A. D. 1*898*.

Present: Hon. *John Marshall*, Judge of the *Superior* Court.

John Doe, plaintiff, against *Richard Roe*, defendant.	Order that a Commission Issue to Examine Witness.

Upon reading and filing the affidavit[4] of *Richard Roe*, and upon the files, papers and records in this action, and legal proof of service of

motion, the court or a judge authorized to make an order in the cause may, in its or his discretion, make an order appointing a referee to take the deposition of that person. N. Y. Code Civ. Proc. § 885 (Birds. Rev. Stat. (1896), p. 858, § 15). See also list of statutes cited *supra*, note 1, p. 488.

1. Order may be Made With or Without Notice. — N. Y. Code Civ. Proc., § 885 (Birds. Rev. Stat.(1896), p. 858, § 15).

2. Motion Papers to be Specified in Order. — If any order is entered, all the papers used or read on the motion on either side shall be specified in the order and shall be filed with the clerk, unless already filed or otherwise ordered by the court. N. Y. Gen. Rules of Pr., No. 3 (Hun's Ct. Rules (1896), No. 3); Faxon *v.* Mason, 87 Hun (N. Y.) 139.

3. The deposition of a witness out of the state may be taken upon a commission issued from the court, under the seal of the court, upon the order of the court, or by a judge or justice thereof, on the application of either party, upon notice to adverse party.

California. — Code Civ. Proc. (1897), § 2024.

Montana. — Code Civ. Proc. (1895), § 3350.

Nevada. — Gen. Stat. (1885), § 3434.

New Jersey. — Gen. Stat. (1895), p. 1403, § 29.

New York. — Code Civ. Proc., § 894 (Birds. Rev. Stat. (1896), p. 860, § 24).

Utah. — Rev. Stat. (1898), § 3450.

4. For form of affidavit upon which order may be issued see *supra*, Form No. 7260.

notice[1] of this motion having been made and filed, on motion of *Oliver Ellsworth*, attorney for the *defendant* in said action:

It is ordered, that a commission issue out of and under the seal of this court, directed to *James Hallett*,[2] a person agreed upon between the above named parties residing at the city of *Chicago*, in the county of *Cook*, in the state of *Illinois*, to take the testimony of *William West*, residing at the same place, as a witness on behalf of the *defendant* upon such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled, if the parties disagree as to their form, by the honorable judge of this court above named, on the *third* day of *May*, 1*898*, at *ten* o'clock in the *fore*noon, at *his chambers in the court-house* in said county of *San Francisco*.

John Marshall, Judge of the *Superior* Court

Form No. 7297.[3]

(*Title of court and cause as in Form No. 7247.*)

An application having been made upon affidavit[4] by the *defendant* in the above entitled cause for a commission to examine *William West*, *de bene esse*, and proof to the satisfaction of the court having been made that the said *William West* is a material witness in behalf of the *defendant* in the said action, and that the said *William West* resides out of this state and in the city of *Minneapolis*, in the state of *Minnesota*,[5] and satisfactory proof having been made that service of notice of said application, together with the copy of the interrogatories proposed by the *defendant*, was duly made upon the *plaintiff* (or *upon the attorney of plaintiff*):

Ordered, that a commission be awarded and issued out of and under the seal of said court, and directed to *James Hallett*, Esq., at No. *10 West* street, in the city of *Minneapolis*, county of *Hennepin*, and state of *Minnesota*, authorizing him to examine, *de bene esse*, the said *William West*, on oath, or affirmation; and it is further ordered, that the interrogatories submitted by the attorneys of the respective

1. **For form of notice of application** for order see *supra*, Form No. 7262.

2. **To Whom Issued.** — If issued to any place within the United States, it may be directed to a person agreed upon by the parties, or, if they do not agree, to any judge or justice of the peace, or commissioner selected by the court, or judge, or justice issuing it. Cal. Code Civ. Proc. (1897), § 2024. See also list of statutes cited *supra*, note 1, p. 488.

If issued to a country out of the United States, it may be directed to a minister, ambassador, consul, vice-consul or consular agent of the United States in such country, or to any person agreed upon by the parties. Cal. Code Civ. Proc. (1897), § 2024. See also list of statutes cited *supra*, note 1, p. 488.

Interrogatories, direct and cross, as the parties may prepare, to be settled, if the parties disagree as to their form, by the judge or officer granting the order for the commission, may be annexed to the commission. Cal. Code Civ. Proc. (1897), § 2025. See also list of statutes cited *supra*, note 1, p. 488.

Oral Examination.— Examination may be without written interrogatories when the parties agree to that mode. Cal. Code Civ. Proc. (1897), § 2025. See also list of statutes cited *supra*, note 1, p. 488.

3. *New Jersey.* — Gen. Stat. (1895), p. 1403, § 29. See also list of statutes cited *supra*, note 1, p. 488.

4. **For form of affidavit** upon which this order may be granted see *supra*, Form No. 7260.

5. **Nonresidence of witness sufficient ground** for the issuance of a commission. Leonard *v.* Sutphen, 7 N. J. Eq. 545.

parties to this action, which have been approved of by the court, be annexed to said commission.

On motion of *Jeremiah Mason*, attorney for *defendant*.

Let the rule above be entered on the minutes.

John Marshall, Judge.

Form No. 7298.[1]

(*Title of court and cause, and caption as in Form No. 6957.*)

Upon reading and filing the affidavit of *Richard Roe*,[2] the *defendant* in the above entitled action, bearing date the *tenth* day of *August*, 1897, and it appearing to the satisfaction of the court that facts exist authorizing the issuing of a commission in this action, and on reading and filing (*Here specify papers, if any, filed by the plaintiff in opposition to the motion*), and upon hearing *Oliver Ellsworth*, attorney for the above *defendant*, in argument in support of said motion, and *Jeremiah Mason*, attorney for *plaintiff* (or *no one appearing*), in opposition:*

Ordered, that a commission issue in this action, directed to *James Hallett*, of *Hartford*, in the state of *Connecticut*, to examine upon oath or affirmation, on interrogatories to be annexed to said commission, *William West*, of said *Hartford*, a witness on the part of the *defendant* in this action, and that the trial of this action be staid until the return of said commission.[3] It is further ordered that the plaintiff (or *defendant*) may join in the said commission, if he see fit.

John Marshall, J. S. C.

Enter:

b. Open Commission.

Form No. 7299.[4]

(*Commencing as in Form No. 7298, and continuing down to* *.)

Ordered, that a commission issue in this action, directed to *James Hallett*, of *Hartford*, in the state of *Connecticut*, to examine upon oath or affirmation any witness who may be produced by either party on or before the *fifteenth* day of *October*, 1897, upon oral questions to be put to the witness when he is produced, to take and certify

1. *New York.* — Code Civ. Proc., §§ 887–889 (Birds. Rev. Stat. (1896), p. 858, §§ 17, 19); Code Crim. Proc., § 643 (Birds. Rev. Stat. (1896), p. 868, § 74). See also list of statutes cited *supra*, note 1, p. 488.

Order is essential to issuance of commission. Mason, etc., Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282.

If commission is to issue by consent of parties, order must nevertheless be entered. Mason, etc., Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282.

2. **For form of affidavit** upon which this order may be granted see *supra*, Form No. 7260.

3. **The court or judge may impose such terms** as justice requires. N. Y. Code Civ. Proc., § 889 (Birds. Rev. Stat. (1896), p. 859, § 19); Hames *v.* Judd, 18 Civ. Proc. Rep. (N. Y. C. Pl.) 327; Kiefer *v.* Grand Trunk R. Co., (Supreme Ct.) 45 N. Y. St. Rep. 708; Wainwright *v.* Low, 49 Hun (N. Y.) 283; Ring *v.* Mott, 2 Sandf. (N. Y.) 683.

Entry of order in the office of the clerk is necessary when order is made by a judge out of court. N. Y. Code Civ. Proc., § 890 (Birds. Rev. Stat. (1896), p. 860, § 20).

4. *New York.* — Code Civ. Proc., § 894 (Birds. Rev. Stat. (1896), p. 860, § 24). See also list of statutes cited *supra*, note 1, p. 488.

For form of affidavit upon which this order may be issued see *supra*, Form No. 7260.

the deposition of each witness so examined, and to return the same and the commission immediately after the expiration of the time limited for the production of witnesses according to the directions given in or with the said commission, and that the trial of the above action be stayed until the return of said commission.

Enter: *John Marshall*, J. *S.* C.

c. For Examination Without Written Interrogatories.

Form No. 7300.[1]

(*Commencing as in Form No. 7298, and continuing down to* *.)[2]

Ordered, that a commission issue in this action, directed to *James Hallett*, of *Hartford*, in the state of *Connecticut*, to examine upon oath or affirmation *William West*, of said *Hartford*, a witness on the part of the *defendant* in this action, without written interrogatories, and that the deposition of said witness be taken upon oral questions (*concluding as in Form No. 7298*).

d. For Examination Partly upon Oral Questions.

Form No. 7301.[3]

(*Commencing as in Form No. 7298, and continuing down to* *.)[2]

Ordered, that a commission issue in this action, directed to *James Hallett*, of *Hartford*, in the state of *Connecticut*, to take the deposition of *William West*, of said *Hartford*, a witness on the part of the *defendant* in this action, partly upon written interrogatories to be annexed to the said commission, and partly upon oral questions (*concluding as in Form No. 7298*).

e. To Examine One Witness upon Oral Questions and Another upon Written Interrogatories.

Form No. 7302.[4]

(*Commencing as in Form No. 7298, and continuing down to* *.)[2]

Ordered, that a commission issue to take the deposition of *William West*, of *Hartford*, in the county of *Hartford* and state of *Connecticut*, a witness on the part of the *defendant* in this action, upon written interrogatories to be annexed to the said commission, and the deposition of *Samuel Short*, of said *Hartford*, a witness on the part of said *defendant*, upon oral questions (*concluding as in Form No. 7298*).

1. *New York.* — Order may direct that the commission issue without written interrogatories and that the deposition be taken upon oral questions. Code Civil Proc., § 893 (Birds. Rev. Stat. (1896), p. 860, § 23). See also list of statutes cited *supra*, note 1, p. 488.

2. **For form of affidavit** upon which this order may be granted see *supra*, Form No. 7260.

3. *New York.* — Order may direct that a commission issue to take the deposition of one or more witnesses, designated in the order, partly upon oral questions and partly upon written interrogatories. Code Civ. Proc., § 893 (Birds. Rev. Stat. (1896), p. 860, § 23). See also list of statutes cited *supra*, note 1, p. 488.

4. *New York.* — Order may direct that commission issue to take the deposition of one or more wit-

f. In Criminal Cases.

Form No. 7303.[1]

(*Venue and title of court and cause as in Form No. 5928.*) Order for Commission — Criminal Action.[2]

An application having been made to me in the above entitled action on the affidavit[3] of *John Doe* to take the testimony of *William West*, residing in *Chicago*, in the county of *Cook*, in the state of *Illinois*, a witness on behalf of the defendant, and being satisfied of the truth of the facts in such affidavit stated, and that the examination of such witness is necessary to the attainment of justice;

It is ordered, that the clerk of this court issue a commission to take the testimony of the witness above named.

It is further ordered, that the trial of this action be stayed for a period of *fifteen* days, for the execution and return of said commission.[4]

John Marshall, Judge.

3. Notice of Examination upon Order.

Form No. 7304.[5]

(*Title of court and cause as in Form No. 6954.*)[6]

nesses, designated in the order, upon oral questions, and one or more witnesses, designated in the order, upon written interrogatories. Code Civ. Proc., § 893 (Birds. Rev. Stat. (1896), p. 860, § 23). See also list of statutes cited *supra*, note 1, p. 488.

1. *North Dakota.* — If the court or judge to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that the commission be issued to take his testimony. Rev. Codes (1895), § 8389. See also

Arizona. — Pen. Code (1887), § 2090.
California.—Pen. Code (1897), § 1354.
Idaho. — Rev. Stat. (1887), § 8181.
Montana. — Pen. Code (1895), § 2505.
Nevada. — Gen. Stat. (1885). § 4436.
New York. — Code Crim. Proc., § 643 (Birds. Rev. Stat. (1896), p. 868, § 74).
Oklahoma. — Stat. (1893). § 5363.
South Dakota. — Dak. Comp. Laws (1887), § 7555.
Utah. — Rev. Stat. (1898), § 5043.

2. **Commission can Issue Only on Trial of an Indictment.** — People *v.* Haight, (Oyer & T. Ct.) 3 N. Y. Crim. Rep. 60, 13 Abb. N. Cas. (N. Y.) 199. In this case it was held that a commission could not issue to take testimony before commissioners on an inquiry into the sanity of a defendant under indictment.

3. **For form of affidavit** upon which this order may be granted see *supra*, Form No. 7260.

4. **Stay of Proceedings.**— The court or judge may insert in the order a direction that the trial be stayed for a specified time, reasonably sufficient for the execution of the commission and return thereof, or the case may be continued. N. Dak. Rev. Codes (1895), § 8389. See also

Arizona. — Rev. Stat. (1887), § 2090.
California. — Pen. Code (1897), § 1354.
Idaho. — Rev. Stat. (1887), § 8181.
Montana. — Pen. Code (1895), § 2505.
Nevada. — Gen. Stat. (1885), § 4437.
New York. — Code Crim. Proc., § 644 (Birds. Rev. Stat. (1896), p. 868, § 75).
Oklahoma. — Stat. (1893), § 5363.
South Dakota. — Dak. Comp. Laws (1887), § 7555.
Utah. — Rev. Stat. (1898), § 5043.

5. *New York.* — Written notice of the time and place of taking deposition, when taken pursuant to an order, must be given to the adverse party. Code Civ. Proc., § 899 (Birds. Rev. Stat. (1896), p. 861, § 29). See also list of statutes cited *supra*, note 1, p. 488.

6. **For formal parts** of notices in any jurisdiction consult the title NOTICES.

You are hereby notified that the deposition of *William West*,[1] a witness on behalf of the *defendant* in the above entitled action, will be taken by *James Hallett*,[2] for that purpose duly appointed by an order of the *Supreme* Court, made on the *fourteenth* day of *September*, 1897, at *the office of Daniel Webster*, No. *10 State* street, in the city of *Hartford*, in the state of *Connecticut*, on the *fifteenth* day of *October*, 1897, at *ten* o'clock in the *fore*noon.[3] (*Date, signature and address as in Form No. 6954.*)

VI. COMMISSION.[4]

1. In General.[5]

Form No. 7305.[6]

(*Formal commencement.*)[7]

Know ye, that we, reposing confidence in your integrity, skill and ability, have appointed you commissioner to take the testimony of *Samuel Short*, a material witness in a suit now pending in our *Circuit* Court of *Jefferson* county (or *in our said chancery court*, as the case may be), wherein *John Doe* is complainant (or *plaintiff*) and *Richard Roe*[8] is defendant, and we hereby authorize and empower you to call and cause to come before you the said witness, at such

1. **Names of witnesses** must be stated in the notice. N. Y. Code Civ. Proc., § 899 (Birds. Rev. Stat. (1896), p. 861, § 29).

2. **Person before whom deposition will be taken** must be stated. N. Y. Code Civ. Proc., § 899 (Birds. Rev. Stat. (1896), p. 861, § 29).

Depositions may be taken pursuant to an order of the court, before a person mutually agreed upon by the parties, or a chancellor, or a judge of a court of record, or the mayor or other chief magistrate of a city, or a justice of the peace of the state or territory where the witness is, who is not counsel or attorney for either party and not disqualified from serving as a juror within the state upon the trial of the action. N. Y. Code Civ. Proc., § 899 (Birds. Rev. Stat. (1896), p. 861, § 29).

3. **Time and place** must be stated. N. Y. Code Civ. Proc., § 899 (Birds. Rev. Stat. (1896), p. 861, § 29).

4. **For forms of application** for commission to take depositions see *supra*, Forms Nos. 7262 to 7270.

5. *Connecticut.* — Gen. Stat. (1888), §§ 1074–1077.

Idaho. — Laws (1893), p. 135, § 16.

Tennessee. — Code (1896), § 5633 *et seq.*

Vermont. — Stat. (1894), § 1260. See also list of statutes cited *supra*, note 1, p. 488.

6. *Alabama.* — Civ. Code (1886), § 2802 *et seq.* and § 3463 (relating to chancery practice).

For form of affidavit upon which commission is granted see *supra*, Form No. 7260.

For form of interrogatories upon which commission is issued see *Interrogatories*, p. 519, *supra*.

7. **Formal commencement** in *Alabama*:

"State of *Alabama*, } *Circuit* Court.
Jefferson County. }

To *William Morris*, *Richard Johnson*, or such of you as may act herein, who reside in the city of *Albany*, county of *Albany*, and state of *New York*, Greeting:"

Must be directed to one or more commissioners appointed by the register. Ala. Civ. Code (1886), § 3470.

Addressed "to *George W. Sneed*, or any justice of the peace of *Lauderdale* county, etc.," was held to be good as an authority to Sneed only, and will not authorize any other justice of the peace to execute it. Campbell *v.* Woodcock, 2 Ala. 41.

Cannot be Issued in Blank. — Worsham *v.* Goar, 4 Port. (Ala.) 441.

8. **Need not state names of all parties** composing a firm, and it is sufficient to describe the firm by its firm name. Evans *v.* Norris, 1 Ala. 511.

time and place as you shall appoint,[1] and his deposition on the Holy Evangelists to take, as well for the plaintiff as the defendant, touching his knowledge of the matters and things in controversy in said suit (or *upon interrogatories annexed to this commission*, when the deposition is to be taken upon interrogatories),[2] which deposition, when so taken, shall be signed by said witness, and certified by such of you commissioners as may act herein; and you are further commanded the deposition, when so taken, with this commission, to return, under your hands and seals to the clerk of said court with all convenient speed,[3] and any one or more of you commissioners are authorized to act alone in the premises. (*Teste.*)[4]

Form No. 7306.[5]

(*Formal commencement.*)[6] Know ye, that we, reposing confidence in your prudence and fidelity, do, by these presents, give unto you authority diligently to examine *Samuel Holtzman* and *Richard Webb* as witnesses in a certain suit now pending in the *Pulaski Circuit* Court, in which *John Drees* is plaintiff and *Edward Nevins* is defendant. Therefore, we desire that you cause the said witnesses to come before you; and, first duly swearing them to testify the whole truth in the premises, that you examine them upon the interrogatories and cross-interrogatories hereto annexed; that you cause said examination to be reduced to writing, either by yourself or by the witnesses in your presence, and to be by them subscribed; and, in taking said depositions, you will permit neither party, nor his agent or attorney, to be present at the examination of the witnesses, unless both parties are present or represented by an agent or attorney, or unless the opposite party, or his agent or attorney, has been seasonably notified of the time and place of taking the depositions, or the party attending has been notified by the opposite party to attend; and when you shall so have taken the same, then that you send the same without delay, duly certified, with the commission, interrogatories and exhibits, closed up under your seal, with an

1. **Time and Place.** — Must instruct the commissioner to take the deposition at such time and place as he shall appoint. Ala. Civ. Code (1886), § 2803.

May direct commissioner to take the deposition on "tomorrow," the commission bearing a specified date. Wolfe *v.* Parham, 18 Ala. 441.

2. Ala. Civ. Code (1886), § 2801.

3. **Must be made returnable** with all convenient speed. Ala. Civ. Code (1886), § 3470.

4. **Teste** in *Alabama:*

"Witness my hand this *tenth* day of *March*, 1896.

John Hancock, Clerk (or *Register*) of said court."

By Whom Issued. — In the criminal or circuit court, by the clerk; in the chancery court, by the register. Ala. Civ. Code (1886), §§ 2817, 3470.

5. *Arkansas.* — Sand. & H. Dig. (1894), § 3001.

For form of interrogatories upon which commission is issued see *supra*, Form No. 7271.

6. **Formal commencement** in *Arkansas:*

"*Pulaski Circuit* Court.

The State of *Arkansas*, To any officer authorized to take depositions in or out of this state."

May issue generally "to any officer authorized to take depositions in or out of this state." Sand. & H. Dig. Ark. (1894), § 3001.

By consent of parties or by order of the court, a commission to take depositions may be directed to any person. Sand. & H. Dig. Ark. (1894), § 2983.

indorsement on the envelope showing them to be depositions, and the style of the case in which they were taken, addressed to the undersigned at *Little Rock*, in said state.[1] (*Teste.*)[2]

Form No. 7307.[3]

(*Formal commencement.*)[4] Whereas, it appears to the judge of our *Superior* Court [Department No. *1*] in and for the *city and* county of *San Francisco*, state of *California*, that *William West*,[5] of the city of *Chicago*, in the county of *Cook*, in the state of *Illinois*, is a material witness in the above entitled action, now depending in our said *Superior* Court, and that the personal attendance of said witness cannot be procured at the trial of the said action, we, confiding in your prudence and fidelity, have appointed you, and by these presents do appoint you, commissioner to examine said witness, and therefore we authorize and empower you,[6] at certain days and places, to be by you for that purpose appointed, diligently to examine said witness on the direct and cross interrogatories[7] annexed to this commission

1. Commission is sufficient in which the clerk, after first stating the name of the parties and the court in which the suit is pending, in the caption, copies the order of the court, and directs the officer to whom the commission is directed to examine the party, named as a witness "in the above mentioned suit," upon the annexed interrogatories. Stone *v.* Stillwell, 23 Ark. 434.

2. Teste in *Arkansas:*

"Witness my hand and seal of said court this *fourth* day of *May*, 1898.

(SEAL) *Calvin Clark*, Clerk."

3. *California.* — Code Civ. Proc. (1897), § 2024 *et seq.*; Pen. Code (1897), § 1354 *et seq.*

Montana. — Code Civ. Proc. (1895), § 3350 *et seq.*; Pen. Code (1895), § 2505 *et seq.*

Nevada. — Gen. Stat. (1885), § 3434 *et seq.*; § 4436 *et seq.* (in criminal cases).

Utah. — Rev. Stat. (1898), § 3450 *et seq.*; § 5043 *et seq.* (in criminal cases).

4. Formal commencement in *California:*

"Department No. *1*.

In the *Superior* Court, *City and* County of *San Francisco*, State of *California*.

John Doe, plaintiff, against *Richard Roe*, defendant.	No. *102*. Commission to Take Testimony.

The People of the state of *California* send greeting to *James Hallett*, of *Chicago*, in the county of *Cook*, in the state of *Illinois*."

To Whom Issued. — In the United States. See *supra*, note 3. Out of the United States. See *supra*, note 3.

For form of affidavit upon which commission is granted see *supra*, Form No. 7260.

For form of order directing issuance of commission, see *supra*, Form No. 7296.

Justice's Court. — If the court be a justice's court, the commission shall have attached to it a certificate, under seal, by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace at the date of the commission. Cal. Code Civ. Proc. (1897), § 2024.

5. Witnessss Must be Named. — A commissioner has no authority to take testimony of any person other than those named in the commission, and a misnomer of the christian name of a witness will render the deposition as to him *ex parte* and inadmissible in evidence. Smith *v.* Westerfield, 88 Cal. 374.

6. Must authorize commissioner to administer oath to the witness, to take his deposition in answer to the interrogatories, or, when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition, to the court in a sealed envelope, directed to the clerk or other person designated or agreed upon, and forwarded to him by mail or other usual channel of conveyance. See *California*, *Montana*, *Nevada* and *Utah* statutes cited *supra*, note 3.

7. Interrogatories, direct and cross, may be annexed to commission. See *California*, *Montana*, *Nevada* and *Utah* statutes cited *supra*, note 3; also list of statutes cited *supra*, note 1, 488.

(or *in respect to the question in dispute*, if no interrogatories are filed), and upon his corporal oath first taken before you, which oath you are hereby empowered to administer, and cause the said examination of the said witness to be reduced to writing, and signed by the said witness, and by yourself, and then return the same annexed to this commission, unto our *Superior* Court aforesaid, with all convenient speed, enclosed under your seal. (*Teste.*)[1]

Form No. 7308.[2]

(*Formal commencement.*)[3] Whereas, it has been represented to us that *William West*, of the city of *Chicago*, in the county of *Cook*, in the state of *Illinois*, is a material witness in a certain cause now pending in our *District* Court, in and for the county of *Arapahoe* aforesaid, between *John Doe*, plaintiff, and *Richard Roe*, defendant, and that the said witness resides at the city of *Chicago* aforesaid, without the said state of *Colorado*, and that his personal attendance cannot be procured at the trial of the said cause: Now, know ye, that we, in confidence of your prudence and fidelity, have appointed and by these presents do appoint you commissioner to examine the said witness, and do therefore authorize and require you to cause the said witness to come before you at such time and place as you may therefor designate and

For form of interrogatories see *interrogatories*, *supra*, p. 519.

Oral examination may be had by agreement of parties. See *California*, *Montana*, *Nevada* and *Utah* statutes cited *supra*, note 3, p. 539.

1. Teste in *California:*

"Witness, Honorable *John Marshall*, presiding judge of the said *Superior* Court in and for the *city and* county of *San Francisco*, state of *California*, this *tenth* day of *May*, A. D. 1898.

Attest my hand and the seal of said court this *tenth* day of *May*, A. D. 1898.

(SEAL) *Calvin Clark*, Clerk."

Under Seal of the Court. — The commission must be issued from the court, under the seal of the court, upon the order of the court or judge, or a justice thereof. See *California*, *Montana*, *Nevada* and *Utah* statutes cited *supra*, note 3, p. 539.

Commission attested by the certificate of the clerk, and under the seal of the court, is sufficient. Smith *v.* North American Min. Co., 1 Nev. 423.

2. *Colorado.*—Mills' Anno. Code (1896), §§ 346–349.

Illinois. — Starr & Co. Anno. Stat. (1896), c. 51, § 26.

Minnesota.—Stat. (1894), §§ 5684–5685.

Commission, When Essential. — The deposition of a witness in this state, living outside of the county in which the action is pending, if on interrogatories, must be taken under a commission directed to the officer taking it. Nevitt *v.* Crow, 1 Colo. App. 453.

For form of application upon which commission in granted see *supra*, Form No. 7262.

3. Formal commencement in *Colorado*,

"State of *Colorado*, } ss.
County of *Arapahoe*. }

The People of the state of *Colorado*, To *James Hallett*, of *Chicago*, in the county of *Cook*, in the state of *Illinois*, Greeting:"

To Whom Issued. — See *Colorado*, *Illinois* and *Minnesota* statutes cited *supra*, note 2.

Clerk of court. Glenn *v.* Brush, 3 Colo. 26.

Any judge, master in chancery, notary public, or justice of the peace, in the county in which the witness resides, is sufficient, and it is unnecessary to name the party before whom the deposition is to be taken. Bracket *v.* Nikirk, 20 Ill. App. 525.

The person may be designated by the name of the office he holds, as well as by his proper name. Brown *v.* Luehrs, 79 Ill. 575.

Where witness is in military service, the commission may be addressed "to any commissioned officer in the military or naval service of this state, or the United States." Starr & C. Anno. Stat. Ill. (1896), c. 51, § 26.

appoint, and diligently to examine the said witness on the oath or affirmation of the said witness by you first duly in that behalf administered, and faithfully to take the deposition of the said witness upon all interrogatories and cross-interrogatories enclosed with or attached to these presents,[1] both on the part of the said plaintiff and of the said defendant and none others (or *in respect to the question in dispute*, if no interrogatories are filed), and the same when thus taken, together with this commission and the said interrogatories, to certify unto our said *District* Court of *Arapahoe* county, with the least possible delay. (*Teste.*)[2]

Form No. 7309.

The State of *Delaware*, To *James Hallett*, Greeting:

Know you, that having confidence in your competency and fidelity we have appointed you, and by these presents do give unto you full power and authority diligently to examine all witnesses whatsoever [upon certain interrogatories annexed to this commission and exhibited to you][3] in a cause wherein *John Doe* is complainant and *Richard Roe* is defendant, now pending in our Court *of Chancery* in and for *Kent* county; and therefore we command you that you do at a certain place, and at such time as may be by you appointed for that purpose, cause the said witnesses to come before you, and then and there examine each of them [apart upon the said interrogatories], either on oath[4] or affirmation, as is, or may be, authorized by law, and that you do take such their examinations and reduce

1. Interrogatories should be attached to commission.

Colorado. — Mills' Anno. Code (1896), § 350.

Illinois. — Starr & C. Anno. Stat. (1896), c. 51, § 26.

In *Colorado*, examination may be without interrogatories, upon agreement of parties. Mills' Anno. Code (1896). § 350.

For form of interrogatories see *Interrogatories*, *supra*, p. 519.

2. Teste in *Colorado:*

"Witness, *Calvin Clark*, clerk of said court, and the seal thereof hereto affixed, at *Denver*, in said county, this *third* day of *August*, A. D. 1897.

(SEAL) *Calvin Clark*, Clerk."

In *Minnesota*, the commission is substantially like that given in Form No. 7308, *supra*, except that it is attested thus:

Witness: The Hon. *John Marshall*, judge of said *District* Court, at *Minneapolis* aforesaid, this *tenth* day of *May*, A. D. 1898.

(SEAL) *Calvin Clark*, Clerk."

Clerk Shall Issue — *Colorado.* — Mills' Anno. Code (1896), § 349.

Illinois. — Starr & C. Anno. Stat. (1896), c. 51, § 26.

Must be Under Seal of the Court — *Colorado.* — Blakeslee *v.* Dye, 1 Colo. App. 118.

Illinois. — Starr & C. Anno. Stat. (1896), c. 51, § 26.

3. Examination of Witness Orally. — Where commission is issued to examine witnesses orally, the form should be as in Form No. 7309, except that the word "orally" should be inserted in place of the words "upon certain interrogatories annexed to this commission and exhibited to you," and the words "apart upon the said interrogatories."

4. Oath to be administered witness is as follows: "You will true answer make to all such questions as shall be asked of you [on these interrogatories] without favor or affection to either party therein; you shall speak the truth, the whole truth, and nothing but the truth; so help you God."

In case of oral examination, the oath is to be varied by omitting the words "on these interrogatories" and inserting the following: "touching such matters as you shall be inquired of in the case

them to writing, and when you shall have taken them you are to send them to our Court *of Chancery* in and for *Kent* county aforesaid without any delay whatsoever, closed up and under your seal, distinctly and plainly set together, with the said interrogatories, and this writ.

And we further command that every clerk employed in taking, writing, transcribing, or engrossing the deposition, or depositions, of witnesses to be examined by virtue of these presents, shall, before he is permitted to act as such clerk, or be present at such examination, be sworn or affirmed, according to the form specified in the schedule hereunto annexed, and which oath or affirmation you are hereby authorized to administer. (*Teste.*)[1]

Form No. 7310.[2]

(*Formal commencement.*)[3] Know you, that in confidence of your prudence and fidelity you have been appointed and by these presents you are invested with power and authority to examine *William West* and *Samuel Short* as witnesses for the *plaintiff* in the above entitled cause, upon the interrogatories and cross-interrogatories annexed to this commission; and, therefore, you are hereby commanded, at a certain day and place, or certain days and places, to be appointed by you, to cause said witnesses to come before you, and then and there examine them on oath or affirmation, upon the said interrogatories and cross-interrogatories,[4] and reduce their testimony into writing to be signed by said witnesses; and, having so done, annex the same to this commission, closed up under your seal, and make return thereof into said court with all convenient speed. (*Teste.*)[5]

now pending wherein *John Doe* is complainant and *Richard Roe* is defendant."

For form of interrogatories see *Interrogatories*, *supra*, p. 519.

1. Teste in *Delaware:*

"Witness, the Honorable *John Marshall*, *chancellor* at *Dover*, the *tenth* day of *May*, A. D. 18*98*.

Calvin Clark, Register."

2. *District of Columbia.* — Comp. Stat. (1894), c. 71, § 19; Supreme Ct. Rules, No. 115.

In Anacostia, etc., R. Co. *v.* Klein, 8 App. Cas. (D. C.) 75, the court questioned whether the Maryland act of 1773, c. 7, § 7 (Dist. of Col. Comp. Stat., c. 71, § 19), was still in force in the District, although the statute has not been expressly repealed, and is not in conflict with the provisions of the acts of congress.

3. Formal commencement in *District of Columbia:*

"In the *Supreme* Court of the *District of Columbia:*

John Doe, plaintiff, against *Richard Roe*, defendant.	Commission to take Deposition. No. *102. At Law.*

The President of the United States, to *James Hallett* and *Edward L. Walker*, Greeting:"

4. Interrogatories. — Deposition shall be taken upon interrogatories. Dist. of Col. Supreme Ct. Rules, No. 115. For form of interrogatories see *Interrogatories*, *supra*, p. 519.

Oral examination may be directed by the court or justice for cause shown. Dist. of Col. Supreme Ct. Rules, No. 115.

5. Teste in *District of Columbia:*

"Witness, the Honorable *John Marshall*, chief justice of said court, the *tenth* day of *May*, A. D. 18*98*.

Calvin Clark, Clerk,
By *John Drew*, Assistant Clerk."

Form No. 7311.[1]

(Fla. Rev. Stat. (1892), § 1128.)

(*Formal commencement.*)[2] Whereas, there is a certain controversy now depending in said court, between *John Doe*, plaintiff, and *Richard Roe*, defendant, and whereas *William West*[3] of *Atlanta*, in the state of *Georgia*,[4] is a material witness in said matter of controversy, and cannot attend our said court in person without manifest inconvenience: Know ye, that we, reposing special trust and confidence in your prudence and fidelity, have appointed you, and you are hereby authorized and required, to cause the said *William West* personally to come before you and after being duly sworn, and having duly sworn him to examine him concerning the said matter of controversy, agreeably to the interrogatories hereunto annexed;[5] and the answers to the same being plainly and distinctly written, you are to send closed up under your hands and seals to our said court, to be held on the *sixteenth* day of *May next*, together with this writ, and all papers hereto attached. (*Teste.*)[6]

Form No. 7312.[7]

(*Formal commencement.*)[8] Reposing full confidence in your prudence and fidelity, you are hereby authorized and empowered to cause the witnesses named in the attached notice, and each of them, to come

1. *Florida.* — Rev. Stat. (1892), § 1127.

Georgia. — Super. Ct. Rules, No. 32, prescribe a form of commission like the *Florida* commission given *supra*, Form No. 7311.

For form of notice of application for commission see *supra*, Forms Nos. 7285, 7286.

2. **Formal commencement** in *Florida:*

"State of *Florida*, }
County of *Leon*. }

By his Honor *John Marshall*, Judge of the *Circuit* Court of the *Second* Judicial Circuit of the state of *Florida*, in and for *Leon* county.

To *James Hallett* and *William Morris*, Esquires, *Atlanta*, *Georgia*, greeting:"

To Whom Issued. — May be issued to two commissioners, one of whom is selected by the applicant and the other by the opposite party. The commissioners must be named in the commission. Fla. Rev. Stat (1892), §§ 1124, 1127.

In *Georgia*, commissions are generally issued in blank allowing the party to select his commissioners, but in any case the opposite party has the privilege of naming two competent commissioners whose names are inserted in the commission, and one of them shall act in the execution thereof unless a good and sufficient reason be shown for his failure. 2 Code (1895), § 5302.

3. **Witnesses' Names.** — The names of the witnesses intended to be examined by commission shall be distinctly specified in the notice served upon the adverse party preparatory to issuing the commission. Ga. Super. Ct. Rules, No. 33.

4. **Residence of witness** must be stated when it is known. McWilliams *v.* McWilliams, 68 Ga. 459.

5. **Interrogatories,** direct, cross and redirect, shall be annexed to the commission. Fla. Rev. Stat. (1892), § 1127.

For form of interrogatories see *Interrogatories*, *supra*, p. 519.

For form of notice of filing interrogatories see *supra*, Forms Nos. 7285, 7286.

6. **Teste** in *Florida:*

"Witness, the Honorable *John Marshall*, judge of said court, this *twenty-fifth* day of *April*, A. D. 1898, and of the independence of the United States the *one hundred and twenty-second* year.

(SEAL) *Calvin Clark*,
Clerk *Circuit* Court."

7. **Commission for Foreign Country.** — Horner's Stat. Ind. (1896), § 433.

8. **Formal commencement** in *Indiana:*

"The State of *Indiana*, }
County of *Posey*. } ss.

The State of *Indiana*, To *James Hallett*

before you as commissioner of and for the state of *Indiana*, at such time and place as you may appoint, and then and there, under oath or affirmation to be by you first administered, to take the deposition of each of said witnesses upon the interrogatories hereto annexed. The depositions of said witnesses are to be taken upon the part of the *plaintiff* in a cause now pending in the *Circuit* Court of *Posey* county, in the state of *Indiana*, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, as well on the part of the plaintiff as of the defendant. You shall first swear or affirm each witness, that he will make a true, full and perfect answer to all interrogatories to be propounded to him. You shall then propound to the witness, in their right order, each of the interrogatories, cross-interrogatories, and re-examining interrogatories hereto annexed,[1] and shall accurately write the answers of the witness to each and all of said interrogatories. At the conclusion of each deposition, you shall read carefully to the witness each interrogatory propounded to him, and his answer thereto, and shall correct the answers as the witness may desire, and then the witness shall sign the deposition. Neither the parties, their agents or attorneys, shall be present, nor shall they or any of them be informed of the nature of the evidence until the deposition is finished. After the depositions are signed, you shall annex thereto your certificate, showing:—

1. That you are not interested in said action, nor of kin to any party thereto.

2. That each witness was sworn or affirmed according to law.

3. That the interrogatories hereto annexed, and each of them, were propounded to the witness in manner and form and order as they are set out.

4. That the answers to said interrogatories were written down by yourself (or by some disinterested person in your presence and under your direction), and were by you read over, with the interrogatories, to the witness, and such corrections were made as the witness requested.

and any other person authorized by law to take and certify depositions in the province of *Ontario*, *Canada*, to be read in evidence within the state of *Indiana*."

Must be issued to the officer or commissioner designated in the request. Horner's Stat. Ind. (1896), § 433.

In contested election cases, the commission must be issued by the clerk of the circuit court, and directed to two justices of the peace of the county in which the contesting party resides. Horner's Stat. Ind. (1896), §§ 4747, 4748.

1. Commission upon Interrogatories.— Interrogatories must be annexed to commission. Horner's Stat. Ind. (1896), § 449. The form of the commission may be as follows:

(*Formal commencement as in Form No. 7312, supra.*) "Reposing full confidence in your prudence and fidelity you are hereby authorized and empowered to cause *William West*, of *Chicago*, in the county of *Cook*, state of *Illinois*, to come before you at such time and place within said county of *Cook* as you may appoint, then and there faithfully to take the deposition of said *William West* upon the interrogatories and questions annexed to this commission. The deposition of said witness to be used on behalf of the *defendant* in a cause now pending in the *Posey Circuit* court, state of *Indiana*, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, and thereupon to make return to this court without delay of your doings under this commission." (*Teste as in Form No. 7312, supra.*)

For form of interrogatories see *Interrogatories, supra*, p. 519.

For form of notice of filing interrogatories see *supra*, Form No. 7287.

5. That the deposition was then signed by the witness in your presence.

6. That none of the parties to said action were present, either in person, by agent or attorney; nor were any of them informed of the nature of the evidence given at any time before the deposition was finished.

7. The time and place of taking said depositions.

You shall then sign and seal said certificate, and shall enclose the deposition, with the commission, notice, interrogatories, answers and exhibits, firmly attached together and securely sealed, and having indorsed the package with the title of the cause and the names of the witnesses, you shall transmit the same addressed to the clerk of the court in which this suit is pending, at *Mount Vernon*, *Indiana*, without delay. (*Teste.*)[1]

Form No. 7313.[2]

(*Formal commencement.*)[3] You are hereby authorized and required, at such time and place as you may designate in said county of *Hennepin* and state of *Minnesota*, to cause to come before you *William West*, of said county and state, for the purpose of taking his deposition upon such interrogatories and cross-interrogatories as may be hereto annexed, which deposition is to be used in evidence on the trial of a certain cause now pending in the *District* Court of *Wayne* county, *Iowa*, wherein *John Doe* is plaintiff and *Richard Roe* defendant.[4] That you propound to the said witness the interrogatories hereto

1. **Teste** in *Indiana:*

"In witness whereof, I, *Calvin Clark*, clerk of said court, hereunto affix the seal thereof and subscribe my name at *Mt. Vernon*, *Indiana*, this *tenth* day of *July*, 1897.

(SEAL) *Calvin Clark*, Clerk."

2. *Iowa.* — Code (1897), § 4685.

3. **Formal commencement** in *Iowa:*

"State of *Iowa*, *Wayne* County. } ss. *District* Court, *March* Term, 1898.

To *Norton Porter*, Esq., a notary public within and for the county of *Hennepin*, in the state of *Minnesota*, greeting:"

Must issue under name of the court. Iowa Code (1897), § 4694.

Must be directed to some officer, either by his name of office or by his individual name and official style, together with the name of the state and county where he resides, and it is not regular to direct to several officers in the alternative. Levally *v.* Harmon, 20 Iowa 533; Iowa Code (1896), § 4690.

Where the commission is directed to the clerk of the district court, and the officer taking the deposition certifies that he is clerk of the first judicial court of Minnesota territory, the deposition will be suppressed, the code requiring that the name of the court of which the commissioner is clerk be stated in the commission. Jones *v.* Smith, 6 Iowa 229.

Need Not Contain Name of Officer. — "To any notary public," etc., is sufficient. Sheriff *v.* Hull, 37 Iowa 174.

A commission directed "To any notary public in and for *Davidson* county, in the state of *Tennessee*," is sufficient. Sheriff *v.* Hull, 37 Iowa 174, *citing* Lyon *v.* Barrows, 13 Iowa 428; Levally *v.* Harmon, 20 Iowa 533.

Residence of Commissioner. — When a deposition is to be taken in the United States or Canada, it is sufficient to name the state and county within which the commissioner resides; but if to be taken outside of the United States or Canada, the city or town in which the commissioner resides should be stated. Lyon *v.* Barrows, 13 Iowa 428.

Abbreviations. — The use of abbreviations of the county and state in a commission will not render the deposition invalid. Gilman *v.* Sheets, 78 Iowa 499.

4. **Need only contain a statement** of the case and court in which testimony is to be used, and the authority conferred upon the commissioner. Iowa Code (1897), § 4694.

annexed, and cause the same to be written out, and the answers thereto to be inserted immediately following the respective interrogatories.[1] That you cause the whole to be read over to the witness and the same to be subscribed by him and duly sworn to before you. That you take such deposition in accordance with your certificate, which you will attach to the deposition of each separate witness, stating that it was subscribed and sworn to by the said witness at the time and place therein mentioned. That you then seal up the whole, including this commission and the interrogatories hereto annexed, all enclosed in one envelope, and return the same to the clerk of the *District* Court of *Wayne* county, at *Corydon*, *Iowa*. That you indorse on the outside of said envelope thus directed the title of the cause in which the deposition is to be used, and that you execute this commission with all convenient speed. (*Teste.*)[2]

Form No. 7314.[3]

(Bullitt's Civ. Code Ky. (1895), p. 724.)

(*Formal commencement.*)[4] You are authorized to examine witnesses upon the interrogatories and cross-interrogatories, copies of which are annexed hereto.[5] (*Teste.*)[6]

Form No. 7315.[7]

(*Formal commencement.*)[8] Be it known that you are appointed commissioners to examine evidence in a cause depending in *Prince George's County* Court, between *John Doe*, plaintiff, and *Richard Roe*, executor of *Julia Roe*, defendant. Therefore you are requested, having first taken the oath hereunto annexed, and also administered the annexed oath to the person whom you shall appoint as clerk to

1. **Interrogatories** shall be annexed to commission. Iowa Code (1897), § 4694.

For form of interrogatories see *Interrogatories*, *supra*, p. 519.

2. **Teste** in *Iowa:*

"Witness, *Calvin Clark*, clerk of the *District* Court of said county, with the seal of said court hereto affixed, at *Corydon*, this *fifteenth* day of *February*, A. D. 18*98*.

(SEAL) *Calvin Clark*, Clerk."

Must be Signed by the Clerk. — Iowa Code (1897), § 4694.

Must be Under Seal of the Court. — Iowa Code (1897), § 4694.

Actions in Justices' Courts. — Commission shall issue from office of clerk of district court of the county. Iowa Code (1897), § 4695.

3. *Kentucky.* — Bullitt's Civ. Code (1895), § 577; Bullitt's Crim. Code (1895), § 153.

This form of commission to take depositions is proper in cases in counties where the circuit court has not continuous sessions. Bullitt's Civ. Code Ky. (1895), p. 724, note *h*.

4. **Formal commencement** in *Kentucky:*

"State of *Kentucky*, *Kenton Circuit* Court.

To any officer authorized to take depositions in or out of this state."

Justices of the peace in other states are not empowered to take depositions to be used in this state. Gilly *v.* Singleton, 3 Litt. (Ky.) 250.

5. **Interrogatories** must be annexed to commission. Bullitt's Civ. Code Ky. (1895), § 577. For form of interrogatories see *Interrogatories*, *supra*, p. 519.

For form of notice of filing interrogatories see *supra*, Form No. 7288.

6. **Teste** in *Kentucky:*

"Witness this *twentieth* day of *May*, 18*98*. *Calvin Clark*, Clerk,

Kenton Circuit Court."

7. *Maryland.*—Pub. Gen. Laws (1888), art. 35, § 15.

8. **Formal commencement** in *Maryland:*

"*Prince George's* County, sct.

The state of *Maryland*, To *James Hallett* and *William Morris*, of *Richmond*, in the state of *Virginia*, gentlemen, greeting:"

attend the execution of this commission, that at such time and place as to you shall seem convenient you cause to come before you all such witnesses as shall be made or produced to you, either by the plaintiff or defendant, and that you examine them upon their corporal oath, to be by you administered, upon the Holy Evangely of Almighty God touching their knowledge or remembrance of anything that may relate to the cause aforesaid, and that you cause notice to be given to the parties, or their attorneys, of the execution of this commission before you execute the same, and having reduced the depositions of the witnesses so taken by you into writing, to send the same with this our commission, closed under your hands and seals, to the *County* Court of *Prince George's* county, with all convenient speed. (*Teste.*)[1]

Form No. 7316.[2]

(Taken from State *v.* Bourne, 21 Oregon 218.)

(*Formal commencement.*)[3] Assured of your prudence and fidelity, we do by these presents appoint and empower you to take the deposition of *Jonathan Bourne, Jr.*, of *Portland*, in said state of *Oregon*, to be used in a suit now pending in our *Superior* Court between *Annie B. Everett*, as plaintiff, and *John Stetson*, as defendant, and on certain days, to be by you appointed, to cause the deponent to come before you, and him carefully examine on oath or affirmation in answer to several interrogatories hereto annexed,[4] and reduce the

Number of Commissioners. — The law requires two commissioners, unless the parties consent that the commission may issue to one alone. Md. Pub. Gen. Laws (1888), art. 16, §§ 227, 228; Billingslea *v.* Smith, 77 Md. 504; Sewell *v.* Gardner, 48 Md. 178.

Judge may prescribe rules for execution and return of commission, as the nature of the case may require. Md. Pub. Gen. Laws (1888), art. 16, § 230.

Where Executed. — A commission addressed to commissioners of the District of Columbia may be executed in Virginia. Calvert *v.* Coxe, 1 Gill (Md.) 95.

When interrogatories are sent with commission, no notice need be given to the parties of the time and place of the execution of a foreign commission. Calvert *v.* Coxe, 1 Gill (Md.) 95.

Deposition taken before commissioner of the United States must be taken in accordance with the provisions of the laws of this state. Crichton *v.* Smith, 34 Md. 42.

1. **Teste** in *Maryland:*

"Witness, the Hon. *John Marshall*, Chief Judge of *Prince George's County* Court, this *tenth* day of *September*, 1897.

(SEAL) *Calvin Clark*, Clerk,
Prince George's County Court."

2. *Maine.* — Rev. Stat. (1883), c. 107, § 21; Supreme Jud. Ct. Rules, No. 24. *Massachusetts.* — Pub. Stat. (1882), c. 169, § 40 *et seq.*; Supreme Jud. Ct. Rules, No. 19; Super. Ct. Rules, No. 38.

3. **Formal commencement** in *Massachusetts:*

"Commonwealth of *Massachusetts.*

(SEAL) To any commissioner appointed by the governor of said commonwealth of *Massachusetts*, or to any justice of the peace, notary public, or other officer legally empowered to take depositions or affidavits in the state of *Oregon*, greeting:"

Name of magistrate need not necessarily be inserted in the commission, if there is a proper designation by official title of the person who may take the deposition. Tucker *v.* Utley, 168 Mass. 415.

A commission directed "To any commissioner appointed by the act of the *commonwealth* of *Massachusetts*, to any justice of the peace, notary public, or other officer legally empowered to take depositions in *Glasgow, Scotland*," is within the sixth rule of the superior court. McKinney *v.* Wilson, 133 Mass. 131.

4. **Interrogatories Shall be Annexed.** — See *Maine* and *Massachusetts* statutes and rules of court cited *supra*, note 2.

For form of interrogatories, see *Interrogatories, supra*, p. 519.

examination, or cause the same to be reduced to writing in your presence; and after such deposition shall have been reduced to writing, it shall be carefully read to or by deponent, and shall then be subscribed by him. You shall permit neither party to attend at the taking of the deposition, either himself or by any attorney or agent, nor to communicate by interrogatories or suggestions with the deponent whilst giving his deposition in answer to the interrogatories annexed to this commission. And you shall take such deposition in a place separate and apart from all other persons, and permit no person to be present at such examination except the deponent and yourself and such disinterested person (if any) as you may think proper to appoint as clerk to assist you in reducing the deposition to writing. And you shall put the several interrogatories and cross-interrogatories to the deponent in their order, and take the answer of the deponent to each fully and clearly before proceeding to the next, and not read to the deponent nor permit the deponent to read a succeeding interrogatory until the answer to the preceding one has been fully taken down.

Of this our writ, with your doings by warrant of the same, you will make return under seal into our said court with all convenient expedition. (*Teste.*)[1]

Form No. 7317.[2]

(*Formal commencement.*)[3] Whereas, it appears herein that *Samuel Short* and *William West* are material witnesses in the above cause, and that the parties thereto are entitled to take the testimony of said witnesses by deposition, *de bene esse*; you are therefore hereby appointed commissioner for the taking of such testimony. We com-

1. **Teste** in *Massachusetts:*

"Witness, the Honorable *Albert Mason*, Chief Justice of our said court, and the seal thereof at our city of *Boston*, on the *twenty-first* day of *November*, in the year of our Lord one thousand eight hundred and *ninety*.

Jos. A. Willard, Clerk."

2. *Michigan.* — In any case where the deposition of a witness can be taken upon notice, his deposition may instead be taken under commission, and any circuit court commissioner in the state of *Michigan*, or the court in which such proceeding is begun or pending, or the judge, clerk or register thereof, or in any case pending before a justice of the peace, such justice shall, upon affidavit showing reason therefor, issue a commission for the taking of the testimony of such witness before any person therein appointed as commissioner. Public acts (1895), No. 180.

3. **Formal commencement** in *Michigan:*

"State of *Michigan*.

In the *Circuit* Court for the county of *Montcalm*.

John Doe against *Richard Roe*. } State of *Michigan*, County of *Montcalm*. } ss.

In the name of the People of the state of *Michigan*.

To *James Hallett*, Esquire, of *Cincinnati*, (SEAL) in the state of *Ohio*, greeting."

Commissioner Shall be Named. — Mich. Pub. Acts (1895), No. 180, § 2.

Interrogatories may be attached to commission. Mich. Pub. Acts (1895), No. 180, § 2.

For form of interrogatories see *Interrogatories*, *supra*, p. 519.

Printed upon commission must be the following:

"Each witness shall be sworn or affirmed by the officer or person empowered to take such testimony, to tell the truth, the whole truth, and nothing but the truth, concerning the matter at issue in the cause. Every witness may be examined, cross-examined, and re-examined orally, and also so examined in addition to written, direct or cross

mand you that at a certain time and place, to be by you appointed, you do cause the said witnesses to come before you, and to be then and there examined on the part of the *plaintiff* on oath or affirmation, touching the matters in controversy in said cause. That you cause the testimony of said witnesses to be reduced to writing, and subscribed by the witnesses, and certified by you to be correct, and annexed to this commission with any exhibits produced and proven before you, and that you return the same into said court at *Stanton*, county of *Montcalm*, *Michigan*, with all convenient speed. And you are to be governed in the premises by the laws of the state of *Michigan*, hereto annexed. (*Teste.*)[1]

Form No. 7318.[2]

(*Formal commencement.*)[3] You are hereby authorized and requested to cause to come before you, at a time and place to be fixed by you, *William West*, a witness for the *plaintiff*, in a certain cause pending in the *Circuit* Court of the county of *De Soto*, in said state of *Mississippi*, styled (No. *100*) *John Doe*, plaintiff, against *Richard Roe*, defendant, and after having sworn or affirmed said witness to testify the truth, the whole truth, and nothing but the truth, you shall carefully and impartially examine the said witness on the interrogatories and

interrogatories. Examinations may be adjourned from time to time. Testimony may be written or taken stenographically and transcribed under direction of the officer so taking the same and shall be signed by the witness and certified as correct by the official before whom it is taken, but the signatures of witnesses may be waived in writing by agreement of parties. The deposition when taken shall be forthwith enclosed by the official before whom the same is taken, and indorsed with the title of the court and cause, and that the deposition was taken and sealed up by him, and how it is to be sent, and he shall sign the indorsement, and the same shall be transmitted, by mail or otherwise, to the court in which the cause is pending, and in case such deposition is taken for use before commissioners on claims appointed by any probate court, to such court, and then be opened by the court or clerk or register, and written notice thereof then given by mail or otherwise to the parties. Objections to notices of, or objections to the manner of taking the testimony, or of certifying or returning the deposition, shall be regarded as waived unless made in writing within three days after knowledge or notice of the return thereof." Mich. Pub. Acts (1895) No. 180, § 4.

1. **Teste** in *Michigan:*

"Witness, the Honorable *John Marshall*, judge of said court, this *tenth* day of *May*, A. D. 1898.

Calvin Clark, Clerk."

2. *Mississippi.* — Anno Code (1892), § 1751.

3. **Formal commencement** in *Mississippi:*

"The State of *Mississippi*.

To *James Hallett* or *William Morris*, of *Atlanta*, in the county of *Fulton*, in the state of *Georgia*, or to any judge of a court of record, justice of the peace, mayor, or chief magistrate of a city or town, commissioner, appointed by the governor of the state of *Mississippi*, or to every person authorized to administer oaths by the law of the state of *Georgia*."

May be directed to one or to several commissioners in the alternative by name, or to any judge of a court of record, justice of the peace, mayor, or chief magistrate of a city or town, commissioner appointed by the governor of the state, or other person authorized to administer oaths by the law of the place where the deposition is to be taken. Miss. Anno. Code (1892), § 1753.

Must contain name of commissioner at the time it was issued from the clerk's office. Rupert *v.* Grant, 6 Smed. & M. (Miss.) 433.

May issue in the alternative to A or B as commissioners. Doe *v.* King, 3 How. (Miss.) 125; Henderson *v.* Cargill, 31 Miss. 367.

cross-interrogatories herewith sent.[1] The taking of said evidence may be continued from day to day, or you may adjourn the taking thereof from time to time, giving notice to the parties unless they are present when such adjournment is made. The testimony of the witness so given you shall cause to be fairly written down, either by yourself or by the witness, or some disinterested person in your presence, and then subscribed by the witness; and the testimony so taken down, with this commission, and said interrogatories and cross-interrogatories, and every exhibit and voucher relating thereto, to be certified by you; and also a certificate by you of all your proceedings under this commission, shall be sealed up and directed "To the Clerk of the *Circuit* Court of the County of *De Soto*, at *Hernando*, *Mississippi*," and transmitted in a safe and convenient manner, so as to reach the clerk of said *Circuit* Court on or before the *fifteenth* day of *May*, A. D. 18*98*, to be read in evidence on the trial of said cause. (*Teste.*)[2]

Form No. 7319.[3]

(Mo. Rev. Stat. (1889), p. 2259.)

(*Formal commencement.*)[4] Know ye, that we, in confidence of your prudence and fidelity, do by these presents authorize you to cause to come before you, to be examined as witnesses in a cause pending in our *circuit* court of *Knox* county, in the state of *Missouri*, wherein *John Doe* is plaintiff and *Richard Roe* defendant, all and every such person, and at such time and place as shall be named to you for that purpose by the said *plaintiff*, his attorney or agent. And we command you to examine all and every such person upon his oath or solemn affirmation, first made or taken before you, to testify the whole truth touching his knowledge of anything relating to said matter in controversy between the said parties, and that you do take his examination and reduce the same to writing. When you shall have taken his examination, you are to cause the witness to sign the same; and to that and each examination, at the foot thereof, you are to append your certificate, setting forth the facts that the examination was subscribed and sworn to, or affirmed, by

1. **Interrogatories** must be annexed to commission. Miss. Anno. Code (1892), § 1751.

For form of interrogatories see *Interrogatories*, *supra*, p. 519.

2. **Teste** in *Mississippi:*

"Given under my hand and official seal, at *Hernando*, *DeSoto* county, *Mississippi*, and issued this *fifth* day of *May*, A. D. 18*98*.

(SEAL) *Calvin Clark*, *Circuit* Clerk,
De Soto County, *Mississippi*."

3. *Missouri.*— Burns' Anno. Pr. Code (1896), §§ 1294, 1295 (applying to justices' courts).

4. **Formal commencement** in *Missouri:* "County of *Knox*, ss.

The State of *Missouri*, To any judge, justice of the peace, or other judicial officer of the state of *Missouri*, greeting:"

May be directed to any officer authorized by the laws of *Missouri* to take depositions in the place where witness is to be found. Burns' Anno. Pr. Code Mo. (1896), § 1297. But need not be directed to any particular officer or place. Borders *v.* Barber, 81 Mo. 636.

Insufficient Direction. — Directed to "any judge or justice of the peace of the city of *New Orleans*" is insufficient. Courts cannot judicially take notice that the city of New Orleans is a municipal subdivision of the state of Louisiana. Ober *v.* Pratte, 1 Mo. 80.

Interrogatories need not be annexed to the commission. Glenn *v.* Hunt, 120 Mo. 330.

the witness, and the day, as well as between what hours of the day, on which it was done, and also the place of residence of the witness (if known to you). Should any paper or exhibit be produced or proved, or be referred to by the witness, you are to describe the same in his examination, or cause it to be so marked by him as to establish its identity, and to attach the same to his examination. The examination thus taken you will cause to be accompanied by a certificate of your official character, attested by the seal of state; or, should it be more convenient, such authentication and proof of your official character may be made by the certificate and seal of the clerk of any court of record of any county of the state, district or territory, in which you reside, stating also in addition to the facts of his being clerk, and that the court is one of record, and at the time when the depositions were taken, you were an acting judge (or *other such officer to whom the commission is addressed*), and duly commissioned as such. And you will return the same, and all exhibits produced to you, annexed hereto, carefully closed up and under your seal, directed to the clerk of the *Circuit* Court, in and for the county of *Knox*, *Missouri*, with the names of the parties litigant indorsed thereon, with all convenient speed. (*Teste.*)[1]

Form No. 7320.[2]

(*Formal commencement.*)[3] Know ye, that we, in confidence of your prudence and fidelity, have appointed you and by these presents do give unto you full power and authority pursuant to an order[4] of the *Circuit* Court of the county of *Bergen* (*or the court or justice granting the order for commission*), made on the *fifteenth* day of *April*, 1*898*, in a certain action of contract (or *state nature of action or proceeding*) depending in said court, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, and we hereby command you that at a certain day and place by you for that purpose to be appointed you call before you *William West*,[5] a witness on behalf of the said *defendant*, *Richard Roe*, in the said action, and then and there examine him upon the part of the *defendant* in the said action upon the interrogatories annexed to this commission,[6] upon his oath or affirmation, first to be administered by you, and that you cause the examination of the said witness to be reduced to writing and signed by such witness and by yourself. When you have so taken his examination, you will close the same up

1. **Teste** in *Missouri:*
"Witness, *Calvin Clark*, clerk of our said court, at *Edina*, in said county of *Knox*, the *tenth* day of *May*, A. D. 1*898*.
(SEAL) *Calvin Clark*, Clerk."
Must be under seal of the court. Burns' Anno. Pr. Code Mo. (1896), § 1297.

2. *New Jersey.* — Gen. Stat. (1895), p. 1403. § 29.

3. **Formal commencement** in *New Jersey:*
"State of *New Jersey*, } ss.
County of *Bergen*. }
(SEAL) The State of *New Jersey*, To *James Hallett*, of the city of *Minneapolis*, in the county of *Hennepin* and state of *Minnesota*, greeting:"
Must be under seal of the court. N. J. Gen. Stat. (1895), p. 1403, § 29.

4. **For form of order** see *supra*, Form No. 7297.

5. **Names of witnesses** must be inserted in the commission. N. J. Gen. Stat. (1895), p. 1403, § 30.

6. **Interrogatories** shall be annexed to the commission. N. J. Gen. Stat. (1895), p. 1403, § 30.
For form of interrogatories see *Interrogatories*, *supra*, p. 519.

under your hand and seal and send the same, together with this commission and the said interrogatories with the answers thereto, to the Hon. *John Marshall*, judge of the *Circuit* Court of the county of *Bergen*, city of *New Barbadoes*, county of *Bergen*, state of *New Jersey* (*or the judge of the court issuing the commission, naming the same*). And you are further commanded that before you act in or be present at the swearing or examination of the said witness you do take the oath specified in the schedule annexed to this commission[1] before some person authorized to administer an oath or affirmation from the state of *Minnesota*. (*Teste.*)[2]

Form No. 7321.[3]

(*Formal commencement.*)[4] Know ye, that we, with full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize you (or *any one of you*, if more than one commissioner is appointed),[5]† to examine * *William West*, of *Boston*,[6] in the county of *Suffolk*, in the commonwealth of *Massachusetts*, a witness on behalf of the *plaintiff*, in an action pending in the *Supreme* Court of the state of *New York*, between *John Doe*, plaintiff, and *Richard Roe*, defendant, upon oath ‡ upon the interrogatories annexed to this commission;[7] to take and certify the deposition of said wit-

1. **Form of oath** may be as follows, omitting the formal parts: "Be it remembered, that on this *tenth* day of *June*, 1898, at the city of *Minneapolis*, in the county of *Hennepin*, in the state of *Minnesota*, before me, *Norton Porter*, who am a notary public within and for said county of *Hennepin*, and lawfully authorized to administer oaths in the state and county aforesaid, personally appeared *James Hallett*, residing in the city of *Minneapolis* aforesaid, the commissioner in the within commission named, who being by me duly sworn on his oath says, that he will faithfully, fairly, and impartially execute the said commission, and faithfully and fairly and impartially take the depositions of the persons named therein." N. J. Gen. Stat. (1895), p. 1404, § 33; Perry *v.* Thompson, 16 N. J. L. 72.

2. **Teste** in *New Jersey:*

"Witness, *John Marshall*, Esquire, judge of our said court, at the city of *New Barbadoes*, this the *sixth* day of *April*, 1898. *Calvin Clark*, Clerk.

Oliver Ellsworth, Attorney."

From justice's court, teste should be as follows:

"Witness: *Abraham Kent*, Justice of the Peace, holding the said court this *tenth* day of *April*, A. D. 1898.

Abraham Kent, Justice of the Peace."

3. *New York.* — Code Civ. Proc., § 887 (Birds. Rev. Stat. (1896), p. 858, § 17).

For form of order upon which commission is issued see *supra*, Form No. 7296.

4. **Formal commencement** in *New York:*

"The People of the State of *New York*. (SEAL) To *James Hallett*, of *Boston*, in the county of *Suffolk*, in the commonwealth of *Massachusetts*."

Commissioners Must be Named. — N. Y. Code Civ. Proc., § 887 (Birds. Rev. Stat. (1896), p. 858, § 17).

Thus a commission issued to the officer exercising the functions of the United States consul of Valparaiso, Chili, without naming such officer, was held to be invalid. Hemenway *v.* Knudson, 73 Hun (N. Y.) 227.

Must bear the seal of the court when issued to take testimony out of the state. Whitney *v.* Wyncoop, 4 Abb. Pr. (N. Y. Supreme Ct.) 370; Ford *v.* Williams, 24 N. Y. 359; Tracy *v.* Suydam, 30 Barb. (N. Y.) 110.

5. **May be executed** by any one of the commissioners named therein. N. Y. Code Civ. Proc., § 887 (Birds. Rev. Stat. (1896), p. 858, § 17).

6. **Witnesses Must be Named.** — Hemenway *v.* Knudson, 73 Hun (N. Y.) 227.

7. **Interrogatories** must be annexed to the commission. N. Y. Code Civ. Proc., § 892 (Birds. Rev. Stat. (1896), p. 860, § 22).

For form of interrogatories see *Interrogatories*, *supra*, p. 519.

ness and return the same and this commission, according to the directions annexed to this commission.[1] (*Teste.*)[2]

Form No. 7322.[3]

(Precedent in Street *v.* Andrews, 115 N. Car. 419.)

The State of *North Carolina*, to *M. Edney*, Greeting: We, reposing special trust and confidence in your integrity, do authorize and empower you to cause *A. B. Long* to appear before you at such time and place as you may appoint, and him upon oath to examine touching all such matters and things as he shall know of and concerning a certain matter of controversy in our *Superior* Court for the county of *Rutherford* pending, wherein *N. M. Street* and others are plaintiffs and *D. W. Q. Andrews* is defendant. And the deposition in writing by you so taken the same to transmit, sealed with your seal, to our *Superior* Court, to be held for said county on the *1st* day of *February*, 1894. Witness: *J. F. Flack*, Clerk of said Court, at office in *Rutherfordton*, on the *25th* day of *January*, 1894.

[(SEAL)][4] *J. F. Flack*, Clerk of the *Superior* Court.

Form No. 7323.[5]

(*Formal commencement.*)[6] Whereas, on the *fifteenth* day of *July*, A. D. 1898, in an action numbered *100*, pending in our said Court *of Common Pleas* in and for the county of *Cuyahoga* aforesaid, wherein

1. **Directions for executing** should be attached to and forwarded with the commission. N. Y. Code Civ. Proc., §§ 900, 901 (Birds. Rev. Stat. (1896), p. 861, § 30; p. 862, § 31). But the provision of the statute that a copy of the section shall be annexed to the commission has been held to be merely directory, and that the validity of the deposition is not affected if the commission has been in fact properly executed. Hall *v.* Barton, 25 Barb. (N. Y.) 274.

2. **Teste** in *New York:*

"Witness, Honorable *John Marshall*, one of the justices of our said *supreme* court, the *tenth* day of *May*, one thousand eight hundred and *ninety-eight*.

Calvin Clark, *County* Clerk of *Albany* County.

Jeremiah Mason, Attorney for Plaintiff, *101 State* Street, *Albany*, *N. Y.*"

Signature of clerk is unnecessary where the commission is issued by the court under the signature of the judge. Goodyear *v.* Vosburgh, 41 How. Pr. (N. Y. Supreme Ct.) 421.

See also Hun's N. Y. Ct. Rules (1896), No. 2.

3. *North Carolina.* — Code (1883), §§ 1357, 1359 (applying to justices' courts).

4. **Seal** must be attached to a commission directed to persons out of the county. N. Car. Code (1883), § 1357. Freeman *v.* Lewis, 5 Ired. L. (27 N. Car.) 91. The seal was not found in the reported case, but is added to complete the form.

5. Any court of record or any judge thereof may grant commission to take depositions within or without the state upon application of either party, on five days' notice to the other. The commission must be issued by the clerk, and be under the seal of the court. Commissioner must be named in the commission.

Kansas.—Gen. Stat. (1897), c. 95, § 362.

Nebraska. — Comp. Stat. (1897), § 5951.

North Dakota. — Rev. Codes (1895), § 5676, and § 8389 (criminal cases).

Ohio. — Bates' Anno. Stat. (1897), § 5272.

Oklahoma. — Stat. (1893), § 4241.

South Dakota. — Dak. Comp. Laws (1887), § 5288, and § 7555 (criminal cases).

Wyoming. — Rev. Stat. (1887), § 2620.

For form of notice of application for commission see *supra*, Form No. 7266.

6. **Formal commencement** in *North Dakota* and *South Dakota:*

District Court, *February* Term, 1898.

"State of *North Dakota*, } ss.
County of *Burleigh*. }

John Doe is plaintiff and *Richard Roe* is defendant, the Hon. *John Marshall*, one of the judges of said court, reposing full confidence in your prudence and competency, did make the following order:[1] (*Here set out the order.*) Know you that you are thereby appointed by said order, and you are hereby vested with full power and authority to execute said commission and make return of the same as directed in said order. The written interrogatories[2] hereto annexed upon which said deposition is to be taken you are to return inclosed with said deposition. (*Teste.*)[3]

Form No. 7324.[4]

(*Formal commencement.*)[5] Application[6] having been made for the issuing of a commission out of the above entitled court, to take the depositions of the following named witnesses residing at *Chicago*, in the county of *Cook*, state of *Illinois*, to wit: *William West*, *Samuel Short* and *Francis Fern*, to be used as evidence on behalf of the *plaintiff* upon the trial of a cause now pending in the *Circuit* Court of the state of *Oregon*, for the county of *Multnomah*, between *John Doe*, plaintiff, and *Richard Roe*, defendant, and it appearing that said persons are material witnesses in said cause and that the personal attendance of said witnesses cannot be procured at the trial of said cause, and said parties having agreed that a commission should be issued to you as commissioner to take such depositions, we, in confidence of your prudence and fidelity, have appointed you, and by these presents do appoint you, a commissioner to examine said witnesses, and you are hereby authorized, at certain days and places, to be by you for that purpose appointed, to administer an oath to them the said witnesses and to take the depositions of said witnesses (or such of them as shall be produced before you), in answer to the interrogatories

John Doe, plaintiff, against *Richard Roe*, defendant.

The State of *North Dakota*, To *James Hallett*, of *New York*, in the state of *New York*, greeting."

In *Ohio:*

"The State of *Ohio*, *Cuyahoga* county, ss.

To *James Hallett*, in the county of *Cook*, in the state of *Illinois*, greeting:

1. **For form of order** upon which commission is granted see *Order*, *supra*, p. 530.

2. **Interrogatories**, direct and cross, should be attached to the commission. See list of statutes cited *supra*, note 1, p. 488.

For form of interrogatories see *Interrogatories*, *supra*, p. 519.

3. **Teste** in *North Dakota* and *South Dakota:*

"Witness my hand and the seal of the said court, at *Bismarck* aforesaid, this *tenth* day of *January*, A. D. 1898.

(SEAL) *Calvin Clark*, Clerk."

In *Ohio:*

"Witness my hand and the seal of said court this *fifteenth* day of *July*, A. D. 1898.

(SEAL) *Calvin Clark*, Clerk."

4. *Oregon.* — Hill's Anno. Laws (1892), § 816 *et seq.* (providing for the issuance of commission to a person agreed upon by the parties, or, if they fail to agree, to a judge, justice of the peace, notary public or clerk of a court selected by the issuing officer).

5. **Formal commencement** in *Oregon:*

"In the *Circuit* Court, State of *Oregon*, for *Multnomah* County.

John Doe, plaintiff, against *Richard Roe*, defendant. } Commission to take testimony out of the state.

To *James Hallett*, of *Chicago*, in the county of *Cook*, state of *Illinois*, greeting:

In the name of the state of *Oregon*."

6. **For form of application** for commission see *Applicatcon for Order or Commission*, *supra*, p. 508.

hereto annexed,[1] and to have them the said witnesses sign their names to their depositions, after the same has been reduced to writing, and to sign the same yourself, and to certify said depositions to the said *Circuit* Court, in a sealed envelope, directed to the clerk of said *Circuit* Court at *Portland* in said county and state, and forward the same by mail or other usual channel of conveyance, under your seal, as soon as possible. (*Teste.*)[2]

Form No. 7325.[3]

(*Formal commencement.*)[4] Know ye, that in confidence of your prudence and fidelity we have appointed you, and by these presents do give unto you full power and authority, in pursuance of an order made in our Court *of Common Pleas*, No. *1*, in and for the county of *Philadelphia*, in a certain cause there depending, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, to call before you on a certain day and place, by you for that purpose to be appointed, all and every person and persons,[5] who may be named to you on the part of the said defendant, as witnesses in the said cause. And there and then to examine each of the said witnesses upon their respective oaths or affirmations touching the premises, and reduce their testimony to writing. And when you shall have so done you are to send the same before us, the judges of the said Court *of Common Pleas*, at *Philadelphia*, in said county of *Philadelphia*, together with the interrogatories and the answers thereunto, and this writ under your hands and seals. (*Teste.*)[6]

Form No. 7326.[7]

(*Formal commencement.*)[8] Whereas, said division of said court now in session have, on motion of *Richard Roe*, granted a dedimus potesta-

1. **Interrogatories** may be annexed to the commission. Hill's Anno. Laws, Oregon (1892), § 818.

For form of interrogatories see *Interrogatories*, *supra*, p. 519.

Oral examination may be had by agreement of parties. Hill's Anno Laws Oregon (1892), § 818.

2. **Teste** in *Oregon:*

"In witness whereof, I have hereunto set my hand and affixed the seal of the said *Circuit* Court at *my office in Portland*, county of *Multnomah*, state of *Oregon*, this *tenth* day of *June*, A. D. 189*8*.

(SEAL) *Calvin Clark*, Clerk."

3. *Pennsylvania.*—Ct. Com. Pl. Rules, No. XVII, § 51.

For form of rule upon which commission is issued see *supra*, Form No. 7270.

4. **Formal commencement** in *Pennsylvania*:

"*Philadelphia* County, ss.

The Commonwealth of *Pennsylvania*, To *James Hallett* and *William Morris*, of *Minneapolis*, in the county of *Hennepin*, and state of *Minnesota*, greeting:"

Residence of commissioners and the place where the commission is to be executed must be stated. Patterson *v.* Greenland, 37 Pa. St. 510.

5. **Names of witnesses** need not be set forth in the commission. Lowry's Estate, 4 Pa. Dist. Rep. 691.

6. **Teste** in *Pennsylvania:*

"In testimony whereof, we have caused the seal of our court to be hereunto affixed.

Witness, the Hon. *John Marshall*, president judge of our said court, at *Philadelphia*, this *tenth* day of *September*, in the year of our Lord one thousand eight hundred and *ninety-eight.*

(SEAL) *Calvin Clark*,
Prothonotary of said Court."

7. *Rhode Island.* — Gen. Laws (1896), c. 240, § 21 c. 244, § 28.

8. **Formal commencement** in *Rhode Island:*

"State of *Rhode Island and Providence Plantations.*

Providence, sc. *Supreme* Court, *Com-*
(SEAL) *mon Pleas* Division, *May* term,
A. D. 189*8*. To *James Hallett*, Esquire, greeting:"

tem to take the deposition of *William West* of *Newport*, in the county of *Newport*, to be used on the trial of a civil action at law here pending between *John Doe*, plaintiff, and *Richard Roe*, defendant, and whereas said division of said court, in full confidence of your fidelity and ability, have appointed you to take said deposition: If, therefore, you accept said appointment, you are hereby requested to proceed and execute the duties thereof, agreeably to the acts of this state authorizing and regulating the taking of depositions. (*Teste.*)[1]

Form No. 7327.[2]

(*Formal commencement.*)[3] Whereas, a certain cause is now pending in the Court *of Common Pleas* for the said county wherein *John Doe* is plaintiff and *Richard Roe* is defendant, and it being necessary to the investigation of the said cause that certain persons, to wit: *William West* and *Samuel Short*, resident in *Atlanta* in *Fulton* county in the state of *Georgia*, should be examined on certain interrogatories: Now know ye, that in confidence of your prudence, ability and integrity, you are appointed, and by these presents, full power and authority are given to you, or any two or more of you, to examine all witnesses whatsoever, as well on the part of the said plaintiff as on the part of the said defendant, or either of them, upon interrogatories;[4] and, therefore, you, or any two or more of you, are hereby authorized and required, on certain days, and at certain places, to be appointed by you for that purpose, to cause such witnesses to come before you, and then and there to examine each of them, apart, on the said interrogatories, on their respective corporal oaths, first taken before you, or any two or more of you, and to reduce their depositions to writing, and return this writ to the clerk of the said court at *Charleston*, in the county of *Charleston*, in the state of *South Carolina*, under your seals, with the said interrogatories and depositions annexed: And you, and every of you, are hereby further required, that before you proceed to swear and examine any witness, you severally take the oath first specified in the schedule hereunto annexed:[5] And any one of you is hereby authorized and

1. **Teste** in *Rhode Island:*

"Witness, Hon. *John Marshall*, Chief Justice of our *Supreme* Court at *Providence*, this *tenth* day of *May*, in the year 1898. *Calvin Clark*, Clerk."

2. *South Carolina.* — Rev. Stat. (1893), § 2332.

For form of affidavit for commission see *supra*, Form No. 7260.

3. **Formal commencement** in *South Carolina:*

"The State of *South Carolina*, County of *Charleston*. } In the Court *of Common Pleas*.

The State of *South Carolina*, To *James Hallett*, *Edward L. Walker*, and *William Mason*, in the city of *Atlanta*, in the county of *Fulton*, in the state of *Georgia*, greeting."

May be directed to one or more commissioners. S. Car. Rev. Stat. (1893), § 2332.

4. **For form of interrogatories** see *Interrogatories*, *supra*, p. 519.

5. **Commissioner's oath** is as follows: "You shall, according to the best of your knowledge, truly, faithfully, and without partiality to any or either of the parties in this cause, take the examination and deposition of all and every witness, and witnesses, produced and examined by virtue of the commission hereunto annexed, upon the interrogatories now produced and left with you. And you shall not publish, disclose, or make known to any person, or persons, whatsoever except the clerk or clerks by you employed and sworn

empowered to administer such oath to the other, or others of you. And you are hereby further authorized and required, jointly or separately, to administer the oath last specified in the said schedule hereunto annexed, to any clerk employed in taking the deposition of witnesses aforesaid, before such clerk is permitted to act, or be present, at such examination. (*Teste.*)[1]

Form No. 7328.[2]

(*Formal commencement.*)[3] We hereby authorize and require you, or either of you, to summon *William West*, a resident of your state (or *country*), to come before you forthwith, and that you then and there take his answers, under oath, to the attached copy of direct and cross interrogatories,[4] and that you return the same, without delay, to the clerk of this court, as herein provided:

1. That you reduce his answers, so taken, to writing, in proper form, and cause the same to be subscribed and sworn to by said witness.

2. That you certify, under your hand and seal of office, that said answers were sworn to and subscribed before you.

to secrecy in the execution of this commission, the contents of all or any of the depositions of the witnesses, or any of them to be taken by you and the other commissioners in the commission named, or any of them, by virtue of the said commission until publication shall pass by rule by order of said court. So help you God."

Clerk's Oath. — Oath to be administered to clerk is as follows: "You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take and write down, transcribe, and engross the depositions of all and every witness and witnesses produced before you and examined by the commissioners, or any of them named in the commission hereunto annexed, as far forth as you are directed, employed by the said commissioners or any of them to take and write down and engross the said depositions, or any of them. And you shall not publish, disclose, or make known to any person, or persons, whatsoever the contents of all or any of the depositions of the witnesses, or any of them to be taken or written down, transcribed, or engrossed by you, or whereto you shall have recourse, or be anywise privy until publication shall pass by rule or order of the said court. So help you God."

1. Teste in *South Carolina:*

"Witness, *Calvin Clark*, clerk of the said court, at *Charleston*, in the county aforesaid, the *twenty-fourth* day of *May*, in the year of our Lord one thousand eight hundred and *ninety-eight*, and in the one hundred and *twenty-second* year of the sovereignty and independence of the United States of America.

(SEAL) *Calvin Clark*, Clerk."

Must be under seal of the court. S. Car. Rev. Stat. (1893), § 2332.

2. *Texas.* — Rev. Stat. (1895), art. 2279 *et seq.* Code Crim. Proc. (1895), art. 82 (criminal cases).

Arizona. — Rev. Stat. (1887), § 1840 *et seq.*

New Mexico. — Comp. Laws (1897), 3039 *et seq.*

For form of notice of application for commission see *supra*, Form No. 7268.

3. Formal commencement in *Texas:*

"The State of *Texas*, To any clerk of a court of record having a seal, any notary public, or any commissioner of deeds duly appointed under the laws of *Texas*, for the state of *Washington*, in and for the county of *King*, state of *Washington*."

In commission issued to foreign country, the address should be as follows: "The state of *Texas* to any notary public, or any minister, commissioner or chargé d'affaires of the United States, resident in and accredited to the *kingdom* of *Italy*, or any consul general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul or consular agent of the United States, resident in said country of *Italy*."

To Whom Issued. — See *Arizona* and *New Mexico* statutes, cited *supra*, note 2.

4. For form of interrogatories see *Interrogatories*, *supra*, p. 519.

3. That you seal up in an envelope the answers so taken, together with the annexed interrogatories and this commission, with your name across the seal.

4. That you indorse on the envelope the name of the parties to the suit, and the name of said witness.

5. That you direct the package "To the Clerk of the *District* Court of *Freestone* County, *Fairfield*, *Texas*."

6. That if said package is sent by mail, the postmaster, or his deputy, shall indorse thereon that he received it from your hands, and sign his name thereto; or if you entrust it to private conveyance, as provided by statute, you will apprise the person receiving it that it must be delivered to the clerk of this court by himself in person; which evidence, so taken as above, is to be used on the trial of a suit now pending in the *District* Court of *Freestone* county, in said state of *Texas*, wherein *John Doe* is plaintiff and *Richard Roe* is defendant.

Herein fail not, but make return of this writ as the law directs. (*Teste.*)[1]

Form No. 7329.[2]

(*Formal commencement.*)[3] Whereas, it appears to the judge of our *Superior* Court of the county of *Spokane*, state of *Washington*, that *William West* and *Samuel Short*, of the city of *Chicago*, in the county of *Cook* in the state of *Illinois*, are material witnesses in a certain action now pending in our said *Superior* Court, between *John Doe*, plaintiff, and *Richard Roe*, defendant, and that the personal attendance of said witnesses cannot be procured at the trial of the said action, we, in confidence of your prudence and fidelity, have appointed you, and by these presents do appoint you, a commissioner to examine said witnesses, and therefore we authorize and empower you at *the office of Daniel Webster*, *100 Lake* street in said city of *Chicago*, commencing at *ten* o'clock *A.* M., on the *tenth* day of *May*, 1*898*, and to continue from day to day until the whole of said depositions be taken; diligently to examine said witnesses on the interrogatories, direct and cross, annexed to this commission,[4] on their oaths first taken before you, and cause the said examination of the said witnesses to be taken by questions and answers, and to be reduced to writing, and signed by the same witnesses and by yourself,

1. **Teste** in *Texas:*

"Witness my hand and seal of office at *Fairfield*, this *tenth* day or *June*, 1*898*.

(SEAL) *Calvin Clark*, Clerk *District* Court, *Freestone* County, *Texas*."

2. *Washington.* — Ballinger's Anno. Codes & Stat. (1897), § 6023.

For form of notice of application for commission see *Application for Order or Commission — The Notice*, *supra*, p. 508.

3. **Formal commencement** in *Washington:*

"In the *Superior* Court of the state of *Washington*, for the county of *Spokane*.

John Doe, plaintiff, against *Richard Roe*, defendant.	No. *102*. Commission to Take Testimony.

The state of *Washington*, To *James Hallett*, of *Chicago*, *Cook* county, state of *Illinois*, greeting."

Commissioner Must be Named.—Ballinger's Anno. Codes & Stat. Wash. (1897), § 6023.

4. **Interrogatories** shall be attached to the commission. Ballinger's Anno. Codes & Stat. Wash. (1897), § 6023.

For form of interrogatories see *Interrogatories*, *supra*, p. 519.

and then certify and return the same, annexed to this commission, in a sealed envelope, unto our *Superior* Court aforesaid, directed to the clerk thereof, by mail or other usual channel of conveyance, with all convenient speed, enclosed under your seal. (*Teste.*)[1]

Form No. 7330.[2]

(*Formal commencement.*)[3] Whereas, it appears unto our judge of our *Circuit* Court, for *Vernon* county, state of *Wisconsin*, that *William West*, of the city of *Minneapolis*, county of *Hennepin* and state of *Minnesota*, is a material witness in a certain cause now pending in our said *Circuit* Court, between *John Doe*, plaintiff, and *Richard Roe*, defendant, and that the personal attendance of said witness cannot be procured at the trial of said cause; and whereas, we, in confidence of your prudence and fidelity, have appointed you, and by these presents do appoint you a commissioner to examine the said witness; now, therefore, we do authorize and empower you, at a time and place to be fixed by you, diligently to examine the said witness on the interrogatories and cross-interrogatories attached to this commission,[4] on his corporal oath first taken before you, and cause the said examination of such witness to be reduced to writing, and signed by such witness and by yourself, and then return the same, annexed to the said commission, unto our *Circuit* Court aforesaid with all convenient speed, enclosed under the seal of you the said commissioner. (*Teste.*)[5] (*Clerk's certificate.*)[6]

May be upon Oral Questions. — Ballinger's Anno. Codes & Stat. Wash. (1897), § 6023.

1. **Teste** in *Washington:*

"Witness, Hon. *John Marshall* judge of the *Superior* Court of the county of *Spokane*, state of *Washington*, this *tenth* day of *April*, A. D. 18*98*.

Attest my hand and seal of said *Superior* Court, the day and year last above written.

(SEAL) *Calvin Clark*,
Clerk of said court."

Must be under seal of the court. Ballinger's Anno. Codes & Stat. Wash. (1897), § 6023.

2. *Wisconsin.* — Sanb. & B. Anno. Stat. (1889), § 4113.

3. **Formal commencement** in *Wisconsin:*

"The State of *Wisconsin*, *Circuit* Court, *Vernon* County, ss.

The State of *Wisconsin*, To *James Hallett*, of the city of *Minneapolis*, county of *Hennepin*, and state of *Minnesota*."

Commissioners shall be named in commission. Sanb. & B. Anno. Stat. Wis. (1889), p. 2135 (*citing* Rules of Court, § 3.)

By consent commission may be issued in blank, and the person taking the testimony may fill in the name of the commissioner. Carlyle *v.* Plumer, 11 Wis. 96.

4. **Interrogatories** must be annexed to commission. Sanb. & B. Anno. Stat. Wis. (1889), p. 2135 (*citing* Rules of Court, § 3).

For form of interrogatories see *Interrogatories*, *supra*, p. 519.

For notice of filing interrogatories see *supra*, Form No. 7290.

5. **Teste** in *Wisconsin:*

"Witness, the Honorable *John Marshall*, judge of the *Circuit* Court of *Vernon* county, state of *Wisconsin*, at the city of *Viroqua*, county of *Vernon*, and state of *Wisconsin*, this *tenth* day of *May*, A. D. 18*98*.

(SEAL) *Calvin Clark*, Clerk.
Oliver Ellsworth,
Defendant's Attorney."

Must be signed by the clerk or judge. Sanb. & B. Anno. Stat. Wis. (1889), § 4113, subs. 4.

Must be under seal of the court. Sanb. & B Anno. Stat. Wis. (1889), § 4113, subs. 4.

6. **Clerk's certificate as to original interrogatories,** which should be appended to the commission, may be as follows:

"State of Wisconsin, }
Circuit Court, *Vernon* County, } ss.

I, *Calvin Clark*, clerk of said court, do hereby certify that the interrogatories and cross-interrogatories attached and

Form No. 7331.[1]

(*Formal commencement.*)[2] Whereas, it appears to our said *Circuit* Court of the United States for the *eastern* district of *Michigan*, that *William West* and *Samuel Short* are material witnesses in a certain cause now depending therein, between *John Doe*, plaintiff, and *Richard Roe*, defendant, and that the said witnesses are not residents of the *eastern* district of *Michigan*, we, in confidence of your prudence and fidelity, have appointed you, or either of you, commissioners to examine the said *William West* and *Samuel Short*, and therefore we authorize and empower you, or either of you, at certain days and places to be by you, or either of you, for that purpose appointed, diligently to examine the said witnesses or each of them, as shall be produced before you, and each apart, on the interrogatories annexed to this commission, on their respective corporal oaths or affirmations first taken before you, or either of you, and cause the said examination to be reduced to writing and signed by said witnesses, respectively, and by yourselves, or such of you as are present at the taking of the same, and then return the same, annexed to this commission, into our said court, with all convenient speed, enclosed under your seals or the seal of such as are present at the execution of this commission, and you will in all things be governed in the business by the instructions hereto annexed. (*Teste.*)[3]

Form No. 7332.[4]

(*Formal commencement.*)[5] You are hereby appointed special commissioner to take the testimony of *William West*, of *Montreal*, in said province of *Quebec*, upon the interrogatories and cross-interrogato-

referred to in the within commission, are the originals, as the same were filed in my office in the action herein entitled.

Witness, my hand and the seal of the *Circuit* Court of *Vernon* county, at the city of *Viroqua*, county of *Vernon*, and state of *Wisconsin*, this *tenth* day of *May*, A. D. 1898.

(SEAL) *Calvin Clark*, Clerk."

1. *Federal Courts.* — In any case, when it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant commission to take depositions according to common usage. U. S. Rev. Stat. (2d ed. 1878), § 866.

2. **Formal commencement** in federal courts may be as follows:

"United States of America.

The *Circuit* Court of the United States for the *Eastern* District of *Michigan*.

The President of the United States of America.

To *James Hallett*, *William Morris* and (SEAL) *Edward L. Walker*, of the city of *Topeka*, in the state of *Kansas*, greeting:"

3. **Teste** in the federal courts:

"Witness, the Honorable *John Marshall*, chief justice of the *Supreme* Court of the United States, this *tenth* day of *May*, in the year of our Lord one thousand eight hundred and *ninety-eight*, and of the independence of the United States of America the one hundred and *twenty-second*. *Calvin Clark*, Clerk."

4. U. S. Ct. of Cl. Rules, Nos. 39 *et seq.*, 52 *et seq.*, and 41 *et seq.* (relating to oral examinations).

5. **Formal commencement** in the court of claims:

"In the Court *of Claims*, *February* Term, 1898.

John Doe against *The United States.* } No. *102.*

The chief justice and judges of the Court *of Claims*, To *James Hallett*, of *Montreal*, in the province of *Quebec*, *Canada*."

For form of interrogatories see *Interrogatories*, *supra*, p. 519.

For form of notice of filing interrogatories see *Interrogatories — Notice of Filing*, *supra*, p. 525.

ries hereunto annexed in the cause aforesaid, pursuant to rules 39 and 40 of this court as printed upon this commission. You will return this commission and the interrogatories and cross-interrogatories with the deposition of the above named witness properly signed by him, all properly connected together, and certified under your hand and seal, to the clerk of the Court *of Claims* at *Washington* City, *D. C.* (*Teste.*)[1]

2. Open Commission.[2]

Form No. 7333.[3]

(*Commencing as in Form No. 7321, and continuing to *; then proceed thus:*) any witness who may be produced by either party in an action pending in the *Supreme* Court of the state of *New York* between *John Doe*, plaintiff, and *Richard Roe*, defendant, on or before the *tenth* day of *June*, 1*898*, upon oral questions to be put to the witness when he is produced, to take and certify the deposition of each witness so examined, and return the same and the commission according to the directions given in or with this commission.[4]

(*Teste as in Form No. 7321.*)

1. Teste in the court of claims:

"In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at *Washington*, this *twenty-first* day of *February*, 1*898*.

(SEAL) *Calvin Clark*, Chief Clerk, Court *of Claims*."

2. *New York.* — Code Civ. Proc., § 894 (Birds. Rev. Stat. (1896), p. 860, § 24).

When Granted. — Shall never be granted except in peculiar instances, and certainly not upon the motion of the plaintiff without the strongest and most convincing reasons, as the granting such a motion on behalf of the plaintiff would simply be to transfer the trial of the cause to a jurisdiction different from that in which he has seen fit to place the venue. Lentilhon *v.* Bacon, (Supreme Ct.) 20 N. Y. Supp. 488; Einstein *v.* General Electric Co., 9 N. Y. App. Div. 570; Kaempfer *v.* Gorman, (Supreme Ct.) 43 N. Y. St. Rep. 800; Darling *v.* Klock, 74 Hun (N. Y.) 248.

If, in a commission with interrogatories, the rights of the parties would not be sufficiently protected, as they could not anticipate the nature of the testimony to be brought out from the witnesses whom it is sought to examine, an open commission should issue. Parker *v.* Lithgoe, (Supreme Ct.) 36 N. Y. St. Rep. 981.

Open commission cannot issue when the adverse party is an infant or the committee of a person judicially declared to be incapable of managing his affairs by reason of lunacy, idiocy or habitual drunkenness, or where the testimony is to be taken elsewhere than in the United States or in Canada. N. Y. Code Civ. Proc., § 895 (Birds. Rev. Stat. (1896), p. 861, § 25).

For form of affidavit upon which commission is ordered to issue see *supra*, Form No. 7260.

For form of order granting commission see *supra*, Form No. 7299.

3. Must be under seal of the court. Mason, etc., Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282.

Commissioners must be named in the commission. N. Y. Code Civ. Proc., § 897 (Birds. Rev. Stat. (1896), p. 861, § 27).

4. Commission must authorize the commissioners, or any one of them, to examine any witness who may be produced by either party, on or before a day specified therein, upon oral questions to be put to the witness when he is produced, to take and certify the deposition of each witness so examined, and to return the same with the commission immediately after the expiration of the time limited for the production of witnesses, according to the directions given in or with the commission. N. Y. Code Civ. Proc., § 897 (Birds. Rev. Stat. (1896), p. 861, § 27).

3. For Examination upon Oral Questions.[1]

Form No. 7334.

(*Commencing as in Form No. 7321, and continuing down to* ‡.) upon oral questions and without written interrogatories (or *partly upon oral questions and partly upon written interrogatories*). (*Concluding as in Form No. 7321.*)

4. In Criminal Cases.

Form No. 7335.[2]

(*Formal commencement.*)[3] Whereas, it has been made to appear to the satisfaction of the Honorable *John Marshall*, judge of the *District* Court of the *Sixth* Judicial District, upon the indictment heretofore rendered by the grand jury at the *April* term of said *District* Court, duly filed in the office of the clerk of the *District* Court of the county of *Burleigh* in said judicial district, and the affidavit of *John Doe*, the defendant above named, that the testimony of *William West*, residing at the city of *Minneapolis*, county of *Hennepin*, state of *Minnesota*, is material to the defense in an action now pending in said court between the state of *North Dakota* and *John Doe*, defendant, and that the personal attendance of said witness cannot be procured on the trial of said indictment, and that the testimony of said

1. *New York.* — Code Civ. Proc., § 893 (Birds. Rev. Stat. (1896), p. 860, § 23).

For form of affidavit upon which commission is ordered see *supra*, Form No. 7260.

For form of order granting commission see *supra*, Forms Nos. 7300, 7301.

Notice of taking without written interrogatories must be served, by the party at whose instance the deposition is taken, upon the attorney of the adverse party. The notice must specify time and place of examination, name of witness, and the person before whom the deposition is to be taken. N. Y. Code Civ. Proc., §§ 896–899 (Birds.Rev.Stat. (1896), p. 861, §§ 26–29). This notice may be as follows: (*Title of court and cause as in Form No.* 6954.) "You are hereby notified that *William West*, a witness on behalf of the *defendant* in the above entitled action, will be examined upon oral questions before *James Hallett*, a commissioner appointed by the *Supreme* Court, at *the office of Daniel Webster*, No. *10 State* street in the city of *Hartford*, in the state of *Connecticut*, on the *fifteenth* day of *October*, 1897, at *ten* o'clock in the *fore*noon." (*Signature, date and address as in Form No.* 6954.)

Commission to take deposition of one witness on oral questions and of another witness on written interrogatories may be as follows: (*Commencing as in Form No. 7321, and continuing down to* †) "to examine *William West* and *Samuel Short*, of *Boston*, in the *commonwealth* of *Massachusetts*, witnesses on behalf of the *plaintiff* in an action pending in the *Supreme* Court of the state of *New York*, between *John Doe*, plaintiff, and *Richard Roe*, defendant, under oath, the examination of the said *William West* to be upon the interrogatories annexed to this commission, and the examination of the said *Samuel Short* to be upon oral questions." (*Concluding as in Form No. 7321.*) N. Y. Code Civ. Proc., § 893 (Birds. Rev. Stat. (1896), p. 860, § 23).

2. *North Dakota.* — Rev. Codes (1895), § 8385.

South Dakota. — Dak. Comp. Laws (1887), § 7551 *et seq.* See also list of statutes cited *supra*, note 1, p. 488.

For form of affidavit upon which application for commission is made see *supra*, Form No. 7260.

For form of notice upon which application for commission is made see *supra*, Form No. 7266.

For form of order granting commission see *supra*, Form No. 7303.

3. See *supra*, note 6, p. 553.

witness is necessary to the attainment of justice, and due notice having been served upon *Daniel Webster*, the state's attorney, of said application: Therefore, know ye, that reposing full confidence in your prudence and fidelity, you are hereby appointed sole commissioner to examine said witness, and are hereby authorized and required to cause him to come before you at such time and place as you may therefor designate and appoint, and carefully to take his testimony upon all interrogatories and cross-interrogatories attached to these presents,[1] and none others, under the oath or affirmation of said witness by you first in that behalf duly administered; and the same, when thus taken and signed and certified by you, together with this commission and the papers hereto annexed, you will return to *Calvin Clark*, clerk of said *District* Court, at *Bismarck*, in said county of *Burleigh*, with all convenient speed. (*Teste.*)[2]

VII. DEPOSITION OF WITNESS.[3]

1. **Interrogatories** must be annexed to commission.

North Dakota. — Rev. Codes (1895). § 8390.

South Dakota. — Dak. Comp. Laws (1887), § 7556. See also list of statutes cited *supra*, note 1, p 488.

For form of interrogatories see *Interrogatories*, *supra*, p. 519.

2. See *supra*, note 3, p. 554.

3. See list of statutes cited *supra*, note 1, p. 488.

Statute must be strictly complied with in the taking of the deposition. McCann *v.* Beach, 2 Cal. 25; Dye *v.* Bailey, 2 Cal. 383; Gibbs *v.* Gibbs, 6 Colo. App. 368; Edleman *v.* Byers, 75 Ill. 367; Greene County *v.* Bledsoe, 12 Ill. 267; Campau *v.* Dewey, 9 Mich. 381; Wattles *v.* Moss, 46 Mich. 52; Patterson *v.* Wabash, etc., R. Co., 54 Mich. 91; Lawrence *v.* Finch, 17 N. J. Eq. 234; Hendricks *v.* Craig, 5 N. J. L. 654; Bell *v.* Morrison, 1 Pet. (U. S.) 355; Laird *v.* Ivens, 45 Tex. 621; Garner *v.* Cutler, 28 Tex. 182; Baxter *v.* Payne, 1 Pin. (Wis.) 501; Goodhue *v* Grant, 1 Pin. (Wis.) 556; Thorpe *v.* Simmons, 2 Cranch (C. C.) 195.

But a substantial compliance has been held to be sufficient. Goodyear *v.* Vosburgh, 41 How. Pr. (N. Y. Supreme Ct.) 421.

And in *Massachusetts*, where a deposition is taken out of the state, it is within the discretion of the court to admit or reject it, notwithstanding the magistrate omitted to comply with some of the formalities required by law. Stiles *v.* Allen, 5 Allen (Mass.) 320; Burt *v.* Allen, 103 Mass. 41; Tyng *v.* Thayer, 8 Allen (Mass.) 391.

Each witness must be sworn or affirmed in the proper manner before examination. Ala. Civ. Code (1886), § 2807; Conn. Gen. Stat. (1888), § 1068; Fla. Rev. Stat. (1892), § 1129; Starr & C. Anno. Stat. Ill. (1896), c. 51, § 30; Idaho Laws (1893), p. 134, § 11; Horner's Stat. Ind. (1896), § 428; Mich. Pub. Acts (1895), No. 180, § 4; Minn. Stat. (1894), § 5689; Miss. Anno. Code (1892), § 1754; Burns' Anno. Pr. Code Mo. (1896), § 1312; Neb. Comp. Stat. (1897). § 5954; N. J. Gen. Stat. (1895), p. 1402, § 27; N. Y. Code Civ. Proc., § 901, subs. 1 (Birds. Rev. Stat. (1896); p. 862, § 31); N. Dak. Rev. Codes (1895), § 5680; Bates' Anno. Stat. Ohio (1896), § 5275; Okla. Stat. (1893), § 4244; So. Dak. Comp. Law (1887), § 5291; Tenn. Code (1896), § 5650; Sanb. & B. Anno. Stat. Wis. (1889), p. 2136 (*citing* Rules of Court, § 5); Wyom. Rev. Stat. (1887), § 2623; U. S. Rev. Stat. (2d ed. 1878), § 864. See also list of statutes cited *supra*, note 1, p. 488.

Cautioning the witness to testify the whole truth, etc., need not appear on the face of the deposition, being merely directory. Burley *v.* Kitchell, 20 N. J. L. 305; Ludlam *v.* Broderick, 15 N. J. L. 269.

Form of oath to be administered to witness is as follows:

"You do swear that the answers which are to be given by you to the questions proposed to you shall be the truth, the whole truth, and nothing but the truth. So help you God." Or, "You do swear, in the presence of the ever living God."

In *Wisconsin*, form of oath is prescribed by Rule XVIII, §§ 4, 5, 6, as

follows: "The commissioner shall publicly administer an oath to each witness named in the commission that the answer he shall make to each of the interrogatories propounded to him shall be the truth, the whole truth, and nothing but the truth. And the commissioner shall subscribe his name at the foot of each page of the testimony." And further, that "the commissioner shall certify in his return that each witness was duly sworn or affirmed before giving his evidence, and shall also state the time when the testimony was taken." Where the commissioner simply certifies that the witness was duly sworn or affirmed before giving his evidence, the presumption is that he administered the oath in the form prescribed by the rule. Cross *v.* Barnett, 61 Wis. 650.

Form of affirmation, when witness declares that he has conscientious scruples against taking an oath, may be as follows: "You do solemnly, sincerely, and truly declare and affirm," etc.

Certificate should state that witness was sworn in due manner according to law. See list of statutes cited *supra*, note 1, p. 488; Parsons *v.* Huff, 38 Me. 137; McCormick *v.* Largey, 1 Mont. 158; Rand *v.* Dodge, 17 N. H. 343; Warring *v.* Martin, Wright (Ohio) 380; Putnam *v.* Larimore, Wright (Ohio) 746; Bond *v.* Ward, Wright (Ohio) 747; House *v.* Elliott, 6 Ohio St. 497; Emberson *v.* McKenna, 4 Tex. App. Civ. Cas., § 94; Sabine, etc., R. Co. *v.* Brousard, 69 Tex. 617; Bush *v.* Barron, 78 Tex. 5; Trammell *v.* McDade, 29 Tex. 360; Homberger *v.* Alexander, 11 Utah 363; Lund *v.* Dawes, 41 Vt. 370; Chipman *v.* Tuttle, 1 D. Chip. (Vt.) 179; Pingry *v.* Washburn, 1 Aik. (Vt.) 264; Baxter *v.* Payne, 1 Pin. (Wis.) 501; Goodhue *v.* Grant, 1 Pin. (Wis.) 556; Bacon *v.* Bacon, 33 Wis. 147 (*citing* Cir. Ct. Rules, No. 61); Pentleton *v.* Forbes, 1 Cranch (C. C.) 507.

Need not state that deponent was sworn previously to his examination, where deposition is taken in another state. Quinley *v.* Atkins, 9 Gray (Mass.) 370.

Need not state that the witness was sworn to testify the whole truth "in the matter in controversy." Bussard *v.* Catalino, 2 Cranch (C. C.) 421; Jameson *v.* Butler, 1 Neb. 115. *Contra*, Simpson *v.* Carleton, 1 Allen (Mass.) 109; Fabyan *v.* Adams, 15 N. H. 371.

Where the caption recites that the deponent was sworn "to testify the truth, and nothing but the truth," it is insufficient under chancery rule No. 14, which provides that the only caption required of the commissioner shall state that he had the rule before him when he executed the commission, and that he in all respects complied with its provisions; and in the absence of this caption it must appear that the deponent was at least sworn according to law. Call *v.* Perkins, 68 Me. 158.

Sufficient Certificates. — The omission to show that witness was sworn is no ground for suppressing the deposition, when in the preamble of the deposition it appears that witness was first cautioned and sworn to testify the truth, etc. Broadnax *v.* Sullivan, 29 Ala. 320.

When taken upon commission, in a foreign country, certificate that witness was duly sworn is sufficient without showing by whom or in what manner. Stocking *v.* Sage, 1 Conn. 519.

The form of the oath administered need not be stated. It is sufficient to state that the deponent was sworn according to law. Ramsey *v.* Flannagan 33 Ind. 305; Atkinson *v.* St. Croix Mfg. Co., 24 Me. 171; Lewis *v.* Soper, 44 Me. 72; Doe *v.* King, 3 How. (Miss.) 125 New Jersey Express Co. *v.* Nichols, 37 N. J. L. 166, *affirmed* in 33 N. J. L. 434, Wellborn *v.* Younger, 3 Hawks (10 N. Car.) 205; Cramer *v.* Noonan, 4 Wis. 231. And that the interrogatories annexed to the commission were all put to them. Keene *v.* Meade, 3 Pet. (U. S.) 1. For the presumption is that the oath was administered according to the requirements of the rules of court. But if the form of oath administered is given, there is no such presumption. Cross *v.* Barnett, 61 Wis. 650. *Contra* Atkinson *v.* St. Croix Mfg. Co., 24 Me 171; Bachelder *v.* Merriman, 34 Me. 60 Brighton *v.* Walker, 35 Me. 132.

That the "witness was sworn to testify the whole truth, of his knowledge touching the matters in controversy in the cause aforesaid," is an unimportant deviation from the literal requirements of the statute. Welborn *v.* Swain, 22 Ind. 194.

Certificate that the deponent was affirmed according to law implies that the magistrate had first performed the duty imposed upon him by the statute of determining by inquiry that the witness had conscientious scruples against taking the oath. Horne *v.* Haverhill, 113 Mass. 344.

Where certificate does not state in express terms that the witness was sworn before the commissioner, it is sufficient if that fact appears from the whole certificate. Cooper *v.* Stinson, 5 Minn. 201; Wanzer *v.* Hardy, 4 Wis. 229.

That "the said witness being duly sworn true answers to make to the interrogatories and cross-interrogatories," etc., is sufficient. Baker *v.* Kelly, 41 Miss. 696.

"That the witness was sworn to testify in the cause, and that the deposition was reduced to writing and subscribed by him in the presence of the officer, on the day and between the hours (naming them) mentioned in the notice," is sufficient. Thomas *v.* Wheeler, 47 Mo. 363; Jolliffe *v.* Collins, 21 Mo. 338; Moss *v.* Booth, 34 Mo. 316.

Commissioner must reduce the examination to writing or cause it to be reduced to writing by a disinterested person, in his presence, as nearly as possible in the language of the witness. Ala. Civ. Code (1886), § 2807; Sand. & H. Dig. Ark. (1894), § 3005; Conn. Gen. Stat. (1888), § 1070; Idaho Laws (1893), p. 134, § 12; Horner's Stat. Ind. (1896), § 429; Iowa Code (1897), § 4700; Kan. Gen. Stat. (1897), c. 95, § 365; Bullitt's Civ. Code Ky. (1895), § 580; Me. Rev. Stat. (1883), c. 107, § 15 *et seq.*; Mass. Pub. Stat. (1882), c. 169, § 31; Minn. Stat. (1894), § 5689; Miss. Anno. Code (1892), § 1754; Burns' Anno. Pr. Code Mo. (1896), § 1312; Neb. Comp. Stat. (1897), § 5959 *et seq.*; N. J. Gen. Stat. (1895), p. 1402, § 27; N. Y. Code Civ Proc., § 901, subs. 2 (Birds. Rev. Stat. (1896), p. 862, § 31); N. Dak. Rev. Codes (1895), § 5684; Bates' Anno. Stat. Ohio (1896), § 5275; Okla. Stat. (1893), § 4244; S. Dak. (Dak. Comp. Laws 1887), § 5291; Hill's Anno. Laws Oregon (1892), § 825; Tenn. Code (1896), § 5650; Ballinger's Anno. Codes & Stat. Wash. (1897), § 6025; Sanb. & B. Anno. Stat. Wis. (1889), §§ 4105, 4119, and see p. 2136 (*citing* Rules of Court, § 5); Wyoming Rev. Stat. (1887), § 2623. See also list of statutes cited *supra*, note 1, p. 488.

Certificate Must State This Fact. — See list of statutes last above cited, and also list of statutes cited *supra*, note 1, p. 488. Hammond *v.* Freeman, 9 Ark. 62; Johnson *v.* Booth, 1 Handy (Ohio) 42; Timms *v.* Wayne, 1 Handy (Ohio) 400; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379; Bailey *v.* Brooks, 11 Heisk. (Tenn.) 1.

But see, however, Jolliffe *v.* Collins, 21 Mo. 338; Sayre *v.* Sayre, 14 N. J. L. 487; but see Den *v.* Lloyd, 31 N. J. L. 395; Vasse *v.* Smith, 2 Cranch (C. C.) 31; Van Ness *v.* Heineke, 2 Cranch (C. C.) 259; Meade *v.* Keane, 3 Cranch (C. C.), 51; Keene *v.* Meade, 3 Pet. (U. S.) 1; Bussard *v.* Catalino, 2 Cranch (C. C.) 421.

Connecticut. — May be in the handwriting of the deponent or magistrate taking the deposition, but must not be written by any party to the action, or by any agent or attorney of such party. Gen. Stat. (1888), § 1070.

Georgia. — The answers may be written out by the witnesses in the presence of the commissioners, and by their consent, but in no other way shall they prepare the same. 2 Ga. Code (1895), § 5307.

Tennessee.—Commissioner should require the questions to be reduced to writing and should take down the answers of the witness in writing, or cause the same to be done by the witness himself, as near as may be in the language of the witness. Code (1896), § 5650. But in Read *v.* Patterson, 11 Lea (Tenn.) 430, it was held that the commissioner need not reduce questions to writing, construing the section above as being merely directory.

Federal Courts. — By magistrate or by witness in magistrate's presence, and by no other persons. U. S. Rev. Stat. (2d ed. 1878). § 864.

Written by Third Person. — Certificate which states that the deposition was reduced to writing by a third person (naming him) under the direction of the magistrate is defective. East Tennessee, etc., R. Co. *v.* Arnold, 89 Tenn. 107.

When taken by a person agreed upon, in writing, by the parties, other than the officer authorized to take the deposition, the agreement shall be returned with the deposition. Va. Code (1887), § 3360.

Whether reduced to writing before or after witness was sworn must appear. Homberger *v.* Alexander, 11 Utah 363. In that case the certificate, which was held insufficient, was as follows:

"*City and* county of *New York*, ss.

I, *George Einstein*, do hereby certify that I am a resident of the city of *New York*, and a duly qualified notary public in and for the *city and* county of *New York*, of the state of *New York*. *Meyer Homberger*, *Morris Koenigsberger* and *Isaac Speien* appeared in person, before me, and answered the interrogatories and cross-interrogatories herein,

as appears by the duly signed and sworn depositions hereto annexed.

Dated *New York*, March *8*, 1*894*.

George Einstein. (SEAL)"

Taken in Shorthand. — Depositions may be taken in shorthand. Iowa Code (1897), §§ 4700, 4702; Pub. Acts Mich. (1895), No. 180, § 4; R. I. Gen. Laws (1896), c. 244, § 25. See also list of statutes cited *supra*, note 1, p. 488.

When taken by typewriter, the requirement of the statute that the deposition be reduced to writing is complied with. Behrensmeyer *v.* Kreitz, 135 Ill. 591.

Time and place of taking the depositien must be stated. Sand. & H. Dig. Ark. (1894), § 3006; Starr & C. Anno. Stat. Ill. (1896), c. 51, § 30; Horner's Stat. Ind. (1896), § 430; Kan. Gen. Stat. (1897), c. 95, § 366; Bullitt's Civ. Code Ky. (1895), § 582; Burns' Anno. Pr. Code Mo. (1896). § 1314; Neb. Comp. Stat. (1897), § 5959; N. H. Pub. Stat. (1891), c. 225, § 9; N. Dak. Rev. Codes (1895), § 5684; Bates' Anno. Stat. Ohio (1896), § 5280; Okla. Stat. (1893), § 4249; Hill's Anno. Laws Oregon (1892), § 825; S. Dak. (Dak. Comp. Laws 1887), § 5295; Sanb. & B. Anno. Stat. Wis. (1889), p. 2136 (*citing* Rules of Court, § 5); Wyoming Rev. Stat. (1887), § 2628; Boudereau *v.* Montgomery, 4 Wash. (U. S.) 186. See also list of statutes cited *supra*, note 1, p. 488.

Certificate must show in what state or country the deposition was taken, and from what state or country the officer received his official authority to take it. Payne *v.* Briggs, 8 Neb. 75. And must show that the deposition was taken at the office, or room, or place, specified in the notice, and also that the taking of the deposition was begun on the day mentioned in the notice. Dawson *v.* Dawson, 26 Neb. 716; Rand *v.* Dodge, 17 N. H. 343.

Where the certificate of the magistrate annexed to a deposition taken upon a commission issued to a foreign country was headed "State of *Massachusetts*, *Suffolk*, ss," it was held that it was competent for the judge to find from an examination of the envelope in which the deposition was returned, and other papers, that the deposition was taken in the place directed in the commission. McKinney *v.* Wilson, 133 Mass. 131.

Stipulation of Parties. — Certificate of commissioner need not show the day upon which the deposition was taken, when the same is taken pursuant to a stipulation of the parties and the stipulation does not prescribe the date upon which the deposition may be taken. Elgin *v.* Hill, 27 Cal. 373. The stipulation in that case was as follows: "It is hereby stipulated and agreed by and between the parties hereto that the deposition of *Wm. H. James*, a resident of *Nevada territory*, be taken in answer to the interrogatories, direct and cross, hereto attached, before some person authorized to take depositions, subject to all legal objections and exceptions, except as hereby waived. Notice, order, commission and channel of conveyance are not required to be in accordance with statutory provisions, and all objection to any omission, informality or irregularity in those regards are hereby waived. *Whitman & Wells* for plaintiff, and *Wallace & Rayle*, attorneys for defendant. *Feb. 16*, 1*864*."

The cause and court in which the deposition is to be used must be stated in certificate under the statutory requirements of many jurisdictions. See list of statutes cited *supra*, note 1, p. 488. Rand *v.* Dodge, 17 N. H. 343; Whitney *v.* Sears, 16 Vt. 587.

Style of court, or name of the justice, or description of the board, or auditors, or referees, by whom the cause is to be tried, and the time and place of the session, must be stated. Plimpton *v.* Somerset, 42 Vt. 35.

"To be tried by the county court, at the next term, to be holden," etc., is a sufficient description of the time and place of the trial. Churchill *v.* Briggs, 24 Vt. 498.

Place of Holding Court Need Not be Stated. — If the county and session are properly stated, it is sufficient. Chandler *v.* Spear, 22 Vt. 388.

Where deposition is to be used before referees, certificate must state before what court the action is pending, and whether the reference is by rule of court or agreement of the parties. Plimpton *v.* Somerset, 42 Vt. 36.

Time of session of court is sufficiently described by the words "next to be holden," etc. Clark *v.* Brown, 15 Vt. 658.

The kind of action need not be specified in the caption of the deposition. Scott *v.* Perkins, 28 Me. 22.

Parties to the action must be stated. Whitney *v.* Sears, 16 Vt. 587. Plimpton *v.* Somerset, 42 Vt. 35.

Parties must be correctly named, and, in order to do this, the christian and

surnames of both plaintiff and defendant, must be set forth; and it is neither a correct nor accurate description of the parties to name them S. S. and others. Haskins *v.* Smith, 17 Vt. 263.

Reasons for taking, under many statutes, are required to be stated. Conn. Gen. Stat. (1888), § 1068; Me. Rev. Stat. (1883), c. 107, § 15; S. Car. Rev. Stat. (1893), § 2347; Whitney *v.* Sears, 16 Vt. 587; Jones *v.* Knowles, 1 Cranch (C. C.) 523; Woodward *v.* Hall, 2 Cranch (C. C.) 235; Patterson *v.* Wabash, etc., R. Co., 54 Mich. 91. But see Thompson *v.* Stewart, 3 Conn. 171.

Sufficient Statement of Reasons. — See McCrillis *v.* McCrillis, 38 Vt. 135; Oatman *v.* Andrew, 43 Vt. 470; Lund *v.* Dawes, 41 Vt. 370.

Stated in the notice, and the notice made part of the officer's return, the reasons for taking the deposition are sufficiently certified. Stoddard *v.* Hill, 38 S. Car. 385.

Whether adverse party was notified must be stated. Whitney *v.* Sears, 16 Vt. 587; Barnes *v.* Ball, 1 Mass. 73; Hunt *v.* Lowell Gas-Light Co., 1 Allen (Mass.) 343; and the reason why notice was not given, when party was not notified. Pentleton *v.* Forbes, 1 Cranch (C. C.) 507.

Taken ex parte, the certificate must state the reason why the adverse party was not notified. Hopkinson *v.* Watson, 17 Vt. 91.

Whether parties were present, and whether in person or by agent or attorney, should be stated. See list of statutes cited *supra,* note 1, p. 488. Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55; Thiebaud *v.* Sebastian, 10 Ind. 454; Rand *v.* Dodge, 17 N. H. 343; Cushman *v.* Wooster, 45 N. H. 410; Carlton *v.* Patterson, 29 N. H. 580. But see, however, Turner *v.* Hardin, 80 Iowa 691.

That the adverse party did not appear "in person or by attorney" is sufficient. Hay *v.* State, 58 Ind. 337.

That plaintiff was present and did not object to the taking is sufficient under the clause of the statute which requires the magistrate to certify that the adverse party did or did not object. Carter *v.* Beals, 44 N. H. 408.

Exhibits, Identification of — *Arkansas.* — Sand. & H. Dig. (1894), § 3008.

Iowa. — Code (1897), § 4700.

Missouri. — Burns' Anno. Pr. Code (1896), § 1319.

New York. — Code Civ. Proc., § 901, subs. 3 (Birds. Rev. Stat. (1896), p. 862, § 31).

Wisconsin. — Sanb. & B. Anno. Stat. (1889), p. 2136 (*citing* Rules of Court, § 5). See also list of statutes cited *supra,* note 1, p. 488.

A certificate stating "that the enclosed deed hereto attached marked 'Exhibit *A*' was shown to the witness and by him examined and recognized to be the original deed by him signed and delivered," is a sufficient identification, where the deed is enclosed with the deposition and marked in the manner stated in the certificate. Humphries *v.* Dawson, 38 Ala. 199.

The provisions of the statute requiring exhibits to be attached to depositions do not apply to a case where the exhibits are made a part of the bill or answer and filed with it. Atkins *v.* Guice, 21 Ark. 164; Nicks *v.* Rector, 4 Ark. 251.

Where interrogatories are suggestive of the answer and are in relation to a note, it should appear that the original note is before the witness, or a copy of it referred to as an exhibit annexed to his deposition. Harsh *v.* Hanauer, 15 Ark. 252.

Exhibits need not be attached to the deposition if properly identified. Toby *v.* Oregon Pac. R. Co., 98 Cal. 490.

The proper mode of identifying papers referred to in depositions is by the statement of the commissioner on each paper that this is the paper referred to by such a witness in his answer to such an interrogatory, adding his signature, or initials, with a mark, or number, or letter. Hatfield *v.* Perry, 4 Harr. (Del.) 463. Such identification may be as follows:

"*May tenth,* 1898.

John Doe, plaintiff, against *Richard Roe,* defendant. } At the execution of the commission in this cause, this paper writing was produced and shown to *William West,* a witness, sworn and examined, and by him deposed to at the time of his examination on the *complainant's* behalf. (If more than one witness, add: *and was also produced and sworn to by Samuel Short and Francis Fern, witnesses.*)

Before me, *James Hallett,*
Commissioner."

Or, "This document, marked Exhibit *A,* was produced and shown to *William West* at the execution of the commission for the examination of the

said *William West* in a cause wherein *John Doe* is plaintiff and *Richard Roe* is defendant, and by him deposed unto at the time of his said examination.

Before me, *James Hallett*,
Commissioner."

William West, Witness."

Or, "At the execution of a commission for the examination of witnesses between *John Doe*, plaintiff, and *Richard Roe*, defendant, this exhibit numbered *2* and hereto annexed was produced and shown to *William West*, and by him deposed unto and subscribed by him at the time of his examination, before me, this *tenth* day of *May*, 18*98*.

James Hallett, Commissioner."

Or, "This is the document identified by the witness, *William West*, in his answer to the *fourth* interrogatory, and therein referred to.

James Hallett,
William Morris,
William West. Commissioners."

Adjournments. — Where the taking of depositions is adjourned from day to day, the certificate of the officer must show the reason for the continuance. Kisskadden *v.* Grant, 1 Kan. 328; Bowman *v.* Branson, 111 Mo. 343; Bracken *v.* March, 4 Mo. 74.

Entries of the proceedings of the day and of the adjournment should be made. Owens *v.* Peyton, 70 Mo. App. 50. The entry may be as follows: "Not being able to complete the taking of said deposition for the reason that (*Here insert the reason*), I adjourn the further taking of the same until tomorrow, then to be continued at the same time, place, and between the same hours mentioned in the annexed notice. *Norton Porter*, Notary Public." On the succeeding day, the officer taking the depositions should commence as follows: "Pursuant to the adjournment as above stated, on the *eleventh* day of *June*, 18*98*, between the hours of *ten* o'clock in the *fore*noon and *four* o'clock in the *after*noon, at the (*Here insert the place where the depositions are taken*), I continue the taking of said depositions, as follows, namely: *William West*, in continuation of his deposition, commenced yesterday, on his oath further says," etc.

Or thus: "The commission was then adjourned to the *twelfth* day of *May*, 18*98*, at the same hour and place, and at the time and place last mentioned we, the commissioners, met pursuant to notice, and proceeded, in the presence of solicitors of the parties above named, to take the following depositions, to wit:" etc.

Or thus: "The taking of said deposition not being finished at *four* o'clock of said *tenth* day of *May*, 18*98*, the further taking of the same is adjourned until *ten* o'clock in the *fore*noon of the *eleventh* day of *May*, 18*98*." And upon resuming the taking of the deposition, the entry may be as follows: "The taking of the deposition of the said *William West* was resumed on the *eleventh* day of *May*, 18*98*, at *ten* o'clock *a.* m."

Or thus: "By consent of parties, the further taking of depositions in this cause is adjourned to the *eleventh* day of *May*, A. D. 18*98*, at the same hour and place. *James Hallett*, Commissioner." And upon resuming the taking of the deposition, the entry should be as follows: "The taking of depositions in this cause was resumed at *the office of Daniel Webster*, No. *10 William* street, in the city of *New Barbadoes*, in the county of *Bergen*, and state of *New Jersey*, on the *eleventh* day of *May*, A. D. 18*98*, at *ten* o'clock *a.* m."

The date to which the adjournment is made must be stated. Bennett *v.* Bennett, 37 W. Va. 396.

Must be signed by witness. Bell *v.* Chambers, 38 Ala. 660; Wiggins *v.* Pryor, 3 Port. (Ala.) 430; Ariz. Rev. Stat. (1887), § 1845; Cal. Code Civ. Proc. (1897), § 2032; Mills' Anno. Code Colo. (1896), § 343; Chipley *v.* Green, 7 Colo. App. 25; Conn. Gen. Stat. (1888), § 1068; 2 Ga. Code (1895), § 5308; Idaho Laws (1893), p. 134, § 12; Starr & C. Anno. Stat. Ill. (1896), c. 51, § 30; Horner's Stat. Ind. (1896), §§ 429, 449; Iowa Code (1897), § 4699; Kan. Gen. Stat. (1897), c. 95, § 365; Mass. Pub. Stat. (1882), c. 169, § 31; Mich. Pub. Acts (1895), No. 180, § 4; Miss. Anno. Code (1892), § 1754; Mont. Code Civ. Proc. (1895), § 3361. Neb. Comp. Stat. (1897), § 5959, subs 3; Nev. Gen. Stat. (1885), § 3431; N. H. Pub. Stat. (1891), c. 225, § 8; N. J. Gen. Stat. (1895), p. 1402, § 27, p. 1404, § 34; N. Mex. Comp. Laws (1897), § 3043; N. Y. Code Civ. Proc., § 901, subs. 2 (Birds. Rev. Stat. (1896), p. 862, § 31); N. Dak. Rev. Codes (1895), § 5684, subs. 3; Bates' Anno. Stat. Ohio (1897), § 5280, subs. 3; Johnson *v.* Booth, 1 Handy (Ohio), 42; Timms *v.* Wayne, 1 Handy (Ohio), 400; Okla. Stat. (1893), § 4249; Hill's Anno. Laws Oregon (1892), §§ 822–824; R. I. Gen. Laws (1896), c. 244, § 25; S. Dak. (Dak. Comp. Laws, 1887, §

5259, subs. 3); Tex. Rev. Stat. (1895), art. 2284; Utah Rev. Stat. (1898), § 3457; Ballinger's Anno. Codes & Stat. Wash. (1897), § 6025; Wyoming Rev. Stat. (1887), § 2628, subs. 3; U. S. Rev. Stat. (2d ed. 1878), § 864. See also list of statutes cited *supra*, note 1, p. 488.

Certificate should state this fact. See list of statutes cited last above, and also list of statutes cited *supra*, note 1, p. 488.

Minnesota.—Witness must sign name to each piece of paper upon which any portion of his testimony is written, and also at the end of the deposition. Stat. (1894), § 5689.

Need not state that deposition was signed by the witness when the signature of the deponent is apparent from inspection. Lewis *v.* Morse, 20 Conn. 211.

Witness should sign at the end of the deposition. Read *v.* Patterson, 11 Lea (Tenn.) 430.

Signature at the close is sufficient. Witness need not sign direct and cross interrogatories separately. Lord *v.* Horsey, 5 Harr. (Del.) 317; Veach *v.* Bailiff, 5 Harr. (Del.) 379; Westcott *v.* Allston, 1 Del. Ch. 74. But see Minn. Stat. (1894), § 5689; Sanb. & B. Anno. Stat. Wis. (1889), p. 2136 (*citing* Rules of Court, § 5); Read *v.* Patterson, 11 Lea (Tenn.) 430.

But it has been held in one state that depositions taken under a commission need not be "subscribed" by the witness. Moulson *v.* Hargrave, 1 S. & R. (Pa.) 201.

Signature at end of certificate just above commissioner's attestation is sufficient, although witness should sign at the end of the deposition. Read *v.* Patterson, 11 Lea (Tenn.) 430.

Subscribing names by initials has been held to be sufficient. Payne *v.* June, 92 Ind. 252.

Signature may be waived by agreement of counsel. Chipley *v.* Green, 7 Colo. App. 25. Or by agreement of parties, in writing. Mich. Pub. Acts (1895), No. 180, § 4.

Must be subscribed by commissioner in the manner required by law or indicated in the commission. Dozier *v.* Joyce, 8 Port. (Ala) 303; 2 Ga. Code (1895), § 5308; Starr & C. Anno. Stat. Ill. (1896), c. 51, § 30; Horner's Stat. Ind. (1896), § 430; Mich. Pub. Acts (1895), No. 180, § 4; N. J. Gen. Stat. (1895), p. 1404, § 34; N. Car. Code (1883), § 1357. See also list of statutes cited *supra*, note 1, p. 488.

Commissioner must subscribe his name to each half-sheet of the deposition. N. Y. Code Civ. Proc., § 901, subs. 4 (Birds. Rev. Stat. (1896), p. 862, § 31); Sanb. & B. Anno. Stat. Wis. (1889), p. 2136 (*citing* Rules of Court, § 5); Merrill's Case, 3 Ct. of Cl. 385. See also list of statutes cited *supra*, note 1, p. 488.

Magistrate must sign both certificate and oath administered to the deponent in the caption. Shed *v.* Leslie, 22 Vt. 498. But where certificate and caption are drawn together, and form a connected statement, the official signature of the commissioner to that statement is sufficient. Hauxhurst *v.* Hovey, 26 Vt. 544.

Deposition in Foreign Language. — A deposition taken under a commission issued to a foreign country may be taken in the language of such foreign land, under section 18 of the schedule of the constitution of Illinois. Christman *v.* Ray, 42 Ill. App. 111.

May be taken in a foreign language and translated in the court. Cavasos *v.* Gonzales, 33 Tex. 133.

Interpreter's Oath. — If interpreter is employed, one of the commissioners will administer to him the following oath, and certify thereto:

"You do solemnly swear that you will truly and faithfully interpret the oath and questions to be administered to *William West*, a witness to be examined out of the English language, into the *German* language, and that you will truly and faithfully interpret the answers of the said *William West* thereto out of the *German* language into the English language." The deposition must be subscribed by the interpreter as well as by the witness, and certified by the acting commissioner.

In Criminal Cases. — The caption and certificate of depositions taken in criminal cases are governed by the same rules which are applicable to depositions in civil cases at law. Ala. Crim. Code (1886), § 4468; Kan. Gen. Stat. (1897), c. 102, §§ 169, 170, 171. New Mex. Comp. Laws (1897), § 3048; Tex. Pen. Code (1895), art. 811, and list of statutes cited *supra*, note 1, p. 488.

The certificate must set forth an actual compliance with all the requirements of the statute. People *v.* Morine, 54 Cal. 575.

For forms of certificates to depositions see *infra*, Forms Nos. 7352 to 7369.

For forms of stipulations relating to the taking of depositions see *supra*, Forms Nos. 7352 to 7369.

1. Caption.[1]

Form No. 7336.[2]

(*Title of court and cause as in Form No. 5907.*) } Deposition of *William West.*

By virtue of the commission hereunto annexed, issued from the office of the clerk of the *Circuit* Court of *Jefferson* county, state of *Alabama*, we, the commissioners therein named, have called and caused to come before us the said *William West*, the witness named in said commission on this *tenth* day of *May*, 1898, at *the office of James Holt*, in the city of *Atlanta*, in the county of *Fulton*, in the state of *Georgia*, and having duly cautioned and sworn the said witness to speak the truth, the whole truth, and nothing but the truth, *William West*, the said witness, deposeth and saith as follows:

1st. To the first interrogatory he saith: (*Here set out answer in the language of the witness, and continue in this manner until all the direct interrogatories have been answered.*)

1st. To the first cross-interrogatory he saith: (*Here set out answer as above directed.*)

William West.

For forms of notices upon which depositions may be taken see *supra*, Forms Nos. 7234 to 7259.

For forms of interrogatories see *supra*, Forms Nos. 7272 to 7283.

For forms of commissions upon which depositions are authorized to be taken see *supra*, Forms Nos. 7305 to 7335.

1. **Illustrations** of captions to depositions are given *infra*, Forms Nos. 7336 to 7351.

2. *Alabama.* — Civ. Code (1886), § 2807.

See also *supra*, note 3, p. 563.

Precedent. — In Griffin *v.* Isbell, 17 Ala. 184, it was held that where the caption of a deposition commenced as follows: "Pursuant to the annexed commission, to me directed, by, etc., I have caused *Thomas Penn*, the witness, etc., to come before me, a justice of the peace, in and for the county of *Patrick*, and State of *Virginia*, on, etc. and the said *Thomas Penn*, being duly sworn on the Holy Evangelists," etc., and concluding "The above answers were sworn to and subscribed before me, a justice of the peace in and for the county of *Patrick* and State of *Virginia*," the words "Pursuant to the annexed commission" showed the character in which he acted, and that the words "justice of the peace," etc., were merely descriptive of the person, and that the deposition was not therefore open to objection.

Under the Arkansas statutes (Sand. & H. Dig. (1894), § 3003 *et seq.*), the caption may be as follows: "The deposition of *William West*, taken on the *tenth* day of *May*, 1894, between the hours of *eight* o'clock *a.* m. and *six* o'clock *p.* m., at the office of *Sergeant Buzfuz*, at No. *10 Markham* street, in the city of *Little Rock*, *Pulaski* county, *Arkansas*, to be read in evidence in the cause pending in *Sebastian Circuit* Court for the *Fort Smith District* wherein *Mrs. Bardell* is plaintiff and *Samuel Pickwick* is defendant" (*concluding as in Form No. 7337 infra*).

See also *supra*, note 3, p. 563.

Under the Kentucky Statutes (Bullitt's Civ. Code (1895), § 580 *et seq.*), as set out in Bullitt's Civ. Code (1895), p. 724, the following caption may be used:

"*John Doe*, plaintiff, against *Richard Roe*, defendant. } *Bourbon Circuit* Court. Deposition of *William West.*

The deposition of *William West*, taken on the *tenth* day of *May*, 1898, at *Visalia*, in *Kenton* county, and to be read as evidence in an action between *John Doe*, plaintiff, and *Richard Roe*, defendant, pending in the *Bourbon Circuit* Court.

1st interrogatory (*stating it*).

Answer to 1st interrogatory (*stating it*). *William West.*"

Form No. 7337.[1]

(*Title of court and cause as in Forms Nos. 5910, 5922, 5924, 5931, 5935 or 5936.*) } Deposition.

Be it remembered, that pursuant to the order (or *notice* or *stipulation*) hereunto annexed,[2] and on the *tenth* day of *May*, 1898, at *Minneapolis*, in the county of *Hennepin*, state of *Minnesota*, before me, *Norton Porter*, a *notary public* in and for said county of *Hennepin*, duly appointed and commissioned to administer oaths, etc., personally appeared *William West*, a witness produced on behalf of the *plaintiff* in the above-entitled action, now pending in the said court, who being first by me duly sworn was then and there examined and interrogated by *Jeremiah Mason*, Esq., of counsel for the said plaintiff, and by *Oliver Ellsworth*, Esq., of counsel for the said defendant, and testified as follows: (*Here set out testimony of witness in form of question and answer, unless parties agree to a different mode.*)[3]

William West.

Form No. 7338.[4]

The deposition of *William West*, of the county of *Cook*, and state (or *territory*) of *Illinois*, a witness of lawful age, produced, sworn and examined upon his corporal oath, on the *tenth* day of *August*, in the year of our Lord one thousand eight hundred and *ninety-seven*, at *the office* (or *house*) of *Daniel Webster*, in the town (or *city*) of *Chicago*, in the county of *Cook* and state (or *territory*) aforesaid, by me, *James*

1. *California.* — Code Civ. Proc. (1897), § 2032 *et seq.*
Montana. — Code Civ. Proc. (1895), § 3361 *et seq.*
Nevada. — Gen. Stat. (1885), § 3431 *et seq.*
Oregon. — Hill's Anno. Laws (1892), §§ 822, 824.
Utah. — Rev. Stat. (1898), § 3457 *et seq.*
Washington. — Ballinger's Anno. Codes and Stat. (1897), § 6025 *et seq.*
See also *supra*, note 3, p. 563.

2. **Commission and interrogatories must be annexed** to the deposition. Ballinger's Anno. Codes & Stat. Wash. (1897), § 6025.

3. **Must be taken in form of question** and answer, and the words of the witness must be written down unless the parties agree to a different mode. Cal. Code Civ. Proc. (1897), § 2006; Mont. Code Civ. Proc. (1895), § 3324.
When may be in Narrative Form. — Pralus *v.* Pacific Gold, etc., Min. Co., 35 Cal. 30; McCormick *v.* Largey, 1 Mont. 158.
For manner of execution in criminal cases see *infra*, note 1, p. 581.

4. *Colorado.* — Mills' Anno. Code (1896), § 343.
Illinois. — Starr & C. Anno. Stat. (1896), c. 51, § 30.
See also *supra*. note 3, p. 563.
No statutory form of caption is prescribed in *Illinois*. Behrensmeyer *v.* Kreitz, 135 Ill. 591.
Several Witnesses, One Caption Sufficient. — Where the depositions of several witnesses are taken at the same time and place, to be read in the same suit, the above form may be modified, as follows:
"The depositions of *William West*, *Samuel Short* and *Francis Fern*, of the county of *Cook*, in the state of *Illinois*, witnesses. of lawful age, produced, sworn, and examined on their respective corporal oaths," etc., and in the latter part of the caption, say: "The said *William West*, *Samuel Short* and *Francis Fern*, being first duly sworn by me as witnesses in said case," etc. At the commencement of each deposition say: "Interrogatories propounded to the said *William West*, a witness produced and sworn as aforesaid on the part of the said *defendant*, and his answers thereto, as follows:
Interrogatory first. (*Here insert the interrogatory.*)
Answer to first interrogatory. (*Here insert the answer, and continue as directed in Form No. 7338.*)

Hallett, a commissioner (or *by us*, if more than one commissioner, inserting all the names of the commissioners) duly appointed by a dedimus potestatem, or commission, issued out of the clerk's office of the *District* Court of *Arapahoe* county, in the state of *Colorado*, bearing teste in the name of *Calvin Clark*, Esq., clerk of the said *District* Court, with the seal of the said court affixed thereto, and to me (or *us*, if more than one) directed as such commissioner (or *commissioners*), for the examination of the said *William West*, a witness in a certain suit and matter in controversy now pending and undetermined in the said *District* Court, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, in behalf of the said *defendant*, as well upon the cross-interrogatories of the *plaintiff* as on the interrogatories of the *defendant*, which were attached to or enclosed with the said commission, and upon none others. The said *William West* being first duly sworn by me (or *by James Hallett, one of said commissioners*, if more than one) as a witness in the said cause, previous to the commencement of his examination, to testify the truth as well on the part of the plaintiff as the defendant, in relation to the matters in controversy between the said plaintiff and defendant, so far as he should be interrogated, testified and deposed as follows:

Interrogatory first. (*Here insert first interrogatory.*)[1]

Answer to first interrogatory. (*Here insert the answer, and so on successively in the order in which the interrogatories may be propounded and answered. Then follow "cross-interrogatories and answers thereto, by the witness, on the part of the defendant," or plaintiff, as the case may be, writing down the interrogatories and answers successively in the order aforesaid.*)

William West.

1. Interrogatories Need Not be Copied.— In *Illinois*, it is enough if they are proposed to and answer by the witness, and so referred to that it can be seen by the court that the deposition was fairly taken. Hawks *v.* Lands, 8 Ill. 227.

But oral interrogatories, together with the answers thereto, must be reduced to writing in the order in which they are proposed and answered. Starr & C. Anno. Stat. Ill. (1896), c. 51, § 30.

Under the Connecticut and Vermont statutes (Conn. Gen. Stat. (1888), § 1068; Vt. Stat. (1894), § 1263 *et seq.*), the following caption is proper: "I, *William West*, of the city of *Providence*, in the county of *Providence* in the state of *Rhode Island*, of lawful age, being duly cautioned, examined and sworn according to law, do testify and say: (*setting out testimony of witness*).

William West."

See also *supra*, note 3, p. 563.

In Delaware, the caption may be as follows: (*Title of court and cause as in Form No. 6936.*) "Depositions of witnesses produced, sworn and examined on the *tenth* day of *May*, A. D. 189*8*, at *the office of James Hallett*, in the town of *Harrison*, in *Hudson* county, and state of *New Jersey*, by virtue of a commission issued out of the Court *of Chancery*, of the state of *Delaware*, in and for *Kent* county, to *James Hallett*, directed for the examination of witnesses in a cause then depending between *John Doe*, complainant, and *Richard Roe*, defendant, on the part and behalf of the complainant, *John Doe*. (*If a clerk has been employed by the commissioner, here insert the following: Charles Chase, the clerk by me employed in taking, writing, transcribing, and engrossing the said depositions, having first duly taken the oath assigned to the said commission according to the tenor thereof*). *William West*, of *Harrison*, in the county of *Hudson*, and state of *New Jersey*, aged *twenty-four* years, a witness produced, sworn, and examined on the part and behalf of the complainant, *John Doe*, deposeth and saith as follows:

1. To the first interrogatory in chief

Form No. 7339.[1]

(*Oath of Commissioners.*)[2]

Caption.

In the *Circuit* Court of the *Second* Judicial Circuit of *Florida*, in and for *Leon* county.

John Doe against *Richard Roe.* } Deposition of *William West.*

William West, who was produced, first duly sworn by Commissioner *James Hallett*, in our presence, and examined on the *tenth* day of *May*, A. D. 1*898*, in the county of *Fulton*, state of *Georgia*, by virtue of the annexed commission issued out of the clerk's office of the above named court, to us directed for the examination of said witness, in the above named cause then and there pending in said court, of lawful age, on the part of the *plaintiff*, being first duly sworn, deposes and says, in answer to the interrogatories as numbered, as follows: (*concluding as in Form No. 7336, supra.*)[3]

Form No. 7340.[4]

(2 Ga. Code (1895), § 5313.)

he answers and says: (*Here set out the answer of the deponent, and continue in the same manner with each interrogatory and cross-interrogatory.*)

William West.

Sworn and subscribed before me this *tenth* day of *May*, A. D. 1*898*.

James Hallett, Commissioner."

1. *Florida.* — Rev. Stat. (1892), § 1129 *et seq.* See also *supra*, note 3, p. 563.

2. **Oath of commissioners** referred to in the text may be as follows:

(*Title of court and cause as in Form No. 7339.*)

State of *Florida*, County of *Leon*.

Before me personally appeared *James Hallett* and *William Morris*, and being by me first duly and severally sworn, each for himself, says that he is one of the commissioners appointed by the judge of the *Circuit* Court for *Leon* county, *Florida*, to take the deposition of *William West*, a witness for the *plaintiff* in the above entitled cause; that he, the said commissioner, is not of kin to, nor the attorney, nor the agent of either party in said suit, nor interested in the result thereof, and that he will well and faithfully perform the duties devolving upon him as commissioner aforesaid.

Subscribed and sworn to before me this *tenth* day of *May*, A. D. 1*898*.

James Hallett,
William Morris,
(SEAL) Commissioners.
Norton Porter, Notary Public."

3. **If additional interrogatories** are propounded to the witness, such interrogatories and the answers thereto shall be written down by the commissioners, or by some one at their request, and shall become a part of the deposition. Fla. Rev. Stat. (1892), § 1130.

4. *Georgia.* — 2 Code (1895), § 5313 (relating to waiver of commission and taking deposition by written interrogatories).

See also *supra*, note 3, p. 563.

Where answers to interrogatories are taken by consent without a commission, the execution of such interrogatories is not governed by the usual provisions. Shorter *v.* Marshall, 49 Ga. 31.

The form of caption of deposition taken without any order or commission, under 2 Ga. Code (1895), § 5315 *et seq.*, as set out in the statute (§ 5317), is as follows:

"*John Doe* against *Richard Roe.* } In the *Superior* Court of *Bibb* County, *Georgia.*

Depositions of *William West* (and *Samuel Short*), witness (or *witnesses*) for the plaintiff (or *defendant*) in the above case, taken upon notice, beginning on the *fifteenth* day of *April*, 1*898*, at *Macon*, in the presence of plaintiff and defendant (*either* or *both*) in person (or *by attorney*, as the case may be). The said witness (or *witnesses*) being first duly sworn, deposed as follows: (*Here state each question, both direct and cross, with the answer delivered by the witness immediately after it.*)"

State of *Georgia*, *Bibb* County.[1]

By virtue of an agreement between the parties, or counsel, [(or *by virtue of a commission duly issued*)][2] in the case of *John Doe* vs. *Richard Roe*, pending in the *Superior* Court of *Bibb* county (or *district*, as the case may be), the undersigned, acting as commissioners, have caused *William West*,[3] the witness in said case, to come before us, who being duly sworn[4] true answers to make to the annexed interrogatories, deposes and answers as follows:

To the first interrogatory, he answers: (*setting out answer*).

To the second interrogatory, he answers: (*setting out answer*).

To the first cross-interrogatory, he answers: (*setting out answer*).

To the second cross-interrogatory, he answers: (*setting out answer*).

Answered, subscribed and sworn to before us, this *fifteenth* day of *April*, 1*898*.

James Hallett, Commissioner. (SEAL)
Edward L. Walker, Commissioner. (SEAL)

William West, witness.

Form No. 7341.[5]

Depositions of witnesses taken before me, *Norton Porter*, a *notary public* within and for the county of *Cook*, state of *Illinois*, in an action pending in the *Circuit* Court of *Posey* county, in the state of *Indiana*, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, on the part of the *defendant* in said action, on the *tenth* day of *May*, 1*898*; said plaintiff was present in person and by his attorney, *Jeremiah Mason*, and said defendant was present by his attorney, *Oliver Ellsworth*.

William West, of *Chicago*, in the county of *Cook*, in the state of *Illinois*, of lawful age, being first duly sworn (or *affirmed*) by me as hereinafter certified, deposed as follows: (*concluding as in Form No. 7337, supra*).[6]

Caption or Preamble Not Necessary. — So held in Flournoy *v.* Jeffersonville First Nat. Bank, 79 Ga. 810.

1. **Place of execution** should appear. 2 Ga. Code (1895), § 5308; Cecil *v.* Gazan, 71 Ga. 631; Wannack *v.* Macon, 53 Ga. 162.

If county and state are given, it is sufficient. Flournoy *v.* Jeffersonville First Nat. Bank, 79 Ga. 810; Rogers *v.* Truett, 73 Ga. 386.

2. The matter enclosed in [ ] will not be found in the form as set out in the statute.

3. **Residence of witness need not be stated** when deposition is taken by consent. Fry *v.* Shehee, 55 Ga. 208.

4. **Answers should be made under oath** and certified to be so taken. 2 Ga. Code (1895), § 5308.

If witness answers from memorandum, such memorandum shall be returned with the commission and the fact certified by the commissioners. 2 Ga. Code (1895), § 5307.

When answers to cross-interrogatories refer to answers to direct interrogatories, and it appears that the answers to the direct interrogatories furnish full answers to the cross-interrogatories, it is sufficient. Georgia R. Co. *v.* Thomas, 68 Ga. 744.

Presumption that right witness was examined exists although the return fails to state that the one examined is the one named in the commission. Flournoy *v.* Jeffersonville First Nat. Bank, 79 Ga. 810.

5. *Idaho.* — Laws (1893), p. 132 *et seq.*

Indiana. — Horner's Stat. (1896), § 428 *et seq.*

See also *supra*, note 3, p. 563.

6. **Narrative Form.** — There is no provision in the code requiring that the questions should be reduced to writing or set out in the body of the deposition.

Form No. 7342.[1]

At the execution of a commission hereto annexed, issued out of the *Circuit* Court of *Allegany* county, directed to *James Hallett* and

If the adverse party appear and require it, each question should be written down before it is answered; but if the adverse party fail to appear, or, on appearance, fail to require that the questions be written down before they are answered, he will not be allowed to object to the deposition upon the grounds that they were written in narrative form, or that the questions were not written down before they were answered. Myers *v.* Murphy, 60 Ind. 282.

Order of Examination. — Witness shall be examined first by party producing him and then by adverse party, and by the officer and parties afterward if they see cause.

Idaho. — Laws (1893), p. 134, § 11.

Indiana. — Horner's Stat. (1896), § 428.

Taken upon interrogatories, the caption may be as follows: "The deposition of *William West*, a witness produced and sworn before me, a *notary public* within and for the county of *Cook*, state of *Illinois*, and a commissioner of the state of *Indiana* to take depositions under the appointment contained in the foregoing commission. The following deposition was taken pursuant to the attached notice and commission, and on the part of the plaintiff in an action now pending in the *Circuit* Court of *Posey* county, *Indiana*, wherein *John Doe* is plaintiff and *Richard Roe* is defendant (*Here set out testimony of the witness, writing out each interrogatory and answer thereto in its proper order.*) *William West.*" .

Idaho. — Laws (1893), p. 138, § 31.

Indiana.—Horner's Stat. (1896), § 449.

Place of Taking. — In Atkinson *v.* Starbuck, 6 Blackf. (Ind.) 353, it was held that a deposition would not be suppressed where the name of the state in which it was taken did not appear in the caption, if the caption alleged that the deposition was taken agreeably to the dedimus and notice, and the state is shown in the dedimus and notice.

Under the Iowa Statutes (Iowa Code (1897), § 4699 *et seq.*), the caption may be as follows:

"Deposition of witness produced, sworn and examined in pursuance of the annexed commission (or *notice* or *agreement*) at *Minneapolis*, in the county of *Hennepin* and state of *Minnesota*, before me, *Norton Porter*, a *notary public* within and for the said county and state, in a certain action now pending in the *District* Court of the state of *Iowa* in and for *Harrison* county, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, on behalf of the *defendant.*

William West, of lawful age, being produced, sworn and examined, on the part of the *defendant*, deposed as follows:" (*concluding as in Form No. 7336, supra*).

See also *supra*, note 3, p. 563.

Interrogatories, if oral, must be written out; if written, stated by number. Iowa Code (1897), § 4699.

Answers must be inserted immediately under the interrogatories. Iowa Code (1897), § 4699.

Must be in language of witness as nearly as practicable. Iowa Code (1897), § 4699.

Under the *Kansas* statutes (Gen. Stat. (1897), c. 95, §§ 359–360), the caption may be as follows:

"State of *Kansas*, County of *Atchison*, ss.

Before *Norton Porter*, a *notary public* in and for the county or *Atchison* and state of *Kansas*.

Depositions of witnesses taken before me, a *notary public* within and for the county of *Atchison* and state of *Kansas*, on the *twenty-fourth* day of *August*, 1898, between the hours of *eight* o'clock *a.* m. and *six* o'clock *p.* m., at *Atchison*, in said county, pursuant to annexed notice (or *agreement*), in an action pending in the *District* Court, within and for the county of *Sedgwick* and state of *Kansas*, wherein *John Doe* is plaintiff and *Richard Roe* is defendant. The said *John Doe*, in person (or *by his attorney*, *Jeremiah Mason*,) appeared, and the said *Richard Roe* (*stating whether the adverse party appeared*): thereupon the said *John Doe* produced the following witnesses, in the following order: *William West*, of lawful age, being by me first duly examined, cautioned, and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says:" (*concluding as in Form No. 7336, supra*).

See also *supra*, note 3, p. 563.

1. *Maryland.* — Pub. Gen. Laws (1888), art. 35, § 20.

See also *supra*, note 3, p. 563.

William Morris, empowering them to examine witnesses in the above entitled cause, we, the said *James Hallett* and *William Morris*, the commissioners in the said commission named, having met on the *tenth* day of *May*, 1898, at *the office of Daniel Webster*, Esq., in the town of *Warsaw*, in the county of *Richmond*, and state of *Virginia*, pursuant to notice,[1] and having taken the oath to the said commission annexed, proceeded to take the deposition of *William West*, a witness produced on behalf of the *defendant*, which was reduced to writing, and transcribed by *Charles Chase*, who was appointed clerk by the said commissioners and took the oath prescribed for such clerk, and to the said commission annexed.

The said *William West*, of lawful age, being first duly sworn on the Holy Evangely of Almighty God, being examined on the following interrogatories to him propounded in that behalf, maketh oath, deposeth and saith as follows, to wit: (*continuing as in Form No. 7336 supra, to end; then proceed thus:*) And no other witnesses being produced to us, at the request of the solicitors of the above-named parties, we closed the said commission and do now herewith return the same, together with the interrogatories, notices and depositions, to the honorable the judges of the said court, under our hands and seals, this *tenth* day of *May*, in the year eighteen hundred and *ninety-eight*, at *Warsaw*, in the county of *Richmond*, in the state of *Virginia*.

Commissioners { *James Hallett.* (SEAL)
William Morris. (SEAL)

1. In the execution of a foreign commission no notice is required to be given to the parties. Notice of the interrogatories sent out with the commission is sufficient. Calvert *v.* Coxe, 1 Gill (Md.) 95.

Where commission is silent as to time and place of its execution, notice must be given, and the return must show compliance with the terms of the notice. Young *v.* Mackall, 4 Md. 362. The form of notice may be as follows:

"*Warsaw Richmond* County, *Va.*,
May 2, 1898.

John Doe, Esquire, *Cumberland*, *Maryland*. Sir: Notice is hereby given to you that on *Tuesday*, the *tenth* day of *May*, 1898, between the hours of *eight* o'clock in the *fore*noon and *four* o'clock in the *after*noon of that day, at *the office of Daniel Webster*, in the town of *Warsaw*, in the county of *Richmond*, in the state of *Virginia*, we shall proceed by virtue of a commission from the state of *Maryland* to us directed, to take the depositions of *William West* of said *Warsaw* and such other witnesses as may be produced to us by the *defendant* in the action pending in the *Circuit* Court of *Allegany* county, in said state of *Maryland*, wherein you are plaintiff and *Richard Roe* is defendant, at which time and place you may attend if you think proper.

James Hallett, } Commissioners."
William Morris, }

Precedent. — In Walkup *v.* Pratt, 5 Har. & J. (Md.) 51, the return, omitting formal parts, was as follows:

"By virtue of the annexed commission, I, *John Fisher*, one of the commissioners therein named, together with *Arthur Johns*, the clerk by me appointed, have, this *ninth* day of *October*, in the year 1818, met *at the house* of *Aber Harris*, in the county aforesaid, at the hour of *3* o'clock in the *after*noon, as by appointment and notice thereof given, and having taken the oath annexed to the said commission, a certificate whereof is hereunto annexed, proceeded to the execution of the same commission. Whereupon *Philip D. Feddeman*, a witness produced by the defendant in this commission named, being duly sworn true and perfect answers to make to all such interrogatories as to him should be put in this cause, and therein to speak the truth, the whole truth, and nothing but the truth. To the first interrogatory, this deponent answereth and saith — That, etc. (*Here were set out answers of deponent.*) Taken, sworn and

Form No. 7343.[1]

(*Title of court and cause as in Form No. 5920.*) Deposition of *William West*, a witness produced, sworn, and examined on oath before me, *Norton Porter*, a *notary public* in and for the county of *Cook*, state of *Illinois*, at *my office*, number *10 L* street, in the city of *Chicago*, in the county of *Cook* aforesaid, on the *tenth* day of *May*, 1*898*, pursuant to the notice (or *agreement* or *commission*) hereunto annexed,[2] at the time and place specified in said notice (or *agreement* or *commission*) to be read in evidence on the part of the defendant, in the action now pending in the *District* Court of *Hennepin* county, in the state of *Minnesota*, wherein *John Doe* is plaintiff and *Richard Roe* is defendant. *Jeremiah Mason*, Esquire, (or *no one*) appearing for the *plaintiff*, and *Oliver Ellsworth*, Esquire, (or *no one*) appearing for the *defendant*.[3] The said *William West* being by me first duly sworn, deposes and says: (*Here set out testimony of the witness in narrative form, or by question and answer, numbering each.*)

William West.

Subscribed and sworn before me this *tenth* day of *May*, 1*898*.

(SEAL) *Norton Porter*, Notary Public.

subscribed, this *9th* day of *October*, 18*18*, before *John Fisher*, Com'r.

I beg leave to return to the honorable the judges of *Queen Anne's County* Court, of the State of *Maryland*, that in virtue of the annexed commission to me directed, having first myself taken the oath aforesaid to the said commission annexed, and presented for me to take, and having also administered to *Arthur Johns*, the person by me appointed clerk of the said commission, the oath to the said commission annexed and presented for him to take, I have caused *Philip D. Feddeman*, a witness, to be sworn, and his deposition fairly and truly to be written down, as by the said commission I am directed; all which, together with the said commission, I return, closed, to your honorable court, under my hand and seal, this *9th* day of *October*, 18*18*, as by the said commission I am directed.

John Fisher, Com'r. (SEAL)"

The court held that the return to this commission to take testimony out of the state was sufficiently executed and authenticated, although there was no other evidence that the person who administered the oath to the commissioner was a justice of the peace than his own act and the return of the commission.

One Commissioner May Execute Commission. — Md. Pub. Gen. Laws (1888), art. 16, § 229. This provision of the statute applies to commissions issued by courts of law, under § 15 of the 35th article of the code, providing for the issuing of commissions by courts of law to take testimony out of the state in the same manner and form as by a court of equity. Purner *v.* Piercy, 40 Md. 212.

Under the Michigan statutes (Pub. Acts (1895), No. 180), the caption may be as follows:

"Deposition of witness taken before me, *Norton Porter*, a *notary public* within and for the county of *Hennepin*, state of *Minnesota*, pursuant to the notice (and *commission*) hereunto attached.

At the time and place named therein I attended for the said examination.

Appearances.

Jeremiah Mason, Esq., appeared as attorney or solicitor for *plaintiff*. *Oliver Ellsworth*, Esq., appeared as attorney or solicitor for *defendant*.

The said witness, *William West*, was first sworn (or *affirmed*) to tell the truth, the whole truth, and nothing but the truth, concerning the matter at issue in the cause (*said affirmation being under the pains and penalties of perjury*), and said witness then testified as follows:

Examined by *Jeremiah Mason*, for the *plaintiff*:" (*concluding as in Form No. 7337, supra*).

See also *supra*, note 3, p. 563.

1. *Minnesota.* — Stat. (1894), § 5689.

See also *supra*, note 3, p. 563.

2. **Copy of noticemust be annexed** to the deposition. Minn. Stat. (1894), § 5689.

3. **Either party may appear in person** or by agent or attorney. Minn. Stat. (1894), § 5689.

Form No. 7344.[1]

(*Venue and title of court as in Form No. 6944, and title and number of cause.*) On this the *tenth* day of *August*, A. D. 1*898*, personally came before me, *Norton Porter*, a *notary public* of said county, at *Hamilton*, in said county of *Monroe*, the following named witness for the *defendant* in the above styled cause, pending in the *Circuit* Court of the county of *Monroe*, in the said state of *Mississippi*, to wit: *William West.* Counsel present: *Jeremiah Mason*, Esq., attorney for plaintiff, and *Oliver Ellsworth*, Esq., attorney for defendant; and said witness, having been by me duly sworn to testify the truth, the whole truth, and nothing but the truth, in answer to such interrogatories and cross-interrogatories as might be propounded to him, testified as follows, to wit:

Deposition of *William West* (*concluding as in Form No. 7336, supra*).

Form No. 7345.[2]

State of *Nebraska*, } ss.
County of *Cass.* }

1. *Mississippi.*—Anno. Code (1892), § 1754.

See also *supra*, note 3, p. 563.

Affidavit that witness is material, and stating reason for taking deposition, must be attached to the deposition, when same is taken within the state. Miss. Anno. Code (1892), § 1749. For form of affidavit see *supra*, Form No. 7260.

Deposition before a justice of the peace, in *Mississippi*, may be as follows: "Deposition of *William West*, a witness on the part of the *defendant* in a case now pending in the county of *Monroe*, state of *Mississippi*, before *Abraham Kent*, justice of the peace, wherein *John Doe* is plaintiff and *Richard Roe* is defendant. I, *James Smith*, a justice of the peace for the county of *Alcorn*, state of *Mississippi*, pursuant to the commission to me directed and hereunto annexed, having given to the plaintiff, *John Doe* above named, *ten* days' notice of the time and place of taking this deposition (as appears by the original notice returned herewith), caused to come before me at *my office* in the town of *Corinth* in said county of *Alcorn*, at *ten* o'clock in the *fore*noon, on the *tenth* day of *May*, 1*898*, the said witness, *William West*, who after being duly sworn testified as follows: (*Here set out fully in narrative form the testimony of the witness.*) *William West.*" Miss. Anno. Code (1892), § 1748. For form of certificate to this deposition see *infra*, Form No. 7360.

Under the Missouri statutes (Burns' Anno. Pr. Code (1896), § 1311 *et seq.*), the following form of caption, given in in Mo. Rev. Stat. (1889), p. 2260, may be used:

"Depositions of witnesses produced, sworn, and examined on the *tenth* day of *June*, in the year of our Lord 1*898*, between the hours of *eight* o'clock in the *fore*noon and *six* o'clock in the *after*noon of that day, at *Minneapolis*, in the county of *Hennepin* and state of *Minnesota*, before me, *Norton Porter*, a *notary public*, in and for said county of *Hennepin*, in a certain cause now pending in the *District* Court of the county of *Barton*, in the state of *Missouri*, between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the plaintiff (or *defendant*).

William West, of lawful age, being produced, sworn and examined on the part of the *plaintiff*, deposeth and saith (*Here insert the statements of the witness*).

William West.

Subscribed and sworn to before me on the day, at the place, and within the hours first aforesaid.

Norton Porter, Notary Public."

(*Proceeding with the other depositions, if any, in the same manner, attaching a like jurat to each.*)

See also *supra*, note 3, p. 563.

Names of witnesses must appear in the certificate or in the caption, and if they appear in the caption and not in the certificate they should be referred to in the certificate. Amick *v.* Holman, 71 Mo. 445.

2. *Nebraska.*—Comp. Stat. (1897), § 5952 *et seq.*

John Doe, plaintiff,
against
Richard Roe, defendant.
} Caption and Certificate of Deposition.

Depositions of sundry witnesses taken before me, *Norton Porter*, a *notary public* within and for the county of *Colfax*, state of *Nebraska*, on the *tenth* day of *May*, A. D. 1*898*, between the hours of *ten A.* M. and *four P.* M., at *my office*, No. *10 L* street in *Schuyler*, in said county of *Colfax*, pursuant to the annexed notice (or *agreement* or *commission*), to be read in evidence in behalf of the *defendant* in an action pending in the *District* Court of *Cass* county, state of *Nebraska*, in which action *John Doe* is plaintiff and *Richard Roe* is defendant, *Jeremiah Mason*, Esq., appearing for the plaintiff and *Oliver Ellsworth*, Esq., appearing for the defendant, *William West*, of lawful age, being by me first duly examined, cautioned and solemnly sworn as hereinafter certified, deposeth and saith as follows: (*concluding as in Form No. 7337, supra*).

Form No. 7346.[1]

Be it remembered that on this *tenth* day of *October*, in the year of our Lord 1*897*, at *my office*, No. *10 West* street, in the city of *Minneapolis*, in the county of *Hennepin* and state of *Minnesota*, being the time and place named in the annexed notice for taking the examination of the witnesses named in the said notice, I, *James Hallett*, the commissioner therein named, having first taken the oath required of me in this behalf before *Norton Porter*, a *notary public* duly authorized to administer an oath in the county and state aforesaid,[2] proceeded

North Dakota. — Rev. Codes (1895), § 5677 *et seq.*

Ohio. — Bates' Anno. Stat. (1896), § 5273 *et seq.*

Oklahoma. — Stat. (1893), § 4242 *et seq.*

South Dakota. — Dak. Comp. Laws (1887), § 5289 *et seq.*

Wyoming. — Rev. Stat. (1887), § 2621 *et seq.*

See also *supra*, note 3, p. 563.

In *North Dakota.* — Before each answer put the following: "To the *first* interrogatory, the witness deposes and says," but do not copy the interrogatories.

Where adverse party is not present, the notice must be enclosed and forwarded with the deposition, and all the requirements of the statute complied with. Bascom *v.* Bascom, Wright (Ohio) 632.

For manner of execution in criminal cases see *infra*, note 1, p. 581.

1. *New Jersey.* — Gen. Stat. (1895), p. 1403, § 29 *et seq.*

See also *supra*, note 3, p. 563.

2. Certificate by commissioner, in his return, that previous to entering upon the duties of his office he had taken the oath prescribed by law, before a person authorized to administer an oath in the place of his residence, is sufficient. Ludlam *v.* Broderick, 15 N. J. L. 269; McNeal *v.* Braun, 53 N. J. L. 617.

But an oath that commissioner will, according to the best of his skill and knowledge, truly, faithfully, and without partiality, etc., take the examinations and depositions, etc., is a substantial departure from the statute. Lawrence *v.* Finch, 17 N. J. Eq. 234. And a certificate that they were sworn faithfully to discharge the duties assigned them in the foregoing commission is not sufficient. Den *v.* Thompson, 16 N. J. L. 72.

In Den *v.* Applegate, 23 N. J. L. 115, it was held that where by the jurat it appeared that the commissioners had been sworn before a person whose name was subscribed "A. B. Justice of the Sup. Court of Nova Scotia," the court will presume that such official had authority to administer the oath. And in Lawrence *v.* Finch, 17 N. J. Eq. 234, it was held that the return to a deposition taken in another state need not show that the officer before whom the commissioner was sworn was

to examine such witnesses as aforesaid as could be met with in pursuance of said notice, and caused said examination to be taken down in writing, signed by the witnesses respectively, and signed the same myself as hereinafter follows:

William West, one of the said witnesses appearing before me and being by me duly sworn (or *and alleging himself to be conscientiously scrupulous of taking an oath being thereupon duly affirmed by me, and having solemnly, sincerely and truly declared and affirmed*) that the answers he should give to the interrogatories put to him should be the truth, the whole truth, and nothing but the truth, says,

First. To the first interrogatory, he says: (*Here set out answer of witness and continue until all the direct interrogatories have been answered.*)

To the first cross-interrogatory, he says: (*Here set out answer of witness and continue as above directed.*)

William West.

Examination taken, reduced to writing, sworn to and subscribed this *tenth* day of *October*, A. D. 1897.

Before me, *James Hallett*, Commissioner.

authorized to administer the oath in the state where the commission was executed.

For form of oath of commissioners see *supra*, note 1, p. 552.

Indorsement upon Commission. — The commissioner should indorse upon the commission as follows:

"State of *Minnesota*, } ss.
County of *Hennepin*. } I, *James Hallett*, the commissioner within named, do hereby certify and return to the *Circuit* Court of *Bergen* county, *New Jersey*, that I have duly executed the within notice and commission in manner and form as is therein and thereby commanded, and that the execution thereof will fully appear by the schedule to the said notice and commission annexed.

Given under my hand and seal this *tenth* day of *October*, A. D. 1897.

(SEAL) *James Hallett*, Commissioner."

Return of commission, generally, see N. J. Gen. Stat. (1895), p. 1404, § 35. Of foreign commission, see N. J. Gen. Stat. (1895), p. 1404, § 37.

May be delivered by the party, his attorney or agent. N. J. Gen. Stat. (1895), p. 1404, § 36.

Taken under rule of court, in *New Jersey*, the caption to the deposition may be as follows: (*Title of court and cause as in Form No. 7247.*) "Deposition and examination of *William West*, a witness in the above entitled cause, before *James Hallett*, a *Supreme* Court commissioner, at *the office of Daniel Webster*, No. *10 William* street, in the city of *New Barbadoes*, in the county of *Bergen*, state of *New Jersey*, on the *tenth* day of *May*, 1898, by virtue of a rule of the above court made in the above entitled cause, on the *tenth* day of *March*, A. D. 1898, pursuant to the notice hereto annexed. Present: *Jeremiah Mason*, Esquire, of counsel for the plaintiff, and *Oliver Ellsworth*, Esquire, of counsel for the defendant *William West*, a witness produced on the part of the *defendant*, being by me first duly sworn, deposes and says:" (*Here set out the testimony of the witness either in narrative form or by question and answer, as counsel may desire.*) (*Concluding as in Form No. 7346, supra.*) N. J. Supreme Ct. Rules, Nos. 60-62.

In the court of chancery, the testimony must be taken in narrative form, unless the master otherwise directs. N. J. Ch. Ct. Rules, No. 90.

Deposition de bene esse, in *New Jersey*, may have this caption: (*Title of court and cause as in Form No. 7247, supra.*) "Deposition of *William West*, a witness on the part of the *defendant* in the above entitled cause, taken *de bene esse* before me, *James Hallett*, a *Supreme* Court commissioner of the state of *New Jersey*, at *my office*, No. *10 William* street, in the city of *New Barbadoes* in the county of *Bergen*, state of *New Jersey*, on the *tenth* day of *May*, A. D. 1898, at *ten* o'clock *a.* m., pursuant to the notice given by me to the *plaintiff* in the above entitled cause, a copy of which is annexed hereto, it being satisfactorily shown to me that the said witness is about to go out of

Form No. 7347.[1]

Depositions of witnesses produced, sworn (or *affirmed*) and examined the *tenth* day of *August*, in the year one thousand eight hundred and *ninety-eight*, at *the office* of *Daniel Webster*, No. *10 West* street, in the city of *Hartford*, in the county of *Hartford*, in the state of *Connecticut*, under and by virtue of a commission issued out of the *Supreme* Court of the state of *New York* in a certain cause therein depending and at issue between *John Doe*, plaintiff, and *Richard Roe*, defendant, as follows:

William West, of said *Hartford*, a *physician*, aged *forty* years and upwards, being duly and publicly sworn (or *affirmed*) pursuant to the directions hereunto annexed, and examined on the part of the above named *defendant*, doth depose and say as follows: (*concluding as in Form No. 7336, supra*).

the state, and that his attendance cannot be secured at the trial of said cause." (*Concluding as in deposition taken under rule of court.*) N. J. Gen. Stat. (1895), p. 1402, § 25 *et seq.*

1. *New York.* — Code Civ. Proc., § 901 *et seq.* (Birds. Rev. Stat. (1896), p. 862, § 31 *et seq.*) See also *supra*, note 3, p. 563.

Manner of Executing Commission. — N. Y. Code Civ. Proc. § 901 (Birds. Rev. Stat. (1896), p. 862, § 31), provides that the person to whom the commission is directed or before whom the deposition was taken unless otherwise expressly directed in the commission or in the order for taking, must execute the commission or the order as follows:

1. He must publicly administer, to each witness examined, an oath or affirmation to testify the truth, the whole truth, and nothing but the truth, as to the matters representing which the witness is to be examined.

2. He must reduce the examination of each witness to writing, or cause it to be reduced to writing, by a disinterested person. After it has been carefully read to or by the witness, it must be subscribed by the witness.

3. If an exhibit is produced and proved, the exhibit, or, if the witness or other person having it in his custody does not surrender it, a copy thereof, must be annexed to the deposition to which it relates, subscribed by the witness proving it, and numbered or otherwise identified, in writing thereon, by the commissioner or person taking the deposition, who must subscribe his name thereto.

4. The commissioner, or person taking the deposition, must subscribe his name to each half sheet of the deposition; he must annex all the depositions and exhibits to the commission, or to a certified copy of the order for taking the deposition, with the certificate specified in the next section; and he must close them up under his seal, and address the packet to the clerk of the court, at his official residence.

5. If there is a direction, on the commission or in the order, to return the same through the post-office, he must immediately deposit the packet so addressed in the post-office, and pay the postage thereon.

6. If there is a direction, on the commission or in the order, to return the same by an agent of the party at whose instance it was issued or granted, the packet so addressed must be delivered to the agent.

7. Where a commission is directed to two or more persons, one or more of them may execute it, as prescribed in this and the next section.

A copy of this and of the next section must be annexed to each commission, or order to take depositions, authorized by this article.

In Criminal Cases. — The commissioner, unless otherwise specially directed, may execute the commission as follows:

1. He must publicly administer an oath to the witness that his answers given to the interrogatories shall be the truth, the whole truth, and nothing but the truth.

2. He must cause the examination of the witness to be reduced to writing, and subscribed by him.

3. He must write the answers of the witness as near as possible in the language in which he gives them, and read to him each answer as it is taken down,

Form No. 7348.[1]

(Precedent in Street *v.* Andrews, 115 N. Car. 420.)[2]

Pursuant to the annexed commission to me directed, I, *B. M. Edney*, commissioned under the authority thereof, on the *30th* day of

and correct or add to it until it conforms to what he declares is the truth.

4. If the witness decline answering a question, that fact, with the reason assigned by him for declining, must be stated.

5. If any papers or documents are produced before him and proved by the witness, they, or copies of them, must be annexed to the deposition subscribed by the witness and certified by the commissioner.

6. The commissioner must subscribe his name to each sheet of the deposition, and annex the deposition, with the papers and documents proved by the witness, or copies thereof, to the commission, and must close it up under seal and address it as directed by the indorsement thereon.

7. If there be a direction on the commission to return it by mail, the commissioner must immediately deposit it in the nearest post-office. If any other direction be made by the written consent of the parties, or by the court or judge, on the commission, as to its return, the commissioner must comply with the direction. N. Y. Code Crim. Proc., § 650 *et seq.* (Birds. Rev. Stat. (1896), p. 869, § 81 *et seq.*).

Arizona. — Pen. Code (1887), § 2093 *et seq.*

California. — Pen. Code (1897), § 1357 *et seq.*

Montana. — Pen. Code (1895), § 2508 *et seq.*

Nevada. — Gen. Stat. (1885), § 4443 *et seq.*

North Dakota. — Rev. Codes (1895), § 8392 *et seq.*

Oklahoma. — Stat. (1893), § 5366 *et seq.*

South Dakota. — Dak. Comp. Laws (1887), § 7558 *et seq.*

Utah. — Rev. Stat. (1898), § 5046 *et seq.*

A copy of this section must be annexed to the commission. N. Y. Code Crim. Proc., § 651 (Birds. Rev. Stat. (1896), p. 869, § 82), and see statutes cited above.

If delivered by agent, he must make affidavit that he received the deposition from the hands of one of the commissioners, and that it has not been opened or altered since he received it. See list of statutes cited *supra*, note 1, p. 488.

If agent is dead, or from sickness or other casualty unable personally to deliver the commission and return, as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making an affidavit that he received it from the agent, that the agent is dead, or from sickness or other casualty unable to deliver it; that it has not been opened or altered since the person making the affidavit received it; and that he believes it has not been opened or altered since it came from the hands of the commissioner. See list of statutes cited *supra*, note 1, p. 488.

Where the Examination is Without Written Interrogatories. — The commissioner must take down or cause to be taken down the substance of the witness's testimony, unless he is directed in the commission or order, or required by the person appearing for either party, to insert in the deposition the questions and answers word for word. N. Y. Code Civ. Proc., § 900 (Birds. Rev. Stat. (1896), p. 861, § 30.)

One or more of the commissioners may execute commission. N. Y. Code Civ. Proc., § 901, subs. 7 (Birds. Rev. Stat. (1896), p. 862, § 31). All the commissioners named in the commission should have notice of the time and place of executing it, and if any of them do not act, the fact that they were notified or could not be notified and their reason for not acting should be stated.

Indorsement on back of commission must be as follows: "The execution of this commission appears in certified schedules hereunto annexed. *James Hallett*, Commissioner."

1. See *supra*, note 3, p. 563.

2. This deposition was ruled out by the trial court, but upon appeal it was held that it was improperly excluded; that the return showed it was taken by the commissioner on the day and at the place mentioned in the notice. It appearing that it was taken on the day and at the place and by the person designated, the presumption is that all things were done rightly. Street *v.* Andrews, 115 N. Car. 417.

January, 1894, at the residence of *A. B. Long, Sr.*, in *Logan's Store Township*, in *Rutherford* county, *N. C.*,[1] defendant *D. W. Q. Andrews*[2] present, plaintiff *N. M. Street* absent, proceeded to take the deposition of *A. B. Long, Sr.*, who, being first duly sworn on the Holy Evangelist to speak the truth, the whole truth, and nothing but the truth, between the parties named in the said commission, deposes as follows:

[1st Interrogatory (*stating it*).

Answer to first Interrogatory (*stating it*).[3]

A. B. Long, Sr.][4]

The foregoing deposition of *A. B. Long, Sr.*, was sworn to and subscribed before me at the time and place mentioned in the caption.

B. M. Edney, Commissioner.

Form No. 7349.[5]

Deposition of *William West*, a witness produced, sworn and examined on the part of the *defendant* in a cause pending in the Court *of Common Pleas* No. *1*, of *Philadelphia* county, state of *Pennsylvania*, in which cause *John Doe* is plaintiff and *Richard Roe* is defendant, at *the office of James Hallett*, No. *10 West* street, in the city of *Minneapolis*, in the county of *Hennepin* and state of *Minnesota*, this *tenth* day of *August*, 1898, by virtue of a commission issued out of and under the seal of said Court *of Common Pleas*, directed to *James Hallett* and *William Morris*, for the examination of a certain witness on the part of *defendant* in said cause.

State of *Minnesota*, }
County of *Hennepin*. } ss.

William West, being produced, sworn and examined on behalf of the *defendant*, deposeth and saith:

1. For answer to the first interrogatory, witness saith:[6] (*Here set out answer of witness.*)

William West.
James Hallett. (SEAL) } Commissioners.
William Morris. (SEAL) }

1. **The place where** the deposition was taken must be stated in the caption. Anonymous, 2 Hayw. (2 N. Car.) 244.

2. **The parties between whom** the depositions are taken must be named either in the caption or in the body of the deposition. Murray *v.* Marsh, 2 Hayw. (2 N. Car.) 290.

3. **That the answers are on a separate sheet** attached to the interrogatories, and not at the end of each interrogatory, when the whole is above the signature of the commissioner, is no objection to the deposition. Street *v.* Andrews, 115 N. Car. 417; Downs *v.* Hawley, 112 Mass. 237.

4. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

5. *Pennsylvania.*—Ct. of Com. Pl. Rules, No. XVII; acts 1895, No. 191. See also *supra*, note 3, p. 563.

6. **Interrogatories need not be incorporated** into the body of the deposition; if they have been severally answered, it is sufficient. Clarke *v.* Benford, 22 Pa. St. 353.

Indorsement on commission should be as follows:

"The execution of this commission appears in a certified schedule annexed hereto.

Comm'rs { *James Hallett.* (SEAL)
William Morris. (SEAL)"

Under the Tennessee statutes the caption may be substantially in this form. (Tenn. Code (1896), § 5637.):

"*John Doe* against *Richard Roe* } In the *Circuit* Court, *Lincoln* county, *Tennessee*. Deposition of *William*

Form No. 7350.[1]

The depositions of *William West* and others, taken before me, *Abraham Kent*, a justice of the peace (or *a notary public*) for the city of *Richmond*, pursuant to notice hereto annexed, at *the office of Oliver Ellsworth*, No. *10* L street, in the city of *Richmond*, on the *tenth* day of *June*, 18*98*, between the hours of *eight A.* M. and *four P.* M., to be read as evidence on behalf of *John Doe*, in a certain action at law (or *suit in equity*) depending in the *Circuit* Court for the county of *Albemarle* wherein the said *John Doe* is plaintiff and *Richard Roe* is defendant.

Present: Mr. *Jeremiah Mason*, attorney for plaintiff.
Mr. *Oliver Ellsworth*, attorney for defendant.

William West, having been first duly sworn, deposeth and saith as follows, to wit:

First question by *Jeremiah Mason*, attorney for plaintiff.

What is your age?

West, a witness for the plaintiff (or *defendant*) in the above case, taken upon notice (or *interrogatories*) on the *tenth* day of *May*, 18*98*, at *Mountain City*, in *Johnson* county, *Tennessee*, in the presence of the plaintiff and defendant (*show the fact*). The said witness, *William West*, age *forty-one* years, being duly sworn, deposed as follows:" (*concluding as in Form No. 7336, supra*). See also *supra*, note 3, p. 563.

On whose behalf taken must be shown in the caption. Read *v.* Patterson, 11 Lea (Tenn.) 432.

Where deposition is taken on interrogatories, it need not be stated in the caption whether the parties or their attorneys were present. Louisville, etc., R. Co. *v.* Garrett, 8 Lea (Tenn.) 440.

In Texas, the following caption may be used:

"*John Doe*, plaintiff, No. *100*. against *Richard Roe*, defendant,	Suit pending in *District* Court of *Freestone* county, *Texas*.

Answers and deposition of *William West*, a resident of the county of *Hill*, in the state of *Texas*, to the accompanying interrogatories propounded to him in the above entitled cause, taken before *Norton Porter*, a *notary public*, in and for *Hill* county, *Texas*, in accordance with the accompanying commission:

Answers of the witness *William West*:

To the first interrogatory, he answers: (*Here write out answer of witness, and continue in same manner with each interrogatory and cross-interrogatory until examination of witness is completed*).

William West."

See also *supra*, note 3, p. 563.

Title of cause must be stated, either in the caption or certificate; and a reference made in the caption to the "annexed commission" is insufficient. Southern Pac. R. Co. *v.* Royal, (Tex. Civ. App. 1893) 23 S. W. Rep. 316; Slaughter *v.* Rivenbark, 35 Tex. 68.

For manner of execution in criminal cases see *supra*, note 1, p. 581.

Depositions in criminal cases must be taken strictly in accordance with the Code of Criminal Procedure. Johnson *v.* State, 27 Tex. 758.

1. *Virginia.* — Code (1887), § 3359.

West Virginia. — Code (1891), c. 130, § 33.

See also *supra*, note 3, p. 563.

No commission necessary in *Virginia* to take a deposition within or without the state, except to prove wills. Va. Code (1887), § 3361. And in *West Virginia* no commission is necessary in any case. Code (1891), c. 130, § 33.

Under the Wisconsin statutes (Sanb. & B. Anno. Stat. (1889), §§ 4104–4115 *et seq.*) the following caption may be used:

"State of *Missouri*, *Jasper* County. } ss.

William West, of the city of *Carthage*, in *Jasper* county, state of *Missouri*, a witness on behalf of the *defendant* in a cause now pending in the *Circuit* Court of *Vernon* county, in the state of *Wisconsin*, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, of lawful age, being first duly sworn, doth depose and say, as follows:" (*concluding as in Form No. 7336, supra*).

See also *supra*, note 3, p. 563.

Answer. (*Here set out answer of witness in his own words.*)

Second question by same.

(*Here set out question and answer and continue in this manner until conclusion of examination in chief, and in every instance write the answer of the witness in his own words.*)

Cross-examined.

First question by *Oliver Ellsworth*, attorney for defendant. (*Write questions and answers as above directed.*)

Re-examined.

Tenth question by *Jeremiah Mason*, attorney for plaintiff.

And further this deponent saith not.

William West.

Samuel Short, having been first duly sworn, deposeth and saith as follows:

(*Write down questions and answers as above.*)

And further this deponent saith not.

Samuel Short.

Form No. 7351.[1]

United States of America:
Southern District of *New York*, }
City of *New York*, County of *New York*. } ss.

Be it remembered, that on this *tenth* day of *May*, in the year of our Lord one thousand eight hundred and *ninety-eight*, I, *Norton Porter*, a *notary public*[2] within and for said county and state, did call and cause to be and personally appear before me, at *my office*, at No. *10 William* street, in the city of *New York*, in the said *southern* district of *New York*, in the state aforesaid, *William West*, to testify, and the truth to say, on the part and behalf of the *defendant* in a certain civil cause or matter of controversy, now depending and undetermined in the *Circuit* Court of the United States, for the *southern* district of *New York*,[3] at the city of *New York* aforesaid, wherein *John Doe* is plaintiff and *Richard Roe* is defendant.[4]

And the said *William West*, being about the age of *forty* years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said *William West*, and he did thereupon depose, testify and say as follows:[5] (*concluding as in Form No. 7336, supra*).

1. *Federal Courts.* — U. S. Rev. Stat. (2d ed. 1878), § 863. See also *supra*, note 3, p. 563.

2. **Before Whom Taken.** — Any judge of any court of the United States, any commissioner of a circuit court, clerk of a district or circuit court, any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel, or attorney, to either party. U. S. Rev. Stat. (2d ed. 1878), § 863.

Notice must be given in writing to adverse party. U. S. Rev. Stat. (2d ed. 1878), § 863. For form of notice see *supra*, Form No. 7253.

3. **County need not be stated** in which the cause is depending. Van Ness *v.* Heineke, 2 Cranch (C. C.) 259.

4. **All the parties to the suit must be named** in the caption. Peyton *v.* Veitch, 2 Cranch (C. C.) 123.

5. If all the interrogatories are substantially, though not formally, answered, it is sufficient. Nelson *v.* U. S., 1 Pet. (C. C.) 235.

Precedent. — In Harris *v.* Wall, 7 How.

(U. S.) 693, the caption, omitting formal parts, was as follows:

"The deposition of *William S. Raynor*, taken before the undersigned commissioner of affidavits in and for the *Southern* District of *Mississippi*, at *the clerk's office* of the *Circuit* Court *of the United States* for the *Southern* District of *Mississippi*, in the town of *Jackson*, between the hours of *eight* o'clock *a.* m. and *three p.* m. on the *third* day of *May*, A. D. 1843, according to a notice by me issued and hereunto annexed; said deposition to be read as evidence on the part of the *defendant de bene esse* in the trial of a certain action at law, depending and mentioned in the *Circuit* Court of the *United States* for the *Southern* District of *Mississippi*, wherein *Benjamin D. Harris* is plaintiff and *Winter* and *Wall* defendants."

District of Columbia. — In Spaids *v.* Cooley, 113 U. S. 278, the following precedent is found:

"State of *Michigan*, } ss:
County of *St. Clair*, }

On the *thirty-first* day of *December*, A. D. 1879, before me, the undersigned, a justice of the peace in and for said county, personally appeared *Joseph E. Spaids*, of *Algonac*, in said county, who, being by me duly sworn according to law, doth depose and say, in relation to the case of *Chauncey D. Spaids* versus *Dennis N. Cooley*, hereunto annexed.

Said deponent states as follows:

No. 1. My name is *Joseph E. Spaids*; my age is *forty-four* years; and residence is *Algonac*, *St. Clair* County, *Michigan*.

No. 2. That the said *Chauncey D. Spaids* is my father.

No. 3. And am acquainted with the said *Dennis N. Cooley*, defendant.

No. 4. I first met the said *Cooley* at *Chicago*, in the State of *Illinois*, about the year 1870; that I was appointed a deputy sheriff to serve a process of a court, to wit, a summons, upon the said *Cooley*, in a suit then and there commenced by said *Spaids* against said *Cooley*; that I did serve said summons upon said *Cooley*.

No. 5. I next saw the said *Cooley* at *Chicago*, aforesaid, in the year 1874. I met him on *Randolph* street, of said city, going towards the *Pittsburgh and Fort Wayne* depot. I then went into an office where my father, the plaintiff, was, and informed him that said *Cooley* was in the city. He asked me where he (said *Cooley*) was. We stepped out of said office on to the street; said *Cooley* being in sight, I pointed him out to said *Spaids*. We both proceeded down to said *Cooley*, and, after the usual compliments were exchanged between saids *Spaids* and *Cooley*, the following conversation took place:

No. 6. The said *Spaids* asked said *Cooley* if he was going to pay him (said *Spaids*) the money due him and now in his (said *Cooley's*) hands, in the *Hudnall* case, without my being obliged to resort to legal proceedings; to which said *Cooley* replied as follows: Mr. *Spaids*, you ought to have had your money long ago, for you got the case and done most of the work in the case before I (*Cooley*) knew much about it; but my partner, Mr. *Clark*, is acting very bad in the matter, and I don't know but what I will have to pay the whole amount myself; but I am now on my way to *Washington*, and while there I will try and get the best settlement I can with *Clark*, and on my return from there, which will be in about *ten* days, you shall have your money, if I have to pay it myself.

I paid particular attention to said conversation, as I had often heard my father speak of said case both before and after I served said summons in 1870.

And further saith not.

Joseph E. Spaids.

Taken, subscribed, and sworn to before me, the day and year first above written.

John M. Robertson,
Justice of the Peace."

Must be taken in narrative form unless parties request that it be taken by question and answer. Dist. of Col. Supreme Ct. Rules, No. 65.

Taken pursuant to U. S. Rev. Stat. (2d ed. 1878), § 866, the caption may be as follows: "The deposition of *William West*, of *Concord*, in the county of *Merrimac* and state of *New Hampshire*, a witness of lawful age, produced, sworn and examined, upon his corporal oath, on the *tenth* day of *May*, in the year of our Lord one thousand eight hundred and *ninety-eight*, at *my office* in the city of *Concord* in the county of *Merrimac* and state aforesaid, by me *James Hallett*, a commissioner duly appointed by a dedimus potestatem, or commission, issued out of the clerk's office of the *Circuit* Court *of the United States* for the *southern* district of *New York* in the state of *New York*, bearing teste in the name of *Calvin Clark*, Esq., clerk

2. Certificate.[3]

of the said *Circuit* Court, with the seal of the said court affixed thereto, and to me directed as such commissioner, for the examination of the said *William West*, a witness in a certain suit and matter in controversy now pending and undetermined in the said *Circuit* Court wherein *John Doe* is plaintiff and *Richard Roe* defendant on behalf of the said *defendant* upon interrogatories to be propounded to said witness orally, pursuant to the notice attached to the said commission and herewith also enclosed, and upon none others. The said *William West*, being first duly sworn by me, as a witness in the said cause, previous to the commencement of his examination, to testify the truth as well on the part of the plaintiff as the defendant, in relation to the matters in controversy between the said plaintiff and defendant, so far as he should be interrogated, testified and deposed as follows: (*concluding as in Form No. 7336, supra*).

May be taken, according to state laws, in the United States courts in the northern district of *Texas*, under the rules of the circuit court of that district, adopted at its April term, 1880. Missouri Pac. R. Co. *v.* White 80 Tex. 202.

Interrogatories need not be inserted in the deposition, as provided by section [4699] of the code of *Iowa*, if the same are numbered, and the answers show by number the interrogatory to which each is intended to apply, and the certificate of the commissioner shows that each of the interrogatories was read over to the witness and his answer was taken down, and then the whole was read over by the witness before he signed the same. Giles *v.* Paxson, 36 Fed. Rep. 882.

3. See *supra*, note 3, p. 563.

Certificate may be at end or beginning of the deposition. Murray *v.* Larabie, 8 Mont. 208.

Annexation of Certificate to Deposition. — Where the documents referred to therein are together enclosed and sealed up in the envelope with the deposition, it is a sufficient method of annexation within the meaning of the statute, which requires the magistrate's certificate to be annexed to the deposition. Shaw *v.* McGregory, 105 Mass. 96.

Several Depositions. — One certificate, appended at the close of all the depositions, is sufficient. Pralus *v.* Pacific Gold, etc., Min. Co., 35 Cal. 30.

It is not essential that the jurat should be attached to the separate examination of each witness. Lord *v.* Siegel, 5 Mo. App. 582; Boston *v.* Bradley, 4 Harr. (Del.) 524.

Venue. — Where the venue appears in the body of the certificate, the certificate is sufficient, although technically it should be placed at the head of the certificate. Glidden *v.* Moore, 14 Neb. 84. In that case the certificate, which was held sufficient, was as follows: "I, *O. W. Rice*, a notary public, duly appointed and qualified, residing in and for *Knox* county, state of *Nebraska*, do hereby certify that *William I. Marsh* was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by myself in the presence of the witness[es], and was subscribed by the said witness in my presence, and was taken at the time and place in the annexed notice specified; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit. And said deposition was commenced at the time in said notice specified, and completed as above stated. In testimony whereof witness my hand and seal of office this *30th* day of *April*, 1881.

(SEAL) *O. W. Rice*, Notary Public."

The annexed notice was for the taking of the deposition "at the office of *O. W. Rice*, in the town of *Creighton*, county of *Knox*, state of *Nebraska*."

Official character of commissioner need not be stated in the body of the certificate; it is sufficient if it appears from his signature at the end. Read *v.* Patterson, 11 Lea (Tenn.) 430. But it must somewhere appear before whom the depositions were taken and sworn. Dane *v.* Mace, 37 N. H. 533; Powers *v.* Shepard, 21 N. H. 60.

If either commissioner shall not attend, the other may proceed to execute the commission, and must certify that the commissioner so absent had due notice of the time and place of executing the commission, and that he failed to attend pursuant thereto. Sanb. & B. Anno. Stat. Wis. (1889), p. 2136 (*citing* Rules of Court, § 4). See also list of statutes cited *supra*, note 1, p 488.

Where three persons are named as commissioners and only two act, the deposition is admissible certified by the two acting commissioners, under the statute requiring that the deposition should be certified by the commissioners, or a majority of them. Stone *v.* Cannon, 9 Smed. & M. (Miss.) 595.

Where more than one commissioner is named, certificate must show that all the commissioners were present, or were notified of the time and place of taking the depositions. Mair *v.* January, 4 Minn. 239.

Form of oath taken by commissioners and witness need not be stated in certificate. Williams *v.* Richardson, 12 S. Car. 584.

Names of witnesses examined need not be stated in the certificate, and "the above named deponents" is sufficient. Prather *v.* Pritchard, 26 Ind. 65. *Contra*, Lund *v.* Dawes, 41 Vt. 370.

Mistake as to party's name in body of certificate is immaterial where properly stated in the caption. Kendall *v.* Limberg, 69 Ill. 355.

As to Reading Deposition to Witness. — Certificate must state that testimony was written by, or read to and subscribed by, witness in the presence of the officer. Sand. & H. Dig. Ark. (1894), § 3006; Horner's Stat. Ind. (1896), § 449; Idaho Laws (1893), p. 138, § 31; Iowa Code (1897), § 4700; Hills' Anno. Laws Oregon (1892), § 825, and list of statutes cited *supra*, note 1, p. 488.

Certificate must show that the depositions were read over to the witnesses before they were subscribed and sworn to. McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314; Ball *v.* Sykes, 70 Iowa 525; Vaughn *v.* Smith, 58 Iowa 553. *Contra*, Birtton *v.* Berry, 20 Neb. 325.

That "deposition was read over by the said witness, was subscribed and sworn to by said deponent therein at Edwardsville, in said county, on the twenty-seventh day of August, 1881," is a literal compliance with the statute. Vaughn *v.* Smith, 58 Iowa 553.

Corrections. — That deposition was read to and corrected by witness must be shown. McCormick *v.* Largey, 1 Mont. 158; Homberger *v.* Alexander, 11 Utah 363.

But where the certificate states that the deposition was corrected by the notary under the direction of the witness, it is sufficient. Higgins *v.* Wortell, 18 Cal. 331.

Interest of Commissioner. — Certificate in some jurisdictions, must show that commissioner is not of counsel or of kin to any of the parties, or in any manner interested in the result of the cause. Ala. Civ. Code (1886), § 2808; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379; Carter *v.* Ewing, 1 Tenn. Ch. 212, and list of statutes cited *supra*, note 1, p. 488. But see *contra*, Moore *v.* Booker, 4 N. Dak. 543; Giles *v.* Paxson, 36 Fed. Rep. 882; Peyton *v.* Veitch, 2 Cranch (C. C.) 123.

Seal of officer must be attached if he have a seal. Horner's Stat. Ind. (1896), § 430; Harvey *v.* Osborn, 55 Ind. 535; Minn. Stat. (1894), § 5689; Hills' Anno. Laws Oregon (1892), § 825; Va. Code (1887), § 3360; W. Va. Code (1891), c. 130, § 34; and list of statutes cited *supra*, note 1, p. 488.

The seal of the officer, or his name across the flap of the envelope, is necessary under the requirements of the statute that depositions taken by a notary public be by such officer sealed up. Travers *v.* Jennings, 39 S. Car. 410.

Seal unnecessary when taken within the state. Kan. Gen. Stat. (1897), c. 95, § 368; Neb. Comp. Stat. (1897), § 5958; N. Dak. Rev. Codes (1895), § 5683; Bates' Anno. Stat. Ohio (1897), § 5279; Okla. Stat. (1893), § 4248; S. Dak. (Dak. Comp. Laws 1887), § 5294; Vt. Stat. (1894), § 1258; Wyoming Rev. Stat. (1887), § 2627.

Notary's seal need not be affixed to the certificate. Mills *v.* Dunlap, 3 Cal. 94.

Where notary's seal is omitted, but the clerk of the court certifies as to the official character of the notary and that his signature to the certificate is genuine, the certificate is sufficient. Curtis *v.* Curtis, 131 Ind. 489; Pape *v.* Wright, 116 Ind. 502.

Omission of commissioner's seal will not exclude the deposition. Dozier *v.* Joyce, 8 Port. (Ala.) 303.

Authentication — *Generally.* — See Conn. Gen. Stat. (1888), § 1068 *et seq.*; Starr & C. Anno. Stat. Ill. (1896), c. 51, § 30 *et seq.*; Horner's Stat. Ind. (1896), § 434 *et seq.*; Iowa Code (1897), § 4703 *et seq.*; Kan. Gen. Stat. (1897), c. 95, § 368 *et seq.*; Burns' Anno. Prac. Code Mo. (1896), § 1315 *et seq.*; Neb. Comp. Stat. (1897), § 5958; N. Dak. Rev. Codes (1895), § 5683; Bates' Anno. Stat. Ohio (1897), § 5279; Okla. Stat. (1893), § 4248; S. Dak. (Dak. Comp. Laws 1887), § 5294; Va. Code (1887), § 3360; W. Va. Code (1891), c. 130, § 34; Wyoming Rev. Stat. (1887), § 2627. See

also list of statutes cited *supra*, note 1, p. 488.

If official character can be ascertained with reasonable certainty from the whole paper, the caption and certificate, it is sufficient. Borders *v.* Barber, 81 Mo. 636.

Commission containing name of officer before whom the deposition is to be taken, his attestation, officially, certifying the same, shall be sufficient. Baber *v.* Rickart, 52 Ind. 594. But when commission is not directed to any particular person as commissioner, the official character of the person taking the deposition must be authenticated. Wheeler *v.* Shields, 3 Ill. 348.

Official character of justice of the peace in another state must be authenticated by a certificate showing that he was such officer. Jenkins *v.* Tobin, 31 Ark. 306.

Certificate of clerk of foreign court.— In Adamson *v.* Adamson, 9 Ark. 26, the court held that a certificate by the clerk of the county court, having his seal of office affixed, raises the presumption that the court has a clerk and is *prima facie* evidence that it is a court of record. The certificate in that case was as follows:

"*State* of *Maryland*, } sct. I hereby
Montgomery County. } certify that *George R. Braddock*, Gentleman, before whom the foregoing depositions appear to have been made, and whose name is thereto subscribed, was at the time thereof one of the State of *Maryland's justices of the peace*, in and for said county, duly commissioned and sworn.

In testimony whereof, I hereunto (SEAL) subscribe my name, and affix the seal of said county court, this *22d* day of *April*, 1847.

Saml. T. Stonestreet,
Clerk *Montg'y Co'ty Court*."

When Unnecessary.— Where depositions are taken without the state before a notary public, there is no necessity of authentication. Hayes *v.* Frey, 54 Wis. 503; Sleep *v.* Heymann, 57 Wis. 495.

When taken by a commissioner, no certificate of official character is necessary. Kendall *v.* Limberg, 69 Ill. 355.

Deputy clerk cannot certify to the official character of the officer taking the depositions in his own name. Hyde *v.* Benson, 6 Ark. 396.

Genuineness of notary's signature cannot be certified to by the clerk; he can only certify to the fact of that official's appointment. Stephens *v.* Williams, 46 Iowa 540.

The form of authentication may be as follows: "It is hereby certified that on the *tenth* day of *May*, A. D. 1898, *James Hallett* was and now is a *notary public* within and for the county of *Cook*, state of *Illinois*, duly commissioned and acting as such; that full faith and credit are due to his acts as such.

In testimony whereof, I, *Calvin* (SEAL) *Clark*, clerk of the *Circuit* Court of *Cook* county, *Illinois*, have hereunto subscribed my name, and affixed the seal of said court, at *office*, this *tenth* day of *May*, eighteen hundred and *ninety-eight*.

Calvin Clark, Clerk *Circuit* Court
Cook County, *Illinois*." Or,

"State of *Rhode Island*, County of *Providence*, ss.

I, *Calvin Clark*, clerk of the *Supreme* Court in and for aforesaid county and state, do certify that *Abraham Kent*, Esq., who hath signed his name to foregoing affidavit, was at the time of so doing a *justice of the peace* in and for said county and state, duly commissioned and sworn; that all his official acts are entitled to full faith and credit, and that his signature thereunto is genuine.

Witness my hand and seal of office, this *tenth* day of *July*, 1898.

(SEAL) *Calvin Clark*,
Clerk of the *Supreme* Court."

Conn. Gen. Stat. (1888), § 1068. Or,

"*Pennsylvania*, } ss. I, *Thomas B.*
Fayette County. } *Searight*, *Pro-*
(SEAL) *thonotary* of the Court *of Common Pleas* in and for said county, do hereby certify that *J. D. Springer*, Esq., before whom the foregoing and within depositions appear to have been made, was at the date thereof, and now is, an acting *justice of the peace*, in and for said county, duly commissioned and qualified, and that he is duly authorized to take the acknowledgment of deeds and other instruments of writing and administer oaths, and that the signature thereto, purporting to be his, is genuine.

In testimony whereof, I have hereunto set my hand and the seal of the said court at *Uniontown*, this *7th* day of *December*, A. D. 1860.

T. B. Searight, Prothonotary."

Thomas *v.* Dunaway, 30 Ill. 373.

Return of Deposition— *Alabama.*— Civ. Code (1886), § 2807.

Arizona.— Rev. Stat. (1887), § 1845 *et seq.*

Arkansas.— Sand. & H. Dig. (1894), § 3007 *et seq.*

California. — Code Civ. Proc. (1897), §§ 2026, 2032.

Florida. — Rev. Stat. (1892), § 1131 *et seq.*

Georgia. — 2 Ga. Code (1895), § 5320.

Idaho. — Laws (1893), p. 138, § 31.

Illinois. — Starr & C. Anno. Stat. (1896), c. 51, § 30.

Indiana. — Horner's Stat. (1896), §§ 431, 449.

Iowa. — Code (1897), § 4705.

Kansas. — Gen. Stat. (1897), c. 95, § 366.

Kentucky. — Bullitt's Civ. Code (1895), § 583.

Michigan. — Pub. Acts (1895), No. 180, § 4.

Minnesota. — Stat. (1894), §§ 5678, 5689.

Mississippi. — Anno. Code (1892), § 1754.

Montana. — Code Civ. Proc. (1895), § 3352 *et seq.*

Nebraska. — Comp. Stat. (1897), § 5955.

Nevada. — Gen. Stat. (1885), § 3431 *et seq.*

New Mexico. — Comp. Laws (1897), § 3043 *et seq.*

New York. — Code Civ. Proc., § 904 *et seq.* (Birds. Rev. Stat. (1896), p. 863, § 34 *et seq.*).

North Dakota. — Rev. Codes (1895), § 5681.

Ohio. — Bates' Anno. Stat. (1897), § 5276.

Oklahoma. — Stat. (1893), § 4245.

Oregon. — Hill's Anno. Laws (1892), § 826.

Rhode Island. — Gen. Laws (1896), c. 244, § 26.

South Carolina. — Rev. Stat. (1893), § 2347.

South Dakota. — Dak. Com. Laws (1887), § 5292.

Tennessee. — Code (1896), § 5651.

Texas. — Rev. Stat. (1895), art. 2284 *et seq.*

Utah. — Rev. Stat. (1898), § 3452 *et seq.*

Vermont. — Stat. (1894), § 1270.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 6026.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), p. 2136 (*citing* Rules of Court, § 6).

Wyoming. — Rev. Stat. (1887), § 2624.

Federal Courts. — U. S. Rev. Stat. (2d ed. 1878), § 865; Shankwiker *v.* Reading, 4 McLean (U. S.) 240. See also list of statutes cited *supra*, note 1, p. 488.

If the agent is dead, or for other cause unable to deliver the package personally, the person delivering it must make affidavit that he received it from the agent, that the agent is dead or otherwise unable to deliver it, that it has not been opened or altered since he received it, that he believes that it has not been opened or altered since it came from the hands of the commissioner, or from the person who took the deposition. N. Y. Code Civ. Proc., § 905 (Birds. Rev. Stat. (1896), p. 863, § 35).

Direction to clerk of the court is sufficient compliance with the requirements of the statute that depositions shall be directed to the court in which they are to be used. Spear *v.* Coon, 32 Conn. 293.

Direction to "the judges" of the court is sufficient. Thorp *v.* Orr, 2 Cranch (C. C.) 335.

Indorsement is sufficient which gives the title of the cause, shows in whose behalf the deposition was taken, name and character of the officer taking the same, that it was sealed up by the officer who took it, and addressed to the clerk of the district court of the eleventh judicial district at Columbus, Cherokee county, Kansas. Babb *v.* Aldrich, 45 Kan. 218; Whittaker *v.* Voorhees, 38 Kan. 71. In this last cited case the indorsement was as follows:

"*Henry L. Walker*, plaintiff, against *D. R. Voorhees*, defendant, sheriff, etc. Depositions taken by me, *John E. Garland*, notary public, *Dakota*. To *J. H. Gleason*, clerk of the *District* Court of *Nemaha* county, at *Seneca*, *Kansas*."

Indorsement of name of firm is sufficient compliance with the requirements that names of parties litigant shall be indorsed. Forsyth *v.* Baxter, 3 Ill. 9.

If returned by mail, the package must be deposited by one of the acting commissioners in the nearest post-office, after making the following indorsement thereon: "Deposited at the post-office, at *Hartford*, *Connecticut*, this *tenth* day of *May*, 1898, by me, *James Hallett*, Commissioner."

If returned by a vessel, it must be deposited by one of the acting commissioners in the letter-bag of such vessel, he making upon the commission the following indorsement: "Deposited in the letter-bag of the steamship *Lucania*, now lying at *Liverpool*, and bound for the port of *New York*, this *tenth* day of *May*, 1898, by me, *James Hallett*, Commissioner."

Writing of Commissioner's name across the seal is not an indispensable requi-

Form No. 7352.[1]

We, *James Hallett* and *Edward L. Walker*, the commissioners in said commission named, do hereby certify that the foregoing testimony and answers taken down and written by us in the words of the witness, *William West*, were read over to him, that he assented, swore to, and subscribed the same in our presence, at the time and place herein mentioned; that we have personal knowledge of the personal identity of the said witness[2] (or, if unacquainted with the witness, *that proof hath been made before us of the identity of the said witness*); that we are not of counsel or kin to either of the said parties to said cause, or interested in the event thereof. And we enclose the said testimony, together with the said commission and interrogatories, direct and cross, to the said clerk of the *Circuit* Court of *Jefferson* county, whence the same emanated as our full execution of said commission.

Given under our hands and seals, this *tenth* day of *May*, 1898.

James Hallett. (SEAL)
Edward L. Walker. (SEAL)

site to the validity of a deposition, where the deposition is received through the mail sealed properly and directed to the clerk of the court with the usual post-mark. Park *v.* Bancroft, 12 Ala. 468.

Sealed Up. — Magistrate need not certify that the deposition was sealed up by him. Spear *v.* Coon, 32 Conn. 293.

Illustrations of direction are the following:

"*John Doe* against *Richard Roe.* } To *Calvin Clark*, Esq., Clerk of the *Circuit* Court of *Jefferson* County. *Birmingham*, *Jefferson* County, *Alabama.*

Deposition of *William West.*"

"To *Calvin Clark*, Esq., Clerk of the *Supreme* Court, at *Albany*, *Albany* County, *New York.*"

"To *Calvin Clark*, Esquire, Prothonotary of the Court *of Common Pleas*, No. *1*, of *Philadelphia* county, *Philadelphia*, *Pennsylvania.*"

"To the Honorable *Superior* Court, to be holden at *Hartford*, within and for the county of *Hartford*, state of *Connecticut*, on the *first Tuesday* of *May*, A. D. 1896. The deposition of *Samuel Short.* Taken, sealed, and directed at *Hartford*, in said county of *Hartford*, this *tenth* day of *March*, A. D. 1896. By me.

Abraham Kent,
Justice of the Peace."

For forms of captions, generally, see *supra*, Form No. 7336 *et seq.*

1. *Alabama.* — Civ. Code (1886), § 2808. See also *supra*, note 3, p. 587.

2. **Knowledge of Identity of Witness.** — That commissioner has personal knowledge of, or has had proof made before him of the identity of, the witness must be stated. Ala. Civ. Code (1886), § 2808. Buford *v.* Gould, 35 Ala. 265; Farrelly *v.* Maria Louisa, 34 Ala. 284.

Certificate is sufficient which states: "I, the commissioner in said commission named, do hereby certify that the evidence of the witness, *Joseph E. Caro*, was taken down under oath, and subscribed by him in my presence, on the *8 April*, 1857, at *Pensacola*, *Florida*; and that I have personal knowledge of said witness. Witness my hand and seal, etc." Stetson *v.* Lyons, 34 Ala. 140.

Also, a certificate to the effect that "by virtue of the commission hereto annexed, I have this *7th October*, 1854, at the office of *Clarke & Terrell*, in the town of *Dayton*, in said county, caused the above named *E. D. Connor* [or *Wm. G. Lancaster*], the witness in said commission named, who is personally known to me, to come before me; who, after being duly sworn, deposed as set forth above in his answers to the annexed interrogatories; that his said answers, as above set forth, were reduced to writing, read over to, approved, and signed by said witness in my presence. Given under my hand and seal," etc., substantially complies with the requirements of the code. Roberts *v.* Fleming, 31 Ala. 683.

Form No. 7353.[1]

State of *Illinois*, } ss.
County of *Cook*. }

I, *James Hallett*, a *notary public* in and for said county, do hereby certify that the witness, *William West*, in the foregoing deposition named, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that said deposition was taken at the time and place mentioned in the annexed commission (*notice* or *stipulation*), to wit, at *my office*, No. *10 L* street, in the city of *Chicago*, in said county of *Cook*, in the state of *Illinois*, on the *tenth* day of *May*, 1*898*, between the hours of *ten* o'clock *A.* M. and *four* o'clock *P.* M. of that day; that said deposition was reduced to writing by me, and when completed was by me carefully read to the said witness, and after being by him corrected was by him subscribed in my presence. In testimony (*concluding as in Form No. 7356*).

A deposition will not be suppressed although it does not affirmatively appear in the certificate that the answers of the witness were reduced to writing, either by the commissioner or the witness, or some impartial person, as nearly as may be in the language of the witness, if the answers on their face appear to be full, and no marks of suspicion are observable about them, the presumption being that the commissioner has done his duty. Thrasher *v.* Ingram, 32 Ala. 645.

Under the Arkansas statute (Sand & H. Dig. (1894), § 3006), the certificate, as set out in Sand. & H. Dig. (1894), p. 1631, is as follows:

"The State of *Arkansas*, } I, *Thomas*
Pulaski County. } *Jones*, a justice of the peace within and for *Pulaski* county, do certify that the foregoing deposition of *Samuel Weller* was taken before me, and was read to and subscribed by him in my presence at the time and place and in the action mentioned in the caption, the said *Weller* having been first sworn by me that the evidence he should give in the action should be the truth, the whole truth and nothing but the truth, and that his statements were reduced to writing by me in his presence (or *by him in my presence*), the plaintiff alone being present at the examination (or *the defendant* or *both plaintiff and defendant* or *neither party, in person or by attorney, being present at the examination*, according to the facts).

Given under my hand this *tenth* day of *May*, 1*898*. *Thomas Jones*, J. P."

See also *supra*, note 3, p. 587.

Under the Connecticut statutes (Gen. Stat. (1888), § 1068), the certificate may be as follows:

"State of *Rhode Island*, } the *tenth*
County of *Providence*, } ss. day of *July*,
City of *Providence*. } A. D. 1*898*.

Then personally appeared the above named *William West*, signer of the foregoing deposition, and after having been duly cautioned to speak the whole truth, and carefully examined, did subscribe the same and make oath before me that the same contains the truth, the whole truth, and nothing but the truth.

The foregoing deposition is taken pursuant to the annexed notice at the request of the *defendant*, *Richard Roe*, to be read on the trial of an action pending before the *Superior* Court, within and for the county of *Hartford*, and state of *Connecticut*, in which action *John Doe* is plaintiff and *Richard Roe* defendant. The cause of taking this deposition is (*Here state cause*).

The adverse party was notified to be present at the taking of this deposition, and was (or *was not*) present thereat.

(SEAL) *Abraham Kent*,
Justice of the Peace."

See also *supra*, note 3, p. 587.

1. *California.* — Code Civ. Proc. (1897), §§ 2026, 2032.

Montana. — Code Civ. Proc. (1895), §§ 3352, 3361.

Nevada. — Gen. Stat. (1885), §§ 3431, 3436.

Utah. — Rev. Stat. (1898), §§ 3452, 3457.

See also *supra*, note 3, p. 587.

Sufficiency of Certificate. — Certificate of a notary stating that the depositions were sworn, etc., before Charles C. Sackett, a notary in and for the county of Sacramento, taken at the city of Sacramento, and pursuant to an

Form No. 7354.[1]

I, *James Hallett*, of the county of *Hennepin*, and state (or *territory*) of *Minnesota*, a commissioner duly appointed to take the deposition of the said *William West*, the witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said *William West* as a witness in the said suit between the said *John Doe*, plaintiff, and the said *Richard Roe*, defendant, he was duly sworn by me (or *by James Hallett, one of said commissioners*, if more than one) to testify the truth in

order of the court, etc., and was dated the tenth day of February, 1882, was held sufficient, and a substantial compliance with the form of the statute. Mills *v.* Dunlap, 3 Cal. 94.

But "that witness appeared in person before me and answered the interrogatories and cross-interrogatories herein, as appears by the duly signed and sworn deposition hereunto annexed," is not sufficient, it not appearing whether the deposition was signed and sworn to before or after the answers were written, or whether the required oath was administered. Homberger *v.* Alexander, 11 Utah 363.

When deposition is taken out of the state, no form of certificate is prescribed by the statute, and where the officer certifies that he administered an oath to the witness and took his deposition in answer to the interrogatories, or, when the examination is without interrogatories, in respect to the question in dispute, it is sufficient. Blackie *v.* Cooney, 8 Nev. 41. In that case the certificate was as follows: "The execution of the commission to examine *Andrew Blackie* and *David Hemphill* directed to me, issued out of said court on the *eighth* day of the month of *May*, will appear by the papers hereto annexed. Given under my hand and seal, in town of *Woodstock*, county of *Carleton*, province of *New Brunswick*, dominion of *Canada*, this *twenty-ninth* day of *May*, A. D. 1871.

(SEAL) *Lewis P. Fisher*, J. P., *C.* Co.

On the *twenty-ninth* day of *May*, in the year of our Lord one thousand eight hundred and *seventy-one*, at the town of *Woodstock*, in the county of *Carleton*, province of *New Brunswick*, dominion of *Canada*, came *David Hemphill*, the aforesaid witness, the deponent, who being by me first carefully examined and sworn to testify the truth, and answer each and every of the interrogatories and cross-interrogatories annexed to the commission hereto affixed, gave the several answers above and within written, which were reduced to writing by me, and by him subscribed in my presence, pursuant to the authority contained in said commission, the same having been previously read over to him by me. All which I hereby certify.

L. P. Fisher,
Mayor of said *town* of *Woodstock*, county of *Carleton*, and a justice of the peace in and for the same."

1. *Colorado.* — Mills' Anno. Code (1896), § 351.

Illinois. — Starr & C. Anno. Stat. (1896), c. 51, § 30.

See also *supra*, note ——, p. ——.

No Statutory Form of Certificate is Prescribed in *Illinois*. Behrensmeyer *v.* Kreitz, 135 Ill. 591.

Identity of Officer. — Certificate of officer that he took the deposition pursuant to the commission is sufficient evidence of his identity. Brown *v.* Luehrs, 79 Ill. 575.

Must be Annexed to Deposition. — Starr & C. Anno. Stat. Ill. (1896), c. 51, § 30.

Certificate is sufficient which states that the witnesses were sworn to speak the truth, the whole truth, and nothing but the truth, although it does not appear when the oath was administered, the assumption being that the officer pursued the course pointed out by the statute. Ballance *v.* Underhill, 4 Ill. 453.

Certificate of magistrate stating that deposition was taken in pursuance of notice is sufficient, although it does not state at what hour the deposition was taken if the notice is annexed. Illinois Cent. R. Co. *v.* Cowles, 32 Ill. 117. In that case the formal parts of the caption and certificate were as follows:

"Deposition of *D. W. Stead*, resident of *Marion* county, state of *Illinois*, aged about 30 years, a witness on the part of the *plaintiff* in the above entitled suit, now pending before *Joseph B. Smith*, justice of the peace in and for the county

relation to the matters in controversy between the said *John Doe*, plaintiff, and the said *Richard Roe*, defendant, so far as he should be interrogated concerning the same; that the said deposition was taken by me and reduced to writing by *Charles Chase*, at *my office* (or *at the house of Daniel Webster*) in the city of *Minneapolis*, in the county of *Hennepin*, and state of *Minnesota*, on the *tenth* day of *August*, A. D. 1897, and that after said deposition was taken by me as aforesaid, the interrogatories and answers thereto, as written down, were read over to the said witness; that thereupon the same was signed and sworn to by the said deponent, *William West*, before me (or *us*), the oath being administered by me (or *James Hallett*, *one of said commissioners*, where there are more commissioners than one) at the place and on the day and year last aforesaid.

James Hallett, Commissioner.

Form No. 7355.[1]

In the *Circuit* Court of the *Second* Judicial Circuit of *Florida*, in and for *Leon* County.

John Doe against *Richard Roe.* } Certificate.

We, *James Hallett* and *William Morris*, commissioners duly appointed by the judge of the *Circuit* Court of *Leon* county, *Florida*, to

of *Stevenson* and state of *Illinois*, aforesaid, produced, sworn, and examined before *George P. McClimans*, justice of the peace in and for said county of *Marion*, on the *third* day of *February*, A. D. 1862, at *the office of said justice* in the town of *Sandoval*, taken by virtue of the annexed notice.

State of *Illinois*, *Marion* county, ss.

I, the subscriber, a justice of the peace in and for the said county, do certify that the above deposition was taken at the time and place mentioned in the caption thereof; that the said witness was first duly sworn; that the said deposition was first carefully read to him and signed by him.

Dated this *third* day of *February*, A. D. 1862. *G. P. McClimans*, J. P."

The notice in that case, omitting the title of cause, was as follows: "Take notice that on *Monday*, the *third* day of *February*, A. D. 1862, at the hour of *10* o'clock *a.* m. of said day, before *G. P. McClimans*, Esq., a justice of the peace, at *his office* in *Sandoval*, *Illinois*, we shall take the deposition of *D. H. Stead*, a witness to be examined on the part of said *plaintiff*, and which said deposition will be read in evidence at the trial of said cause, and when and where you may appear and cross-examine said witness, if you see proper."

In Delaware, the certificate may be as follows: "To the *Chancellor* of the state of *Delaware*: I, *James Hallett*, commissioner named in the foregoing writ, do certify that, in pursuance of the authority therein contained, I caused the several witnesses, whose depositions appear in the schedule thereto annexed, to be examined on oath (or *affirmation*) upon interrogatories annexed, and that I caused such examination to be reduced to writing as the same in such schedule appears. *James Hallett*, Commissioner."

That deposition was taken by the commissioner must be shown. Porter *v.* Beltzhoover, 2 Harr. (Del.) 484.

See also *supra*, note 3, p. 587.

1. *Florida.* — Rev. Stat. (1892), §§ 1129, 1130. See also *supra*, note 3, p. 587.

Under the Georgia statutes (2 Ga. Code (1895), § 5315 *et seq.*), the certificate may be as follows: "The foregoing depositions were taken before me, as stated in the caption, and the answers reduced to writing by me, or by the witness in my presence, and I certify that I am not interested in the cause, nor of kin or of counsel to either of the parties. *James Hallett*, Commissioner. (SEAL)" 2 Ga. Code (1895), § 5317. See also *supra*, note 3, p. 587.

take the testimony of *William West* in the above styled cause, then and there pending, hereby certify that the said witness, *William West*, was first duly sworn by commissioner *James Hallett* in our presence and that the foregoing pages contain the answers to the interrogatories propounded in the commission sent to us, and which were reduced to writing by commissioner *James Hallett* in our presence and read by him to the said witness, who signed the same in our presence respectively; and that the said testimony was taken at the city of *Atlanta*, county of *Fulton*, state of *Georgia*, on the day named and as set out in the caption hereto.

James Hallett,
William Morris,
Commissioners.

Form No. 7356.[1]

I, *Norton Porter*, a *notary public* in and for the county of *Cook*, state of *Illinois*, and commissioner of the state of *Indiana* to take depositions under the appointment contained in the attached commission, do hereby certify that the foregoing deposition was taken pursuant to the attached notice and commission, in a cause now pending in the *Circuit* Court of *Posey* county, *Indiana*, in which *John Doe* is plaintiff and *Richard Roe* is defendant; that I am not interested in said action, nor of kin to any party to said action; that *William West*, the witness above named, was by me first duly sworn (or *affirmed*) according to law to make true, full and perfect answer to all interrogatories, cross-interrogatories and re-examining interrogatories which might be propounded; that the interrogatories hereto annexed and each of them were propounded to said witness in manner and form and order as they are set out;[2] that the answers to said interrogatories were accurately written down by me (or *by Charles Chase, a disinterested person, in my presence and under my direction*),[3] and, with the interrogatories, were afterwards by me read over to deponent and such corrections made as deponent requested;[4] that afterwards said deposition was signed by deponent in my presence; that none of the parties to said action were present, either in person, by attorney or agent, nor was any party, his agent or attorney, at any time before the deposition was finished, informed of the nature of the evidence.[5]

1. *Indiana.* — Horner's Stat. (1896), § 449.
Idaho. — Laws (1893), p. 138, § 31.
See also *supra*, note 3, p. 587.

2. **That interrogatories were propounded** to witness in their order.
Indiana.—Horner's Stat. (1896), § 449.
Idaho. — Laws (1893), p. 138, § 31.

3. **That Answers were Accurately Written Down.**
Indiana.—Horner's Stat. (1896), § 449.
Idaho. — Laws (1893), p. 138, § 31.

4. **That answers were corrected** at request of deponent.
Indiana.—Horner's Stat. (1896), § 449.
Idaho. — Laws (1893), p. 138, § 31.

5. That neither party was informed of the nature of the evidence until deposition was finished must be stated.
Indiana.—Horner's Stat. (1896), § 449.
Idaho. — Laws (1893), p. 138, § 31.

Presumption. — Where the code does not specify the contents of the certificate, it will be presumed that the commissioner did all he was required to do. Darby *v.* Heagerty, 2 Idaho 260.

Taken Without Interrogatories. — Under Horner's Stat. Ind. (1896), § 430, and Idaho Laws (1893), p. 134, § 13, the certificate may be as follows:

"State of *Illinois*, } sct:
Cook County, }

Said deposition was taken at *Chicago*, in the county of *Cook*, in the state of *Illinois*, upon the *tenth* day of *August*, 1897.

In testimony whereof, I have hereunto set my hand and affixed (SEAL) my seal of office, at *Chicago*, this *tenth* day of *August*, 1897.

Norton Porter,
Notary Public and Commissioner.

Form No. 7357.[1]

I, *James Hallett*, a *notary public* within and for the county of *Cook* and state of *Illinois*, do hereby certify that *William West*, the deponent, whose place of residence is *Chicago*, in *Cook* county, state of *Illinois*, was by me sworn[2] (or *affirmed*) to testify the whole truth of his knowledge touching the matter in controversy in the cause aforesaid; that deponent was examined, and that his testimony was correctly and fully written down by me (or *by Charles Chase, who is neither of the parties, their attorney, or otherwise interested in the event of the suit*), and after being by me carefully read over to the said deponent the same was sworn to and subscribed by the said deponent, in my presence, on the *tenth* day of *May*, 1898, between the hours of *ten* A. M. and *four* P. M. of said day, at *my office*, No. *10 L* street in the city of *Chicago*, in the county of *Cook* and state of *Illinois*. In testimony (*concluding as in Form No. 7356*).

I, *Norton Porter*, a *notary public*, in and for the county of *Cook* and state of *Illinois*, do hereby certify that the witness *William West*, whose deposition is hereunto attached, was by me first duly sworn according to law, to testify to the truth, the whole truth, and nothing but the truth, relating to matters in controversy in the cause hereinafter mentioned; and that said witness was examined according to law, and the foregoing deposition to which this certificate is attached was reduced to writing by *Charles Chase* in my presence and under my direction; and that the said deposition was taken by me, reduced to writing and subscribed by said witness as aforesaid stated, on the *tenth* day of *May*, in the year 1898, between the hours of *ten* o'clock *a.* m. and *four* o'clock *p.* m., of said day, at *my office*, No. *10 L* street in the city of *Chicago*, in said county of *Cook* and state of *Illinois*.

I further certify that the foregoing deposition was taken in pursuance to the notice hereto attached, and at the time and place therein specified, to be used on behalf of the *defendant* as evidence in an action of (*state nature of action*) now pending in the *Circuit* Court of the county of *Posey*, State of *Indiana*, in which *John Doe* is plaintiff and *Richard Roe* is defendant, and that the adverse party, the *plaintiff* in said suit, did *not* attend the taking of such deposition.

In testimony whereof" (*concluding as in Form No. 7356, supra*).

1. *Iowa.* — Code (1897), § 4700.

See also *supra*, note 3. p. 587.

2. **When oath is administered by person other than officer,** the certificate shall recite such fact, stating his name and official character. Iowa Code (1897), § 4700.

Final Certificate. — When all the witnesses who appear have been sworn and examined, and their depositions reduced to writing, subscribed, and certified as above, the officer will attach to the depositions all papers and exhibits proved or referred to in the examination, the commission and notice, and entries thereon, and attach thereto the following certificate:

"State of *Illinois*, } ss.
Cook County. }

I, *Norton Porter*, a *notary public* within and for said county and state, do hereby certify that in pursuance of the annexed notice (or *commission* or *stipulation*) I caused to come before me at *my office*, No. *10 L* street in *Chicago*, in *Cook* county, state of *Illinois*, on the *tenth* day of *May*, 1898, between the hours of *ten* o'clock in the *fore*noon and *four* o'clock in the *after*noon, *William*

Form No. 7358.[1]

Commonwealth of *Massachusetts.*

Middlesex, ss.

This is to certify that *William West*, the above named deponent, appeared before me at *ten* o'clock *A.* M., on the *tenth* day of *May*, A. D. 1*898*, at *my office*, No. *1000 Massachusetts avenue* in the city of *Cambridge*, in said county of *Middlesex*, and gave the foregoing deposition,

West and *Samuel Short*, who were then and there by me duly sworn and examined, and their examinations were reduced to writing by me (or *by Charles Chase, who is neither one of the parties, their attorney, or in any wise interested in the event of the suit*), and after being by me read over to the said witnesses, the same were subscribed and sworn to by them in my presence, and the said depositions are now herewith returned.

And I further certify that *Oliver Ellsworth*, Esq., was present and conducted the examination on the part of the *defendant*, and that *Jeremiah Mason*, Esq., was present and cross examined said witnesses on behalf of the *plaintiff*. In testimony" (*concluding as in Form No. 7356*).

Under the Kansas statutes (Gen. Stat. (1897), c. 95, § 366), the certificate may be as follows:

"State of *Kansas*, }
County of *Atchison*. } ss.

I, *Norton Porter*, a *notary public* within and for the county of *Atchison*, in the state of *Kansas*, do hereby certify that *William West* was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; and that the deposition by him subscribed, as above set forth, was reduced to writing by (*Here state by whom deposition was written, whether by the officer, witness, or a disinterested person, naming him*) in presence of the witness, and was subscribed by said witness in my presence, and taken at the time and place specified in the annexed notice (or *agreement* or *commission*), and that I am not a relative, counsel or attorney of either party, or otherwise interested in the event of this action or proceeding. In testimony" (*concluding as in Form No. 7356.*)

See also *supra*, note 3, p. 587.

Under the Kentucky statutes (Bullitt's Civ. Code (1895), § 582), the certificate may be as follows: "I, *James Hallett*, examiner for *Kenton* county, in the state of *Kentucky* (or *state other official title*), certify that, pursuant to the notice (or *the interrogatories*) hereto annexed (or *with the consent of the parties named in the caption hereof*), the foregoing deposition of *William West* was taken before me at the time and place and for the purpose stated in the caption; that said witness was duly sworn before giving evidence; that it was written and subscribed by him in my presence (or *was written by me in his presence and read to and subscribed by him in my presence*), and that (*state whether or not any party, and, if any, who was present, in person or by agent or attorney, during the examination of the witness*). Given under my hand this *twentieth* day of *May*, 1*898*.

James Hallett, Examiner."

Bullitt's Civ. Code Ky. (1895), p. 725, giving this form of certificate as proper when the deposition is taken in an action pending in a circuit court not having continuous sessions.

When action is pending in a circuit court having continuous sessions, the following form of certificate should be used: "I, *James Hallett*, examiner for *Jefferson* county, in the state of *Kentucky* (or *state other official title*), certify that pursuant to the interrogatories (or *the interrogatories and notice*) hereto annexed the foregoing deposition of *William West* was taken before me at the time and place and for the purpose stated in the caption; that the said witness was duly sworn before giving it, and it was written and subscribed by him in my presence (or *was written by me in his presence and was read to and subscribed by him in my presence*), and that the said *John Doe* was permitted to be present because he had notified the said *Richard Roe* of his intention (or *had been notified by said Richard Roe of his intention*) to be present, as appears from the notice annexed hereto." (*Concluding as in Form No. 7356.*)

See also *supra*, note 3, p. 587.

1. *Maine.* — Rev. Stat. (1883), c. 107, § 15.

Massachusetts. — Pub. Stat. (1882), c. 169, § 32.

to be used in an action of *contract* now pending between *John Doe*, plaintiff, and *Richard Roe*, defendant, before the *Superior* Court for the county of *Essex*; that prior to his examination the said deponent was duly sworn by me to testify the truth, the whole truth, and nothing but the truth, relating to the cause for which said deposition is taken; that both parties to the said action had an opportunity to examine the said deponent as in the statute provided; that the said deposition was reduced to writing by me; that it was carefully read to the said deponent, and was then subscribed by him; that the said deposition was taken at the request of the *defendant* in said action, the said deponent being (*Here set out reason for taking deposition*); and that the *plaintiff* in said action attended at the taking of said deposition.

Dated at *Cambridge* this *tenth* day of *May*, A. D. 1*898*.

Abraham Kent, Justice of the Peace.

Form No. 7359.[1]

I do hereby certify and report that the foregoing deposition of *William West* was taken before me at the time and place stated in the notice therefor hereto attached, and at the adjournments thereof as the same appear therein. That each said witness was first duly sworn by me (or *affirmed, under the pains and penalties of perjury*,) to testify the truth, the whole truth, and nothing but the truth, concerning all matters at issue in said cause. He was then examined as in the body of said deposition appears. That the said testimony, being the several direct interrogatories, and cross-interrogatories, and the answers of each said witness, was written out under my direction, and I certify the same is correct. The said testimony was then subscribed by said witness (or *signature of witness was waived by parties in writing hereto attached*).

Norton Porter, Notary Public.

This *tenth* day of *May*, 1*898*.

1. *Michigan.* — Pub. Acts (1895), No. 180, § 4.

See also *supra*, note 3, p. 587.

Where deposition is taken pursuant to stipulation, no certificate as to the manner of taking it is required. Knight *v.* Emmons, 4 Mich. 554.

Under the Minnesota statutes (Stat. (1894), § 5689), the following certificate is prescribed:

"State of *Idaho*, } ss.
County of *Shoshone*. }

Be it known, that I took the annexed depositions pursuant to the annexed notice (or *order*); that I was then and there (*state the title of the officer*); that I exercised the power of that office in taking such depositions; that, by virtue thereof, I was then and there authorized to administer an oath; that each witness, before testifying, was duly sworn to testify the whole truth, and nothing but the truth, relative to the cause specified in the annexed notice (or *order*); that the testimony of each witness was correctly read over to him by me before he signed the same; that the examination was conducted on behalf of the plaintiff by *Jeremiah Mason*; that the examination was conducted on behalf of the defendant by *Oliver Ellsworth*." In testimony (*concluding as in Form No. 7356*).

See Atkinson *v.* Nash, 56 Minn. 472. See also *supra*, note 3, p. 587.

Under section 5677, this form is prescribed:

"State of *Minnesota*, } ss.
County of *Goodhue*. }

I, *Abraham Kent*, justice of the peace in and for said county, do hereby certify that the above deposition was taken before me, at *my office* in *Red Wing* in said county, on the *tenth* day of *May*, 1*898*, at *ten* o'clock in the *fore*noon; that it was taken at the request of the plaintiff

Form No. 7360.[1]

I, the said *James Hallett*, commissioner named in said commission (or *Abraham Kent, a justice of the peace of said county*), do hereby certify that the deposition of each of said witnesses was by me reduced to writing in his presence, and was then by him subscribed; and I return herewith the commission, interrogatories and cross-interrogatories relating to the foregoing depositions; and the following described vouchers and exhibits, duly certified by me, which said vouchers and exhibits are made part of said depositions, to wit: (*Here describe vouchers and exhibits certified to.*)

In testimony (*concluding as in Form No. 7356*).

Form No. 7361.[2]

(Mo. Rev. Stat. (1889), p. 2260.)

I, *Norton Porter*, a *notary public* within and for the county of *Hennepin*, in the state of *Minnesota*, do certify that in pursuance of the within (or *annexed*) commission and notice[3] came before me, at

(or *defendant*), upon verbal (or *written*) interrogatories; that it was reduced to writing by myself (or *by deponent* or *by Samuel Short, a disinterested person, in my presence and under my direction*); that it was taken to be used in the suit of *John Doe* against *Richard Roe*, now pending in the *District* Court of the county of *Hennepin*, state of *Minnesota*; and that the reason for taking it was (*here state the true reason*); that the defendant attended at the taking of said deposition (or *that a notice, of which the annexed is a copy, was served upon him, on the twenty-sixth day of April, 1898*); that said deponent, before examination, was sworn to testify the whole truth, and nothing but the truth, relative to said cause, and that the said deposition was carefully read to (or *by*) said deponent, and then subscribed by him. Dated at *Red Wing*, the *tenth* day of *May*, one thousand eight hundred and *ninety-eight*.

Abraham Kent, Justice of the Peace."

Stipulation. — Certificate stating that under and by virtue of the foregoing stipulation the testimony of the witness (naming him) was taken under said stipulation on the 28th day of February, 1868, and again on the 2d day of March, is sufficient. Day *v.* Raguet, 14 Minn. 273.

1. *Mississippi.* — Anno. Code (1892), § 1754. See also *supra*, note 3, p. 587.

In Justices' Courts.—Under Miss. Anno. Code (1892), §§ 1747, 1748, this form of certificate may be used: "I hereby certify that I caused the foregoing testimony to be reduced to writing, and that the said witness, after having the same read over to him, signed the same in my presence, on the day and at the place stated in the caption. Witness my hand this *tenth* day of *May*, 1898.

James Smith, Justice of the Peace."

2. *Missouri.* — Burns' Anno. Pr. Code (1896), § 1314. See also *supra*, note 3, p. 587.

3. Certificate by a notary that he took the deposition pursuant to the annexed notice is sufficient, and he need not state the manner of pursuing the notice. Walley *v.* Gentry, 68 Mo. App. 298.

Precedents. — In Vawter *v.* Hultz, 112 Mo. 633, the following certificate was held sufficient:

"I, *W. H. Truitt*, a *notary public* within and for the county of *Boone*, in the state of *Missouri*, do certify, that in pursuance of the annexed notice came before me, at the office of *Bass & Gordon*, in the county and state aforesaid (*naming all the witnesses*), who were by me severally sworn to testify the whole truth of their knowledge touching the matter in controversy aforesaid, and that they were examined, and their examination reduced to writing and subscribed by them respectively in my presence on the day, between the hours and at the place in that behalf aforesaid, and that their depositions are now herewith returned, and I further certify (*naming all the witnesses again*) are residents of said county of *Boone*, in the state of *Missouri*.

Given at the office of *Bass & Gordon*, in the county of *Boone*, in the state

Minneapolis, in the county and state last aforesaid, *William West*, who was by me sworn (or *affirmed*) to testify the whole truth, of his knowledge, touching the matter in controversy aforesaid; that he was examined, and his examination reduced to writing and subscribed and sworn to by him in my presence on the day between the hours and at the place in that behalf first aforesaid, and his said deposition is now herewith returned.

I further certify that said *William West* is a resident of the said county of *Hennepin* in said state of *Minnesota*. In testimony (*concluding as in Form No. 7356*).

Form No. 7362.[1]

State of *Nebraska*,)
Colfax County, ss.)

Be it known that I took the annexed deposition of *William West* pursuant to the annexed notice (*stipulation* or *commission*); that I was then and there a *notary public* in and for said county and state; that I

of *Missouri*, this *fourth* day of *March*, A. D. 1890.

(SEAL) *W. H. Truitt*, Notary Public.

My commission as notary public will expire *January 30*, 1892."

This certificate was held to comply with all the requirements of the statute. The court stated, quoting Borders *v.* Barber, 81 Mo. 636, that the caption and certificate should be read in connection, and if from the whole the official character of the certifying officer, as also the venue, can be ascertained to a reasonable certainty, it will suffice.

In Warlick *v.* Peterson, 58 Mo. 408, the caption of the deposition was as follows:

"State of *North Carolina*, *Burke* County, *March 12th*, 1873. Pursuant to notice heretofore served, the following depositions of witnesses produced, sworn and examined, on this *12th* day of *March*, in the year of our Lord one thousand eight hundred and *seventy-three*, between the hours of *eight* o'clock in the *fore*noon and *six* o'clock in the *after*noon, at the *post-office*, in the *town* of *Morganton*, county of *Burke*, and State of *North Carolina*, before me, *William A. Ross*, an acting justice of the peace," etc., and proceeding in the usual form.

At the conclusion of the depositions the justice certified that, in pursuance of the annexed commission and notice, came before him, at the *post-office* at *Morganton*, in the county of *Burke*, State of *North Carolina*, between the hours of *eight* o'clock in the *fore*noon and *six* o'clock in the *after*noon (*names of witnesses*), of the same county and State, "who were severally sworn to testify the whole truth of their knowledge touching the matter in controversy, between *Philip Warlick*, plaintiff, and *Daniel Peterson*, defendant; that they were examined and their examination reduced to writing, and subscribed by them, respectively, in my presence, at the time and place above mentioned, and that said depositions are now herewith returned. Given at the *post-office* at *Morganton*, in the county of *Burke*, State of *North Carolina*, this *12th* day of *March*, one thousand eight hundred and *seventy-three*." It was objected that the certificate does not show that the depositions were taken on the 12th day of March and is therefore bad.

The court held, that the caption to the deposition stating that the witnesses appeared on the 12th day of March and were sworn and examined on that day in pursuance of the notice, and the certificate stating that the depositions were taken in pursuance of the notice attached, and concluding, "given at *the post-office* in *Morganton*," etc., "on the *12th* day of *March*," etc., when all taken together, showed a substantial compliance with the statute.

1. *Nebraska.* — Comp. Stat. (1897), § 5959.

North Dakota. — Rev. Codes (1895), § 5684.

Ohio. — Bates' Anno. Stat. (1897), § 5280.

Oklahoma. — Stat. (1893), § 4249.

South Dakota. — Dak. Comp. Laws (1887), § 5295.

exercised the power of that office in taking such deposition; that by virtue thereof I was then and there authorized to administer an oath; that I am not an attorney or relative of either party or otherwise interested in the event of this action; that said witness, before testifying, was duly sworn to testify the truth, the whole truth, and nothing but the truth, relative to the cause specified in the annexed notice (*stipulation* or *commission*); that the deposition of said witness was reduced to writing by *Samuel Short*, a disinterested and proper person, and not interested in the action; that the deposition of said witness was written and subscribed in my presence and in the presence of the witness; that said deposition was taken at *my office*, No. *10 State* street in the city of *Schuyler*, in said county of *Colfax*, on the *tenth* day of *July*, 1*898*, at *ten* o'clock *A.* M., the time and place specified in said notice; that the examination was conducted on behalf of the plaintiff by *Jeremiah Mason*, Esq.; that the examination was conducted on behalf of the defendant by *Oliver Ellsworth*, Esq.

In testimony (*concluding as in Form No. 7356*).

Form No. 7363.[1]

State of *New Hampshire.*
Sullivan, ss.

Personally appeared the within named *William West* at *the law office* of *Oliver Ellsworth* in *Claremont* in said county, on the *twenty-ninth* day of *September*, 1*897*, and made solemn oath that the within deposition by him subscribed contains the truth, the whole truth, and nothing but the truth, relative to the cause for which it was taken.

Wyoming. — Rev. Stat. (1887), § 2628. See also *supra*, note 3, p. 587.

In Ohio and Wyoming.—Where deposition is taken out of the state by an officer authorized to take the same, the certificate may be as above, or in the form authorized by the laws of the place where taken. Bates' Anno. Stat. Ohio (1897), § 5280; Rev. Stat. Wyoming (1893), § 2628.

1. *New Hampshire.*—Pub. Stat. (1891), c 225, § 9. See also *supra*, note 3, p. 587.

Precedent.—In Currier *v.* Boston, etc., R. Co., 31 N. H. 210, under the provisions of the statute requiring that "the magistrate taking any deposition shall certify such fact, with the time, place and cause of taking the same, and the case and court in which it is to be used, and that the adverse party was or was not present, was or was not notified, and that he did not object," the court held that it is not required that all these things shall be included in a single certificate, nor is it material whether the magistrate includes the whole in one certificate or more. No caption is required nor is any particular form or manner of certificate required, the only requirement being that the magistrate shall certify certain facts. In this case there were two certificates, as follows:

"State of *Illinois*, *Cook* county, ss. Personally appeared before me, the within named *Henry Bacon*, at *the City Hotel*, in *Chicago*, in said county of *Cook*, on the *fourteenth* day of *June*, A. D. 1*853*, and made solemn oath that the within deposition, by him subscribed, contains the truth, the whole truth, and nothing but the truth, relative to the cause for which it was taken. Taken at the request of the *Boston and Maine Railroad*, a corporation doing business at *Dover*, in the county of *Strafford* and State of *New Hampshire*, to be used at the Court *of Common Pleas*, to be held at *Dover* aforesaid, in and for said county of *Strafford*, on the *third Tuesday* of *August next*, in a plea of the case, wherein *Samuel Currier*, of said *Dover*, is plaintiff, and said *Boston and Maine Railroad* is defendant. The said *Currier* being duly notified, as appears by the annexed notice and certificate of service, was not present, and did not

Taken at the request of *Richard Roe*, of said *Claremont*, to be used at the *Supreme* Court, to be held at *Keene* in and for the county of *Cheshire* on the *third Tuesday* of *October*, 1897, in a plea wherein *John Doe*, of said *Keene*, is plaintiff and the aforesaid *Richard Roe* is defendant. Said *John Doe*, being duly notified, was present, and did not object. The taking of the same was commenced at *ten* o'clock *A.* M., on the *twenty-ninth* day of *September*, 1897, at the place aforesaid, and continued until completed.

Before me, *Abraham Kent*, Justice of the Peace.

Form No. 7364.[1]

State of *Oregon*, } ss.
County of *Multnomah*. }

I hereby certify that the foregoing deposition of *William West* was

object. The deponent living more than *ten* miles from the place of trial, and without the state of *New Hampshire*, is the cause of this caption.

Alexander S. Prentiss,
Commissioner, etc., for the State of *New Hampshire*."

"I, *Alexander S. Prentiss*, of the city of *Chicago*, in the county of *Cook* and State of *Illinois*, a commissioner appointed by the governor of the State of *New Hampshire*, under and by virtue of a statute of said State, entitled 'An act to authorize the appointment of commissioners without this State, to administer oaths and take acknowledgments of deeds,' do hereby certify, that previous to the examination of the said *Henry Bacon*, whose name was subscribed to the foregoing deposition, as a witness in the said suit between the said *Samuel Currier*, plaintiff, and the said *Boston and Maine Railroad*, defendant, in the Court *of Common Pleas* for the county of *Strafford*, in the State of *New Hampshire*, he was duly sworn by me, as such commissioner, to testify the truth in relation to the matters in controversy between the said *Samuel Currier*, plaintiff, and the said *Boston and Maine Railroad*, defendant, so far as he should be interrogated concerning the same. And I further certify that the said deposition was taken at *the City Hotel*, in the city of *Chicago*, in the county of *Cook*, and State of *Illinois*, on the *fourteenth* day of *June*, at *ten* o'clock in the *fore*noon. And that after said deposition was taken by me as aforesaid, the interrogatories and answers thereto, as written down, were read over to the said *Henry Bacon*; and that thereupon the same were signed and sworn to by the said *Henry Bacon* before me, the oath being administered by me as such commissioner, at the place and on the day and year last aforesaid.

Alexander S. Prentiss,
Commissioner, etc., for the State of *New Hampshire*."

The court held that, taken together, the above certificates contain everything required by the statute.

Under the New York statutes, Code Civ. Proc., § 902 (Birds. Rev. Stat. (1896), p. 862, § 32), the following certificate may be used:

"State of *Connecticut*, } ss.
County of *Hartford*. }

I, *James Hallett*, do certify that *William West*, the witness, personally appeared before me on the *tenth* day of *June*, 1898, at *ten* o'clock in the *fore*noon, at *the office of Daniel Webster*, No. *10 State* street, in the city of *Hartford*, in the county of *Hartford*, in the state of *Connecticut*, and after being sworn (or *affirmed*, as the case may be) to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did in my presence subscribe the same, and indorse the exhibits annexed thereto. And I further certify that I have subscribed my name to each half sheet thereof and to each exhibit. And I further certify that *Jeremiah Mason*, Esq., appeared in behalf of the plaintiff, and that *Oliver Ellsworth*, Esq., appeared in behalf of the defendant. In testimony" (*concluding as in Form No. 7356*).

This certificate is a sufficient return to the commission. N. Y. Code Civ. Proc., § 903 (Birds. Rev. Stat. (1896), p. 863, § 33).

See also *supra*, note 3, p. 587.

1. *Oregon.* — Hill's Anno. Laws (1892), § 825.

See also *supra*, note 3, p. 587.

taken before me at *my office*, at No. *10 State* street in the city of *Portland*, in said county of *Multnomah*, on the *tenth* day of *June*, 1*898*, between the hours of *ten* o'clock *A.* M. and *four* o'clock *P.* M., pursuant to the annexed notice. That said deposition was reduced to writing by me (or *by Samuel Short*). That before proceeding to the said examination the witness was duly sworn to tell the truth, the whole truth, and nothing but the truth. That when the same was completed the deposition was read to the witness and by him signed.

(SEAL) *Norton Porter*, Notary Public.

Form No. 7365.[1]

State of *Rhode Island and Providence Plantations.*

Providence, SC.

Be it remembered, that at the place mentioned in the citation[2] hereto annexed, in said county, on the *tenth* day of *August*, A. D. 1*898*, at *ten* o'clock *A.* M., *William West*, the within named deponent, came before me, and after being by me first carefully examined, cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, gave the within deposition, which was reduced to writing by me in the presence of the said deponent and by said deponent was signed in my presence; said deposition to be used in the trial of a civil action at law now pending in the *Supreme* Court of the State of *Rhode Island*, within and for the county of *Providence*, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, and taken at the request of the said defendant *Richard Roe* after more than twenty-four hours' notice to said plaintiff *John Doe*, as appears by the citation annexed and the return thereon made. The adverse party *John Doe* was (or *was not*) present at the taking of the within deposition.

I further certify that I am not interested in, nor of counsel for, nor the attorney of, either party in said action.

Norton Porter, Notary Public.

Depositions Taken Out of the State. — No form of certificate prescribed. Clark *v.* Ellis, 9 Oregon 128.

The provisions of section 825 of the code are not applicable in determining the sufficiency of a certificate to a deposition taken out of the state upon written interrogatories; the code only requires that the commissioner shall certify the deposition to the court. This is sufficiently done when he certifies that the following, or foregoing, or accompanying, is the examination of the witness, given on his oath or affirmation by me duly administered, in answer to the interrogatories annexed to the commission, as therein stated. Clark *v.* Ellis, 9 Oregon 128.

1. *Rhode Island.* — Gen. Laws (1896), c. 244, § 26.

2. For form of citation, see *supra*, Form No. 7258.

See also *supra*, note 3, p 587.

Under the Tennessee statutes (Code (1896), § 5637), the following certificate is prescribed: "The foregoing depositions were taken before me as stated in the caption, and reduced to writing by me (or *by the witnesses*); and I certify that I am not interested in the cause, nor of kin or counsel to either of the parties, and that I sealed them up and delivered them to (*Here state to whom delivered*) (or *delivered them to the express office* or *put them into the post-office*) without being out of my possession or altered after they were taken. Given under my hand the *tenth* day of *June*, 1*898*.

Abraham Kent, Justice of the Peace."

See also *supra*, note 3, p. 587.

Form No. 7366.[1]

The State of *Texas*, }
County of *Hill*. } I, *Norton Porter*, a *notary public* in and for *Hill* county, *Texas*, do hereby certify that the foregoing answers of *William West*, the witness before named, were made before me, and were sworn to and subscribed before me on the *tenth* day of *June*, A. D. 1*898*, by the said witness.

In testimony (*concluding as in Form No. 7356*).

Form No. 7367.[2]

State of *Virginia*, City of *Richmond*, to wit:

I, *Abraham Kent*, a justice of the peace (or *notary public*) for the city aforesaid in the said state, do hereby certify that the foregoing depositions were duly taken, sworn to and subscribed before me at the times and places mentioned therein. In testimony (*concluding as in Form No. 7356*).

1. *Arizona.* — Rev. Stat. (1887), § 1845.

New Mexico. — Comp. Laws (1897), § 3043.

Texas. — Rev. Stat. (1895), art. 2284.

See also *supra*, note 3, p. 587.

No technical form of certificate is required by statute; a substantial compliance with the direction of the statute is sufficient. Ballard *v.* Perry, 28 Tex. 347; Carroll *v.* Welch, 26 Tex. 147; Neill *v.* Cody, 26 Tex. 286.

Certificate is sufficient if, when taken with the caption, it appears from the whole that the statute has been substantially complied with. Houston, etc., R. Co. *v.* Larkin, 64 Tex. 454; Carroll *v.* Welch, 26 Tex. 147.

When the testimony of all the witnesses named in the commission is not taken, the officer need not certify the reason for such omission. Schunior *v.* Russell, 83 Tex. 83.

Under the Vermont statutes (Stat. (1894), § 1270), the following certificate, which is set out in Vt. Stat. (1894), § 5417, No. 29, may be used:

"State of *Vermont*, } At *Rutland*,
County of *Rutland*, ss. } in the county of *Rutland* and state of *Vermont*, this *tenth* day of *August*, A. D. 1897, personally appeared *William West*, the witness above named, and made oath that the foregoing deposition by him subscribed contains the whole truth, and nothing but the truth.

Before me,

Norton Porter, Notary Public.

The above deposition was taken at the request of *John Doe*, to be used in a cause to be heard and tried by the honorable *County* Court, next to be holden at *Montpelier*, within and for the county of *Washington*, in which cause *John Doe* is plaintiff and *Richard Roe* is defendant. The witness residing more than *thirty* miles from the place of trial (or *state other cause for taking deposition*) is the cause for taking this deposition, and the adverse party was (or *was not*) notified, and did (or *did not*) attend.

Certified by

Norton Porter, Notary Public."

The form of certificate and caption given in the statute need not be literally or exactly followed, but all it contains and requires should be substantially used and embraced in order to make a sufficient compliance with the law. McCrillis *v.* McCrillis, 38 Vt. 135.

See also *supra*, note 3, p. 587.

At whose request deposition was taken must be stated. Whitney *v.* Sears, 16 Vt. 587.

Taken in other states, may be taken agreeably to the laws of the state where taken. Vt. Stat. (1894), § 1262. But it must be shown that they were taken in accordance with the laws of the state where taken. Johnson *v.* Perry, 54 Vt. 459.

2. *Virginia.* — Code (1887), § 3360.

West Virginia. — Code (1891), c. 130, § 34.

See also *supra*, note 3, p. 587.

Under the Washington statutes (Ballinger's Anno. Codes and Stat. (1897), § 6025), the following certificate is prescribed:

"State of *Washington*, }
County of *Spokane*. } ss.

I, *Abraham Kent*, justice of the peace in and for said county (or *judge*, *clerk*, etc., as the case may be), do hereby

Form No. 7368.[1]

State of *Missouri*, } ss.
Jasper County. }

I, *James Hallett*, the commissioner named (or *one of the commissioners named*) in the annexed and foregoing commission, do hereby certify and return to the *Circuit* Court for *Vernon* county, in the state of *Wisconsin*, that I duly received the said commission on the *sixth* day of *July*, A. D. 1*898*; that previous to the execution of said commission I duly gave written notice, which notice is hereunto annexed and made a part hereof, and marked "Exhibit *99*," unto *William Morris*,[2] of *Joplin*, county of *Jasper* and state of *Missouri*, the commissioner named in the cross-interrogatories hereunto attached, of the time and place of executing the same; that said city of *Joplin*, county of *Jasper*, in the state of *Missouri*, which is the place of residence of the said *William Morris*, who is named as commissioner in the cross-interrogatories hereunto attached, is distant *ten* miles from *Carthage*, county of *Jasper* and state of *Missouri*, which is the place fixed for the execution of said commission; and that said notice, marked "Exhibit *99*," was served upon said *William Morris*, of *Joplin*, county of *Jasper* and state of *Missouri*, personally, by delivering to and leaving with the said *William Morris* at *Joplin*, county of *Jasper* and state of *Missouri*, a copy of said notice hereto attached, marked "Exhibit *99*," on the *twelfth* day of *July*, 1*898*, as will more fully appear from the proof of service on said "Exhibit *99*," and that such service was made *two* days before the execution of said commission, thereby giving to said *William Morris*, of *Joplin*, county of *Jasper* and state of *Missouri*, the notice of one day required by section 4115 of Sanb. and B. Anno. Stat. of Wisconsin, and in addition thereto one day for every thirty miles of distance between the place of residence of said *William Morris* and the place of execution of said commission;[3] that the said *William Morris*, of *Joplin*,

certify that the above deposition was taken before me, and reduced to writing by myself (or *witness*, as the case may be), at *Cheney*, in said county, on the *tenth* day of *May*, 1*898*, at *ten* o'clock, *a.* m., in pursuance of notice hereto annexed; that the above named witness, before examination, was sworn (or *affirmed*) to testify the truth, the whole truth, and nothing but the truth, and that the said deposition was carefully read to (or *by*) said witness, and then subscribed by him.

Abraham Kent, Justice of the Peace.

Dated at *Cheney*, the *tenth* day of *May*, 1*898*."

See also *supra*, note 3, p. 587.

1. *Wisconsin.* — Sanb. & B. Anno. Stat. (1889), § 4115.

See also *supra*, note 3, p. 587.

2. **Notice to Commissioner.** — The commissioner named in the direct interrogatories shall fix the time and place for executing the commission, and give the other commissioner, if any, one day's notice thereof, when he resides in the same place, and when not, one day's notice in addition for every thirty miles of distance between the place of his residence and the place fixed for the execution of the commission. Sanb. & B. Anno. Stat. Wis. (1889), § 4115.

Double time shall be allowed when notice is by mail. Sanb. & B. Anno. Stat. Wis. (1889), § 4115.

3. *When notice is by mail*, say "by depositing on the *eighth* day of *July*, A. D. 1*898*, in *the post-office* in the city of *Carthage*, county of *Jasper* and state of *Missouri*, and leaving there to be carried a copy of said notice properly enclosed in a post-wrapper, and on which wrapper there was no direction to the postal officers for the return thereof in case of nondelivery to the person addressed, and addressed to *William Morris*, at *Joplin*, county of *Jasper* and state of *Missouri*, between

county of *Jasper* and state of *Missouri*, the commissioner named in the cross-interrogatories hereunto attached, failed to attend upon the execution of said commission, and that I attended alone at the execution thereof, and at the time and place stated in the caption to the annexed deposition caused said witness *William West* to appear before me; that then and there said witness was by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in relation to the matters in difference in said action, and in answer to the direct and cross interrogatories to him administered; that I then propounded to said witness consecutively each interrogatory and cross-interrogatory annexed to said commission, and herewith returned, and in the same order his answers thereto were reduced to writing by myself (or *by Samuel Short, a disinterested person, in my presence and under my direction*), and the same are hereto annexed; and the same having been concluded, I read to said witness *William West* the several answers so made and written, and he thereupon subscribed the same in my presence, and that I have subscribed my name to each page of said deposition; that the said deposition was taken on the *fourteenth* day of *July*, A. D. 1*898*, between the hours of *ten* A. M. and *four* P. M., that my fees for the same are (*Here set out amount of fees*).

In testimony (*concluding as in Form No. 7356*).

Form No. 7369.[1]

United States of America, }
District of *Minnesota*. } ss.

I, *Norton Porter*, a *notary public* in and for the county of *Hennepin*, in the state of *Minnesota* (or *a United States commissioner*), duly commissioned and qualified and authorized to administer oaths and to take depositions, do hereby certify, that the reasons for taking the

which last named place and the place where said copy of the notice was mailed there is a regular communication by mail."

Taken upon Notice.— Within the state, under Sanb. & B. Anno. Stat. Wis. (1889), § 4106, the following certificate is prescribed:

"State of *Wisconsin*, }
Vernon County, ss. }

I, *Norton Porter*, a *notary public* in and for said county, do hereby certify that the above deposition was taken before me, at *my office*, in the town of *Viroqua*, in said county, on the *twentieth* day of *July*, 1*898*, at *ten* o'clock in the *fore*noon; that it was taken at the request of the plaintiff (or *defendant, or other person procuring it*), upon verbal (or *written*) interrogatories; that it was reduced to writing by myself (or *by deponent* or *by Samuel Short, a disinterested person, in my presence and under my direction*); that it was taken to be used in the action of *John Doe* against *Richard Roe* now pending in the *Circuit* Court of *Dane* county (*or to be used in some proceeding or matter, mentioning it*), and that the reason for taking it was (*Here state the true reason*); that *John Doe* attended at the taking of such deposition (or *that a notice, of which the annexed is a copy, was served upon John Doe on the fifteenth day of July, 1898*, or *that the deposition was taken in pursuance of the annexed stipulation*); the said deponent, before examination, was sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause, and that said deposition was carefuly read to (or *by*) said deponent, and then subscribed by him.

(SEAL) *Norton Porter*,
Notary Public."

When taken without the state upon notice, this form of certificate should also be used. Hayes *v.* Frey, 54 Wis. 503.

1. *Federal Courts.* — U. S. Rev. Stat. (2d ed. 1878), § 863, relating to taking depositions *de bene esse*. See also *supra*, note 3, p. 587.

foregoing deposition are that the witness above named is a material and necessary witness in the cause in the caption of said deposition entitled, and that he resides at *Minneapolis*, in the county of *Hennepin* in the state of *Minnesota*, more than *one hundred* miles from the place where the said civil action is by law appointed to be tried.

I further certify, that notice to *John Doe*, the *plaintiff* in the above entitled action, of the time and place of taking said deposition, and notifying him to appear at said time and place and take such part in the examination of said witness as he might be advised, and as should be fit and proper, was made out and served on said *John Doe*, as appears from said notice hereto annexed, with the proof of such service thereon indorsed.

And I further certify, that I was attended by the parties and their counsel at the time and place as stated in the caption of said deposition, and by the said witness therein named; and that the said witness, being of sound mind and of lawful age, was, before the commencement of the taking of his deposition, by me duly and publicly cautioned[1] and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and was carefully examined, and that the deposition as given was reduced to writing by myself in the presence of such witness and the said counsel, and from the statements of the witness, and that the deposition of such witness when completed was by me carefully read over to such witness and subscribed by such witness, in the presence of such of said counsel and parties in said cause as were in attendance.

And I further certify, that the exhibits attached to said deposition are the ones referred to therein; and that in the caption and said deposition is contained a complete record of all the proceedings before me at the time of taking the same; that I have retained the said deposition in my possession until I could deliver the same to the court in which said action is pending, or seal the same up and deposit it in the post-office, directed to said court.

And I do further certify, that I am not of counsel or attorney for either of the parties to said cause, nor in anywise interested in the event thereof.

In testimony (*concluding as in Form No. 7356*).

1. That witness was cautioned must be stated. Pentleton *v.* Forbes, 1 Cranch (C. C.) 507.

But in Brown *v.* Piatt, 2 Cranch (C. C.) 253, it is held that magistrate need not certify that he cautioned the witness.

Taken under Dedimus Potestatem, under U. S. Rev. Stat. (2d ed. 1878), § 866, the certificate may be as follows:

"United States of America,
District of *New Hampshire*,
County of *Merrimac*,
City of *Concord*. } ss,

I, *James Hallett*, of *Concord*, in the county of *Merrimac* and state of *New Hampshire*, a commissioner, duly appointed to take the deposition of the said *William West*, a witness, whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said *William West* as a witness, in the said suit between the said *John Doe*, plaintiff, and the said *Richard Roe*, defendant, said witness was duly sworn by me to testify the truth in relation to the matters in controversy between the said *John Doe*, plaintiff, and the said *Richard Roe*, defendant, so far as he should be interrogated concerning the same; that the said deposition was taken at *my office*, No. *10 State* street, in the city of *Concord*, in the county of *Merrimac* and state of *New Hampshire*, on the *tenth* day of *May*, A. D. 18*98*; and that after said deposition was taken by me as

VIII. FILING.

1. Notice of Filing.

a. By Party or Attorney.

Form No. 7370.[1]

(*Title of court and cause as in Form No. 5937.*) Please take notice, that the deposition of *William West*, a witness produced, sworn and examined on behalf of the *defendant* above named, before *Norton Porter*, a *notary public* in and for the county of *Dane* and state of *Wisconsin*, and a person by law authorized to take depositions, taken pursuant to the notice hereinbefore served (or *stipulation hereinbefore entered into*), has been duly certified to and returned by said officer to the clerk of the *Circuit* Court of *Vernon* county, and has been filed in the office of the clerk of the *Circuit* Court of *Vernon* county, and that said *defendant* will claim the right to use said deposition on any trial of said action that may be had. Yours, etc. (*Signature, date and address as in Form No. 7234.*)

b. By Clerk of Court.

Form No. 7371.[2]

(*Title of court and cause as in Form No. 5916.*) } Notice of Filing Deposition.

To *Jeremiah Mason*, attorney for plaintiff (or *defendant*) above named:[3] You will take notice that the deposition of *William West*,[4] a witness examined on behalf of the *defendant* in the above entitled cause now pending in the above court, has been duly certified to and returned to me, and has been filed in *my office* in *Logan*, in said *Harrison* county, *Iowa*, this *twenty-fourth* day of *June*, 1898.[5]

Witness my hand and seal of said court this *twenty-fourth* day of *June*, A. D. 1898.

(SEAL) *Calvin Clark*, Clerk of the *District* Court in and for *Harrison* County, *Iowa*.[6]

aforesaid, the interrogatories and answers thereto, as written down, were read over to the said witness *William West*, and that thereupon the same was signed and sworn to by the said *William West* before me, the oath being administered by me at the place and on the day and year last aforesaid.

In testimony" (*concluding as in Form No. 7356*).

1. *Wisconsin.* — Sanb. & B. Anno. Stat. (1889), § 4090. See also list of statutes cited *supra*, note 1, p. 488, and Mont. Dist. Ct. Rules (4th Jud. Dist.), No. 23.

For the formal parts of notice in any particular jurisdiction consult the title NOTICES.

Service of Notice. — For forms of affidavits or acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS.

2. *Iowa.* — Code (1897), § 4711. See also list of statutes cited *supra*, note 1, p. 488.

If post-office address of attorney is unknown to the clerk, the notice shall be addressed to him at the post-office where the cause is pending. Iowa Code (1897), § 4711.

Title of cause must be stated. Iowa Code (1897), § 4711.

3. **Must be given to attorney** of each party. Iowa Code (1897), § 4711.

4. **Names of all the witnesses** must be stated. Iowa Code (1897), § 4711.

5. **Date of filing** must be stated. Iowa Code (1897), § 4711.

6. **Must be Given by Clerk.** — Iowa Code (1897), § 4711.

2. Motion to File.

Form No. 7372.[1]

(Precedent in California *v.* Southern Pac. Co., 153 U. S. 240.)

To the Honorable *Chief Justice*, and the *Associate Justices* of the *Supreme* Court of the *United States*:[2]

The *plaintiff* moves the court as follows:

First — That the court make an order directing that the depositions heretofore taken upon notice and the stipulation of the parties in the above entitled action, now in the custody of the clerk of this court, be opened and filed in this cause, and the same be printed as a part of the record, whenever said record shall be printed; and that the map exhibits now in the custody of said clerk referred to by the witnesses in their several depositions, be also filed by said clerk in said cause; and that said depositions and map exhibits may be used as evidence upon the hearing of said case, subject to the objections therein specified, in the same manner as if the same had been regularly taken and returned in pursuance of the order therein applied for, a printed copy of which testimony, and of the map exhibits, has been deposited with the clerk of this court, to which I respectfully refer.

Second — That this honorable court make an order designating one of its members, or some other person or officer, to take, in the State of *California*, such further testimony and evidence in the above entitled cause as may be offered by either of the parties hereto.

Third — That the person or officer designated to take such testimony as aforesaid, have the power and be instructed to return such testimony as may be offered by either of the parties to said action, and to receive and return such documents and maps illustrative of the alleged title of the city of *Oakland* as said city may deem proper to offer, pursuant to the order of this court made on *March 12th*, 1894, and that said officer so appointed notify the respective parties and the city of *Oakland* of his appointment, and thereupon either of the parties shall be authorized, within *ten* days thereafter, or as soon as convenient, to proceed before said officer or person to take additional evidence, and said person or officer to receive and take such documents and maps as may be offered by said city of *Oakland* under the said order of *March 12th*, 1894, as hereinbefore specified; and that the taking and receiving of said evidences, documents, and maps shall be completed and certified by said person or officer and forwarded to the clerk of this court on or before the *first Monday* of *July*, 1894; upon the receipt whereof, the clerk of this court is hereby instructed to open and file the same, and thereafter to have printed the record in this cause (embracing the depositions heretofore taken), upon the parties hereto paying therefor, the record to be thereupon filed in this court; that there be printed in addition to the requisite number of copies for this court, *ten* copies for the *plaintiff*, *ten* copies for the *defendant*, and *ten* copies for the city of *Oakland*.

1. **For form of order granted upon this motion** see *supra*, note 6, p. 530.

2. **For the formal parts of motions** in any particular jurisdiction consult the title MOTIONS.

That in printing such record, it shall not be necessary for the clerk to print copies of the map exhibits; provided, there shall be furnished to the court a sufficient number of the map exhibits required by the rules of this court, and *one* copy thereof to each of the parties hereto, and *one* copy to the said city of *Oakland.*

Fourth — That the parties hereto and the city of *Oakland* are hereby permitted, during the vacation of this court, to file their briefs and points in said action with the clerk of said court without further order of the court.

Fifth — That the court make an order setting down this cause for trial and hearing on the *second Monday* of *October*, 1*894*, or as soon thereafter as may be convenient for the court.

Sixth — That such other and further orders may be made as the court may seem meet.

For the purpose of the hearing and consideration of this motion, I respectfully refer to:

The order of this court, made *March 12th*, 1*894*, a copy of which is hereto annexed, marked Exhibit "*A*;"

The stipulation signed by the parties, hereto attached, marked Exhibit "*B*;"

The statement of the *Attorney-General* of the State of *California*, solicitor for *plaintiff*, hereto attached, and marked Exhibit "*C*;"

The consent of the *defendant* to the granting of the orders asked for, hereto attached, marked Exhibit "*D*."

All of which papers are hereby referred to and made a part hereof.

Washington, D. C., March 12th, 1*894*.

Wm. H. H. Hart, Attorney General for *California*,
Solicitor for *Plaintiff*.

IX. PUBLICATION.

1. Application.

Form No. 7373.[1]

(*Title of court and cause as in Form No. 6955.*)

To *Jeremiah Mason*, attorney for *John Doe*, plaintiff above named.

You will take notice that the *defendant* in the above entitled action, on the *tenth* day of *September*, 1*897*, at *ten* o'clock in the *forenoon*, will apply to the clerk of the above court at *his office*, in the city of *Mt. Vernon*, in said county of *Posey*, to have the deposition of *William West* taken on behalf of the said *defendant*, published (or *as soon thereafter as counsel can be heard will move the court that the deposition of William West, taken on behalf of the said defendant, be ordered published*).

Oliver Ellsworth, Attorney for *Defendant*.

1. *Indiana.* — Horner's Stat. (1896), § 437. See also list of statutes cited, *supra*, note 1, p. 488.

During trial this motion may be made. Mitten *v.* Kitt. 118 Ind. 145.

For the formal parts of notice in any particular jurisdiction consult the title NOTICES.

Service of Notice. — For forms of affidavits or acknowledgments of service of notices, generally, see the title SERVICE OF WRITS AND PAPERS.

2. Objections.

Form No. 7374.[1]

(*Title of court and cause as in Form No. 6955.*) The *plaintiff* herewith files the following objections to the publication of the deposition of *William West*, taken on behalf of the *defendant* in this action, to wit, (*Here set out objections by paragraphs, numbering each*), and the *plaintiff* asks that the said deposition be not received in evidence, but that the same be suppressed.

Jeremiah Mason, Attorney for *Plaintiff*.

3. Order.

Form No. 7375.[1]

(*Title of court and cause as in Form No. 6958.*) Now come the above named parties by their attorneys, and the motion of the said *defendant*, *Richard Roe*, to publish the deposition of *William West* taken herein, coming on to be heard, and it being shown to the court that due notice has been given of the motion, and objections, in writing, to such publication having been filed by the *plaintiff*, and the counsel of the aforesaid parties having been heard in argument, the aforesaid motion is sustained by the court, and the said objections overruled, to which ruling the *plaintiff* excepts; and it is therefore ordered that said deposition be published; and it is further ordered that the *plaintiff* be given *twelve* days within which to file his bill of exceptions.

X. SUPPRESSION.

1. Notice of Motion.

Form No. 7376.[2]

1. *Indiana.* — Horner's Stat. (1896), § 437. See also list of statutes cited *supra*, note 1, p. 488.

For the formal parts of orders in any particular jurisdiction consult the title ORDERS.

Order may be Granted During Trial. — Mitten *v.* Kitt, 118 Ind. 145.

2. *New York.* — Code Civ. Proc. § 910. (Birds. Rev. Stat. (1896), p. 863, § 40).

Motion must be Made, When. — Must be made before the commencement of the trial.

Alabama. — McArthur *v.* Carrie, 32 Ala. 75; Hudson *v* Hawlett, 32 Ala. 478; Thompson *v.* Rawles, 33 Ala. 29; Scott *v.* Baber, 13 Ala. 182; McCreary *v.* Turk, 29 Ala. 244; Oxford Iron Co. *v.* Quinchett, 44 Ala. 487.

Illinois. — Stowell *v.* Moore, 89 Ill. 563; Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19; Moshier *v.* Knox College, 32 Ill. 155; Thomas *v.* Dunaway, 30 Ill. 373; Cole *v.* Choteau, 18 Ill. 439; Corgan *v.* Anderson, 30 Ill. 95.

Indiana. — National Bank, etc., Co. *v.* Dunn, 106 Ind. 110; Newman *v.* Manning, 89 Ind. 422; Fruchey *v.* Eagleson, 15 Ind. App. 88; Graydon *v.* Gaddis, 20 Ind. 515.

Iowa. — Code (1897), § 4712; Winters *v.* Winters, 102 Iowa 53; Bixby *v.* Carskaddon, 63 Iowa 164; Byington *v.* Moore, 62 Iowa 470; Turner *v.* Hardin, 80 Iowa 691; Neimeyer *v.* Cass County Bank, 42 Iowa 124; Harris Mfg. Co. *v.* Marsh, 49 Iowa 11; Johnson *v.* Chicago, etc., R. Co., 51 Iowa 25; Alveson *v.* Bell, 13 Iowa 308; Frazier *v.* Smith, 10 Iowa 591.

Kansas. — Adams Express Co. *v.* McConnell, 27 Kan. 238.

Mississippi. — Anno. Code (1892), § 1758; Ratliff *v.* Thomson, 61 Miss.

(*Commencing as in Form No. 6954, and continuing down to* *)[1] for an order requiring that the deposition of *William West*, taken under the commission issued in the above entitled action (or *under the order of the Supreme Court*), bearing date the *tenth* day of *September*, 1897, be suppressed upon the following grounds set forth in the affidavit[2] of the above named *plaintiff*, *John Doe*, hereto annexed, to wit, (*Here specify the grounds of objection*,[3] *concluding as in Form No. 6954.*)

71; Hartford F. Ins. Co. *v.* Green, 52 Miss. 332.

Missouri. — Holman *v.* Bachus, 73 Mo. 49.

North Carolina. —Code (1883), § 1361; Woodley *v.* Hassell, 94 N. Car. 157.

Oregon. — Foster *v.* Henderson, 29 Oregon 210; Sugar Pine Lumber Co. *v.* Garrett, 28 Oregon 168.

Texas. — Southern Pac. R. Co. *v.* Royal, (Tex. Civ. App. 1893) 23 S. W. Rep. 316; Hill *v.* Smith, 6 Tex. Civ. App. 312; Texas, etc., R. Co. *v.* Burnes, 2 Tex. Unrep. Cas. 239.

Utah. —American Pub. Co. *v.* C. E. Mayne Co., 9 Utah 318.

In *Iowa*, motion to suppress must be filed by the morning of the second day of the first term held after the depositions have been filed with the clerk. Harris Mfg. Co. *v.* Marsh, 49 Iowa 11; Bixby *v.* Carskaddon, 63 Iowa 164; Johnson *v.* Chicago, etc., R. Co., 51 Iowa 25.

In *Montana*, it shall be the duty of the person filing the deposition to serve immediately upon the attorney for the opposite party a written notice of the filing thereof, and a motion to suppress the deposition must be served and filed within ten days thereafter. Cir. Ct. Rules, No. 23.

In *California*, motion before trial is premature and should be made when deposition is offered in evidence. Mills *v.* Dunlap, 3 Cal. 94.

1. For the formal parts of notice in any particular jurisdiction consult the title NOTICES.

2. Motion must be Made upon Affidavit. — N. Y. Code Civ. Proc., § 910 (Birds. Rev. Stat. (1896), p. 863, § 40).

In *Alabama*, the affidavit must show that if an opportunity for cross-examination had been afforded the party he could have proved certain facts material to him which had been omitted. Cameron *v.* Clarke, 11 Ala. 263.

Sufficiency of Affidavit. — In McClintock *v.* Laing, 22 Mich. 212, the affidavit, omitting the formal parts, was as follows: "That annexed is the only notice of taking testimony ever served on the deponent on the part of the defendant, *Harriet C. Laing*, in this cause. That the same was handed to deponent by a colored man whom he did not then know, and who was then an entire stranger to him. Deponent further says that *S. T. Parsons*, Esq., is the solicitor for the defendant, *Harriet C. Laing*, and the only solicitor of record of such defendant, and he is also well acquainted with the handwriting of *S T. Parsons*, the said defendant's solicitor. That on the receipt of said notice deponent examined the signature, and he was then, and is now, well satisfied that said notice and the signature thereto is not the handwriting of such *S. T. Parsons*. That he is not acquainted with other signatures attached to said notice. Deponent further says that, from the way said notice was served, and from an examination of the signatures thereto, he came to the conclusion that the same was not made by any person authorized to take proceedings in the cause, and he gave it no attention, and he so believed until on his way to *Flint*, on the *29th* day of *June*, 1868, at *Gaines*, deponent met Mr. *Charles Draper*, who informed deponent that he had been called upon to take testimony under said notice." The motion to suppress the deposition in this case was granted, the court holding that the opposite party need not regard a notice which neither has the solicitor's signature to it nor comes from his office, nor bears upon its face any indication of having been given with his assent.

3. Must Specify the Particular Ground of Objection. — Swinney *v.* Dorman, 25 Ala. 433; Murray *v.* Phillips, 59 Ind. 56; Chapman *v.* Spicer, 10 Mo. 690; Smith *v.* McGregor, 96 N. Car. 101; Neyland *v.* Bendy, 69 Tex. 711.

A motion that answers were evasive, irresponsive, and contained improper matter, is too general. Swinney *v.* Dorman, 25 Ala. 433.

That commission was not executed by person intended, as an objection to the deposition, should be taken by a motion to suppress. Newton *v.* Porter, 69, N. Y 133.

2. Motion.

Form No. 7377.

(*Title of court and cause as in Form No. 6955.*)[1] And now comes the above *plaintiff*, *John Doe*, by his attorney, *Oliver Ellsworth*, and moves the court that the within deposition of *William West*, taken on the *tenth* day of *August*, 1897, be suppressed on the following grounds: (*Here set out each ground in a separate paragraph, numbering the same.*)

Oliver Ellsworth, Attorney for *Plaintiff*.

3. Order.

Form No. 7378.[2]

(*Title of court and cause as in Form No. 6957.*)[3]

Upon reading and filing (*Here enumerate the motion papers*), together with satisfactory proof of service of said notice of motion and papers upon *Oliver Ellsworth*, attorney for *Richard Roe*, the *defendant* above named, and upon reading and filing (*Here specify papers, if any, filed by the defendant, in opposition to the motion*), and upon hearing *Jeremiah Mason*, attorney for the above *plaintiff*, in argument in support of said motion, and *Oliver Ellsworth*, attorney for *defendant* (or *no one appearing*), in opposition; ordered, that the deposition of *William West*, taken under a commission issued in this action on the *tenth* day of *September*, A. D. 1897, be suppressed; and it is further ordered, that the *defendant* pay to the *plaintiff ten* dollars, the costs of this motion.

Enter: *John Marshall*, J. *S.* C.

XI. LETTERS ROGATORY.[4]

1. For the formal parts of motions, generally, consult the title MOTIONS.

See also *supra*, note 5, p. 508.

2. *New York.* — Code Civ. Proc., § 910 (Birds. Rev. Stat. (1896), p. 863, § 40.) Consult also note 1, p. 488, *supra*.

This Order may be Entered Conditionally. — Palmer *v.* Great Western Ins. Co., 47 N. Y. Super. Ct. 455; Graham *v.* Carleton, (Supreme Ct.) 31 N. Y. St. Rep. 127.

3. For the formal parts of orders in any particular jurisdiction consult the title ORDERS.

Another form of such an order may be as follows: (*Title of court and cause as in Form No. 6958.*) "Now come the above named parties by their attorneys, and the motion of the said *plaintiff*, *John Doe*, that the deposition of *William West*, taken in this action, on the *tenth* day of *August*, 1898, be suppressed, coming on to be heard, and the counsel of the aforesaid parties having been heard in argument, the aforesaid motion is sustained by the court; and it is therefore ordered that the said deposition be suppressed and be not received in evidence in this action."

4. Letters Rogatory. — Where the laws of a country forbid the execution of a commission to examine witnesses, the proper method to obtain the testimony of the witnesses is by letters rogatory or requisitory, which are in fact applications in the name of one state, through its courts of justice, to another state to permit and assist in obtaining testimony. The Republic of Mexico *v.* Arrangois, 3 Abb. Pr. (N. Y. Super. Ct.) 470; Anonymous, 59 N. Y. 313.

In State *v.* Bourne, 21 Oregon 218, the court, *citing* 1 Greenl. Ev., § 320, stated that the obtaining of testimony in a foreign country by letters rogatory has always been familiar in the courts of admiralty, and also deemed to be within the inherent powers of all courts of justice.

Form No. 7379.[1]

State of *New York*, ss.

The People of the State of New York, to any Judge or Tribunal having Jurisdiction of Civil Causes at *Vienna*, Empire of *Austria*, Greeting:

Whereas, there is now pending in the *Supreme* Court of our state a certain action in which *John Doe* is plaintiff and *Richard Roe* is defendant, and it having been made known to us that the testimony of *Samuel Short*, a witness residing at *Vienna*, in the empire of *Austria*, is necessary in order that full justice may be done in the premises;

We therefore request you, that in furtherance of justice, you will, by the proper and usual process of your court, cause such witness to appear before you, or some competent person by you for that purpose to be appointed and authorized, at a precise time by you to be fixed, and there to answer on his oath or affirmation to the several interrogatories and cross-interrogatories hereto annexed,[2] and that you will cause his deposition to be committed to writing, enclosed and sealed, and returned to us, together with these presents,[3] and we shall be ready and willing to do the same for you in a similar case when required.

Witness the Honorable *John Marshall*, a judge of our *Supreme* Court, at the city of *Albany*, this *tenth* day *May*, 1*898*.

Calvin Clark, County Clerk of *Albany* County.

Oliver Ellsworth, Plaintiff's Attorney,
100 State street, *Albany*, *New York*.

For method of procedure under such letters consult Whart. Conflict of L., § 722 *et seq.* See also Nelson *v.* U. S., 1 Pet. (C. C.) 235; Kuehling *v.* Leberman, 9 Phila. (Pa.) 160; Matter of Jenckes, 6 R. I. 18.

1. This form is substantially that reported in Union Square Bank *v.* Reichmann, 9 N. Y. App. Div. 596.

In *New York*, letters rogatory may be issued by the court, in its discretion, in a case where a commission may be issued, notwithstanding that a commission can be executed in the country to which they are sent. Code Civ. Proc., § 913 (Birds. Rev. Stat. (1896), p. 864, § 43).

Affidavit must be made stating that there is good reason to believe that the ends of justice will be better promoted by the agency of letters than by the issuing of a commission. N. Y. Code Civ. Proc., § 913 (Birds. Rev. Stat. (1896), p. 864, § 43).

2. Interrogatories. — Letters rogatory can be issued only to examine witnesses upon written interrogatories annexed thereto, which must be framed and settled as prescribed with respect to interrogatories annexed to a commission. N. Y. Code Civ. Proc., § 913 (Birds. Rev. Stat. (1896), p. 864, § 43).

Oral examination will not be permitted unless the court cannot otherwise obtain the testimony. Froude *v.* Froude, 1 Hun (N. Y.) 76.

Execution of Letters Rogatory. — No provision is made in the code as to the manner in which letters rogatory are to be executed, and no information is given as to their nature, and the courts must therefore assume that the legislature inserted this provision in the code, having in mind the nature of such letters as ordinarily understood in legal literature. They are derived from the civil law, and the practice under them is regulated thereby. They are largely made use of in courts of admiralty. They were unknown to the common law; therefore the execution thereof cannot be said to be improper or irregular if in accordance with the usual and customary practices in the courts where taken. Union Square Bank *v.* Reichmann, 9 N. Y. App. Div. 596.

3. Return of deposition must be as prescribed with respect to deposition taken under commission. N. Y. Code Civ. Proc., § 913 (Birds. Rev. Stat. (1896), p. 864, § 43).

Form No. 7380.[1]

(Precedent in Note to Nelson *v.* U. S., 1 Pet. (C. C.) 236.)

United States of America, }
District of *Pennsylvania.* } sct.

The President of the United States, to any Judge or Tribunal having Jurisdiction of Civil Causes at *Havana*, Greeting:

Whereas, a certain suit is pending before us in which *John D. Nelson*, *Henry Abbott*, and *Joseph E. Tatem* are the claimants of the schooner "*Perseverance*" and cargo, and the *United States of America* are the defendants; and it has been suggested to us, that there are witnesses, residing within your jurisdiction, without whose testimony justice cannot completely be done between the said parties.

We therefore request you that in furtherance of justice you will, by the proper and usual process of your court, cause such witness or witnesses as shall be named or pointed out to you by said parties, or either of them, to appear before you, or some competent person, by you for that purpose to be appointed and authorized, at a precise time and place by you to be fixed, and there to answer on their oaths and affirmations, to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing and returned to us under cover, duly closed and sealed up together with these presents. And we shall be ready and willing to do the same for you in a similar case when required.

[Witness the Honorable *John Marshall*, Judge of the *District* Court [SEAL] of the *United States*, this *tenth* day of *July*, 1898, and in the *one hundred and twenty-second* year of the independence of the United States of America.

Attest: *Calvin Clark*, Clerk.][2]

1. Federal Courts. — When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country in any suit in which the United States are parties or have an interest, is executed by the court or commissioners to whom it is directed, it shall be returned by such court or commissioner to the minister or consul nearest the place where it is executed. U. S. Rev. Stat. (2d ed. 1878), § 875

Indorsement by minister or consul shall be made thereon stating when and where the same was received, and that the said deposition is in the same condition as when he received it. And he shall transmit said letter or commission so executed and certified by mail to the clerk of the court from which the same issued. U. S. Rev. Stat. (2d ed. 1878), § 875.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

Another precedent is found in State *v.* Bourne, 21 Oregon 218, as follows:

"*Commonwealth* of *Massachusetts*, *Superior* Court, *Suffolk*, ss.

To the *circuit* court within and for the county of *Multnomah*, in the state of *Oregon*, or any judge or tribunal having jurisdiction of civil cases in the city of *Portland*, in the county of *Multnomah*:

Whereas in our *superior* court, in the case of *Annie B. Everett* v. *John Stetson*, the *plaintiff* filed in said court interrogatories to take the deposition of *Jonathan Bourne*, *Jr.*, of said *Portland*; and whereas after due notice the *defendant* filed certain cross-interrogatories, and thereupon a commission to take the deposition of said *Bourne* was issued by this court, with the several interrogatories and cross-interrogatories thereto annexed, and afterwards *A. C. Emmons*, Esq., of said *Portland*, a duly authorized notary public, commissioned and authorized to take the said deposition in pursuance of said commission, issued his subpœna to said *Bourne* to appear before him and give answer to the said interrogatories, and

XII. EXAMINATION OF WITNESSES CONDITIONALLY.[1]

said *Bourne*, although duly served and his fees paid him, refused to appear or show any cause why he did not appear at the time and place fixed, and said commissioner doubting his authority to compel the attendance of said *Bourne*, has returned said commission into our *superior* court; and it appearing to us that without the testimony of said *Bourne* justice cannot completely be done between the parties; we therefore request you that in furtherance of justice you will afford your aid in the examination of said witness by said commissioner upon said commission upon the interrogatories thereto annexed; that you will by the usual and proper process of your court cause the said *Bourne* to appear before said commissioner at a time and place by you to be fixed, and him examine on oath or affirmation to the several interrogatories to said commission annexed, and that you will cause his deposition to be committed to writing, returned and duly closed and sealed up, and return with these presents; and we shall be ready and willing to do the same for you in a similar case when required.

Witness, *Albert Mason*, Esq., justice of our said *superior* court, at *Boston*, in said county of *Suffolk*, this *fifth* day of *August*, A. D. 1891.

(SEAL) *Jos. A. Willard*, Clerk."

1. *New York.* — Code Crim. Proc., § 620 (Birds. Rev. Stat. (1896), p. 866, § 51). On part of the state. Code Crim. Proc., § 219.

Similar statutes exist in the following states:

Arizona. — Pen. Code (1887), § 2065 *et seq.*

California. — Pen. Code (1897), § 1335 *et seq.*

Idaho. — Rev. Stat. (1887), § 8160 *et seq.*

Montana. — Pen. Code (1895), § 2480 *et seq.*

Nevada. — Gen. Stat. (1885), § 4430 *et seq.*

North Dakota. — Rev. Codes (1895), § 8374 *et seq.*

Oklahoma. — Stat. (1893), § 5348 *et seq.*

South Dakota. — Dak. Comp. Laws (1887), § 7540 *et seq.*

Utah. — Rev. Stat. (1898), § 5027 *et seq.*

In What Cases Allowed. — When a material witness for the defendant is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally. N. Y. Code Crim. Proc., § 621 (Birds. Rev. Stat. (1896), p. 866, § 52), and list of statutes last above cited.

Application must be made to the court, or a judge thereof.

New York. — Code Crim. Proc., §§ 623, 624 (Birds. Rev. Stat. (1896), p. 866, §§ 54, 55), and list of statutes last above cited.

During term, application must be made to the court. N. Y. Code Crim. Proc., § 623 (Birds. Rev. Stat. (1896), p. 866, § 54). See also list of statutes last above cited.

Application must be made on affidavit showing: 1. The nature of the crime charged. 2. The state of the proceedings in the action. 3. The name and residence of the witness; that his testimony is material to the defense of the action. 4. That the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial. N. Y. Code Crim. Proc., § 622 (Birds. Rev. Stat. (1896). p. 866, § 53), and list of statutes last above cited.

The affidavit, omitting formal parts thereof, may be as follows: "*John Doe* being duly sworn, says that he resides at *Albany*, in the county of *Albany*, in the state of *New York*; that at the last term of the *supreme* court in and for the county of *Albany* aforesaid, he was indicted on a charge of *burglary in the first degree*; that since said indictment he has been confined in the county jail in said county of *Albany* (or *that immediately after said indictment he gave bail to appear at the next term of said court, to be held at the court-house in the city of Albany, on the tenth day of September, 1897*); that *William West*, who resides at *Albany*, in the county of *Albany*, in said state of *New York*, is acquainted with all the facts of the case, and his evidence is very material to the deponent's defense in this action; that said *William West* above named is about to leave the state (or *is in such an enfeebled and infirm state of health that there is reasonable ground for apprehending that he will be unable*

Form No. 7381.[1]

(*Title of court as in Form No. 6957.*)

The People
against
John Doe.[2]

On reading and filing the affidavit of the above named *defendant* hereto annexed, and on motion of *Jeremiah Mason*, Esq., his attorney, it is hereby ordered, that *William West*, residing at *Albany*, in the county of *Albany*, in the state of *New York*, be examined conditionally, before *me*,[3] on the *third* day of *September*, 1897, at *my chambers in the court-house*, in said city of *Albany* (or *at the residence of the said William West, No. 10 L street, in the city of Albany, in the county aforesaid*),[4] and that a copy of this order and of the annexed affidavit be served on the district attorney of the county of *Albany*, on or before the *twenty-third* day of *August*, 1897.[5]

Dated at *Albany*, this *twelfth* day of *August*, 1897.

Enter: *John Marshall*, J. *S.* C.

on account of such infirmities to attend the trial of this cause at the time and place above named, or at any subsequent time)."

For the formal parts of affidavits in any particular jurisdiction consult the title AFFIDAVITS, vol. 1, p. 548 *et seq.*

1. *New York.*—Code Crim. Proc., § 625 (Birds. Rev. Stat. (1896), p. 866, § 56), and list of statutes last above cited.

2. **For the formal parts of orders** in any particular jurisdiction consult the title ORDERS.

3. **Must direct that examination be taken before magistrate** named therein. Ariz. Pen. Code (1887), § 2070, and list of statutes last above cited.

In *Nevada*, order must direct that a commission issue. Nev. Gen. Stat. (1885), § 4430 *et seq.*

In *New York*, if the order be made by the court, it may direct that the examination be taken before a judge thereof, or before a magistrate in the county, to be named in the order. If made by a justice of the supreme court, a county judge, recorder, city judge, or judge of general sessions, or one of the judges of the supreme court, in the city of New York, it must direct the examination to be taken before him. N. Y. Code Crim. Proc., § 626 (Birds. Rev. Stat. (1896), p. 867, § 57.

4. **Time and place** must be specified. N. Y. Code Crim. Proc., § 625 (Birds. Rev. Stat. (1896). p. 866, § 56). See also list of statutes cited *supra*, note 1, p. 616.

5. **Must Direct** that a copy of order, and of the affidavit on which it was granted, be served on the district attorney within a specified time before that fixed for the examination. N. Y. Code Crim. Proc., § 625 (Birds. Rev. Stat. (1896), p. 866, § 56). See also list of statutes cited *supra*, note 1, p. 616.

DEPOSITS.

By William F. Harding.

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CROSS-REFERENCES.

For Forms relating to Actions on Bills and Notes and other Negotiable Instruments, generally, see the title BILLS AND NOTES, vol. 3, p. 260.

For Forms relating to Proceedings with respect to Funds and Deposits in Court, see the title FUNDS AND DEPOSITS IN COURT.

For Forms in Actions for Money Had and Received, generally, see the title MONEY HAD AND RECEIVED.

For Forms in Actions with respect to Goods, Wares and Merchandise Deposited or Stored in Warehouses, see the title WAREHOUSEMEN.

See also the GENERAL INDEX to this work.

I. PROSECUTION FOR RECEIVING DEPOSITS AFTER INSOLVENCY.[1]

1. Scope of Section. — This section is confined to the offense as committed by owners or officers of unincorporated or private banks. For similar prosecutions against the officers and agents of incorporated banks see the title DIRECTORS AND CORPORATION OFFICERS, *post*, p. 691.

Receiving Deposits After Insolvency. — See the following statutes:

Arizona. — Pen. Code (1887), § 880.

California. — Pen. Code (1897), § 562.

Colorado. — Mills' Anno. Stat. (1891), §§ 222, 224.

Idaho. — Rev. Stat. (1887), § 7119.

Iowa. — Code (1897), § 1885.

Kansas. — Gen. Stat. (1897), c. 18, § 58.

Louisiana. — Rev. Laws (1897), p. 226; Act 108 (1884), p. 144.

Minnesota. — Stat. (1894), § 6763.

Missouri. — Rev. Stat. (1889), § 3581.

Nebraska. — Comp. Stat. (1897), § 637.

New York. — Cook's Pen. Code (1891), § 601.

North Dakota. — Rev. Codes (1895), § 7524.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 499, § 171.

South Carolina. — Rev. Stat. (1893), § 1460.

South Dakota. — Dak. Rev. Code (1885), p. 1244, § 648*a*.

Utah. — Rev. Stat. (1898), § 4412.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7121; Const. of Wash., art. 12, § 12.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4541.

In *Mississippi*, the indictment should allege that the depositor was not noti-

1. With Knowledge of Insolvency.

Form No. 7382.

(Precedent in State *v.* Buck, 108 Mo. 625.)[1]

[State of *Missouri*, } ss. In the *Harrison Circuit* Court, *April* Term,
Harrison County. } A. D. 1*888*.

The grand jurors for the state of *Missouri* empaneled, sworn and charged to inquire within and for the county of *Harrison* and state aforesaid, do present][2] that *Harvey S. Buck* and *Thomas G. McCrosky*, late of the county aforesaid, on the *first* day of *December*, 1*887*, at the county of *De Kalb*, and state aforesaid, being then and there owners and managers of a private bank, known as the *Stewartsville Bank*, the same being a banking institution, doing business in said county, a certain deposit of money, to wit, $*150* lawful money of the United States, of the value of $*150*, the money and property of *Thomas Allen*, unlawfully and feloniously did assent to the taking, having and receiving on deposit, in said *Stewartsville Bank*, a private banking institution, after said *Harvey S. Buck* and *Thomas McCrosky*. owners and managers as aforesaid, had knowledge of the fact and well knew that said *Stewartsville Bank* was then and there in failing circumstances, and so the said *Harvey S. Buck* and *Thomas G. McCrosky*, aforesaid, the money aforesaid, to-wit, $*150*, of the value of $*150*, the money and property of said *Thomas Allen*, in manner aforesaid, unlawfully and feloniously, did steal, take and carry away, against the peace and dignity of the state.

[*Daniel Webster*,
Prosecuting Attorney for the County of
Harrison.][2]

fied of the insolvency at the time of deposit. Anno. Code (1892), § 1089.

The following states provide for civil as well as criminal actions for receiving deposits after insolvency:

Kansas. — Gen. Stat. (1897), c. 18, § 74.

Louisiana. — Rev. Laws (1897), p. 226; Acts 108 (1884), p. 144.

Oklahoma. — Stat. (1893), §§ 2453, 334 *et seq.*

South Carolina. — Rev. Stat. (1893), § 1460.

Certification of Check. — As to the penalty for an officer of a bank certifying check without sufficient deposits in bank to pay, see 1 Kan. Gen. Stat. (1897), c. 18, § 60.

An indictment drawn under the act of July 12, 1882, c. 290, § 13, amendatory of U. S. Rev. Stat., § 5208, which makes it a misdemeanor for any national bank officer to certify any check drawn by a person not then having on deposit sufficient to cover the same, need not allege delivery of the check by the bank after certification. U. S. *v.* Potter, 56 Fed. Rep. 83.

Failure to pay deposit, after insolvency, see Ga. Pen. Code (1895), § 207.

As to the remedy in *Maine*, and the failure of a bank to pay deposits on demand or within fifteen days thereafter, see Rev. Stat. (1883), c. 47, § 56.

1. Motion to quash this indictment, because, first, it charged no facts which constitute a crime under the laws of *Missouri*; second, that the law does not apply to a private banker nor to a firm of individuals doing a banking business; third, that it was not charged that the defendants as owners of the bank were previously insolvent or in failing circumstances; fourth, that it was not charged that defendants were private bankers as defined by the statute, was overruled.

2. For the formal parts of indictments and informations, generally, consult the titles INDICTMENTS; INFORMATIONS. The words and figures enclosed by [ ] will not be found in the precedent, but

Form No. 7383.

(Precedent in Robertson *v.* People, 20 Colo. 280.)[1]

[State of *Colorado*, } ss.
Fremont County. }

Of the *April* Term of the *District* Court, in the year of our Lord 1894.

The grand jurors chosen, selected, and sworn in and for the county of *Fremont*, in the name and by the authority of the people of the state of *Colorado* upon their oaths present][2] that *William E. Robertson*, late of the county of *Chaffee* and state aforesaid, on, to wit: the *30th* day of *June* in the year of our Lord one thousand eight hundred and *ninety-three*, then and there being a banker and manager and cashier of a certain bank and banking institution doing banking business under the name and style of *The Chaffee County Bank*, in the county of *Chaffee* and state of *Colorado*, he the said *William E. Robertson*, being the only person known to the district attorney operating and owning the said bank and banking institution, did then and there fraudulently, knowingly and feloniously receive and assent to the reception of a certain deposit of money, to wit: the sum of *two hundred and fifty-four* dollars and *seventy* cents in money, of the value of *two hundred and fifty-four* dollars and *seventy* cents, of the personal property and moneys of one *James Taggert*, by said banker and in said bank and banking institution, the said banker, bank and banking institution then and there being and for a long time prior thereto insolvent, and that he the said *William E. Robertson*, at the time and before the reception of the deposit, had full knowledge of the fact that the said banker, bank and banking institution were insolvent, and so in manner and form and by the means aforesaid he, the said *William E. Robertson*, did then and there feloniously steal, take and carry away the said *two hundred and fifty-four* dollars and *seventy* cents in money, of the value of *two hundred and fifty-four* dollars and *seventy* cents, of the personal property and moneys of the said *James Taggert*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the state of *Colorado*.

2. Without Knowledge of Insolvency.

Form No. 7384.

(Precedent in Murphy *v.* People, 19 Ill. App. 125.)[3]

[State of *Illinois*, } Of the *April* Term of the *Circuit* Court of *Jackson* County, in said county, in the year of our Lord 1885.
Jackson County. }

The grand jurors chosen, selected and sworn in and for the county

have been added to render the form complete.

1. Conviction under this information was sustained against a motion to quash.

2. **For the formal parts** of indictments and informations, generally, consult the titles INDICTMENTS; INFORMATIONS. See *supra*, note 2, p. 620.

3. **This was a prosecution under a special statute** in *Illinois* which provides that if any banker or broker, or person or

of *Jackson* in the state of *Illinois* in the name and by the authority of the people of the state of *Illinois*, upon their oaths present:][1] That *William S. Murphy* on the *16th* of *July*, 1*884*, at and within said county, then and there being a banker, did then and there receive on deposit, from one *Samuel Desbarger*, the sum of *two hundred and fifty* dollars in money, said *Samuel Desbarger* not then and there being indebted to said *William S. Murphy*, banker. The said *William S. Murphy*, banker, at the time of receiving such deposit, was insolvent,[2] whereby said deposit, the said sum of *two hundred and fifty* dollars in money, was lost to said *Samuel Desbarger*, said depositor, and the same then and there feloniously and fraudulently was converted to the use of him, the said *William S. Murphy*, banker, [contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Illinois*.

And the jurors aforesaid in the name and by the authority of the people of the state of *Illinois*, upon their oaths aforesaid, do further present][1] that *William S. Murphy* on the *16th day* of *July*, 1*884*, at and within said county, then and there doing a banking business, did then and there unlawfully, fraudulently and feloniously receive on deposit from one *Samuel Desbarger*, the sum of *two hundred and fifty* dollars in money, said *Samuel Desbarger* not then and there being indebted to said *William S. Murphy*. Said *William S. Murphy* at the time of receiving said deposit, said sum of *two hundred and fifty* dollars in money, was insolvent, whereby the said deposit of *two hundred and fifty* dollars in money was lost to said *Samuel Desbarger* the depositor, [contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of *Illinois*.

James Cavinis, state's attorney.][1]

persons doing a banking business shall receive from any person or persons, firm, company, or corporation, or from any agent thereof not indebted to said banker or broker, banking company, or incorporated bank, any money, check, draft, bill of exchange, stocks, bonds, or other valuable thing which is transferable by delivery when at the time of receiving such deposit, said banker, broker, banking company, or incorporated bank is insolvent, whereby the deposit so made shall be lost to the depositor, said banker, broker or officer receiving such deposit shall be deemed guilty of embezzlement, and upon conviction thereof shall be fined in a sum double the amount of the sum so embezzled and fraudulently taken, and, in addition thereto, may be imprisoned in the state penitentiary not less than one or more than three years. Starr & C. Anno. Stat. Ill. (1896), c. 38, par. 168. There was a motion to quash and motion overruled. It was urged that the indictment was fatally defective in not averring that the defendant knew of his insolvency. It was held that the intent was not an element of the crime and need not therefore be averred.

1. **For the formal parts** of indictments and informations, generally, consult the titles INDICTMENTS; INFORMATIONS. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. **Allegation of Insolvency.** — In an indictment against a banker for receiving deposits after insolvency, the allegation of insolvency of banker is a material and necessary one. Murphy *v.* People, 19 Ill. App. 125.

Allegation of Knowledge of Fraudulent Intent. — An indictment against a banker for fraudulently receiving a deposit when the bank was insolvent need not allege either knowledge of the insolvency or fraudulent intent. Murphy *v.* People, 19 Ill. App. 125.

3. With Intent to Defraud.

Form No. 7385.

(Precedent in Com. *v.* Rockafellow, 163 Pa. St. 139.)[1]

[In the Court of *Quarter Sessions* of the Peace for the county of *Luzerne*, *June* term, 1893. County of *Luzerne*, ss.][2]

The grand inquest of the *Commonwealth* of *Pennsylvania*, inquiring for the county of *Luzerne*, upon their respective oaths and affirmations, do present that *F. V. Rockafellow*, *yeoman*, late of said county, on the *seventh* day of *February* in the year of our Lord one thousand eight hundred and *ninety-three*, at the county aforesaid and within the jurisdiction of this court, being then and there a banker and engaged in carrying on a private bank in the city of *Wilkes-Barre*, in said county, under the name of *F. V. Rockafellow & Co.*, then and there took and received of and from one *Isaac Long*, who was then and there a depositor in said bank, money of the said *Isaac Long*, depositor as aforesaid, to wit, the sum of *four thousand six hundred* dollars lawful money of the United States of America, with the knowledge of the said *F. V. Rockafellow*, banker, that he and the said bank were then and there insolvent, with intent of the said *F. V. Rockafellow* then and there unlawfully, wilfully and fraudulently to embezzle the said sum of *four thousand six hundred* dollars, contrary to the form of the act of the general assembly [in such case made and provided and against the peace and dignity of the said *commonwealth*.

F. W. Wheaton, District Attorney.][2]

II. CIVIL ACTIONS.

1. Relating to Money Deposited.

a. In Bank.

(1) IN GENERAL.

(*a*) *By Depositor.*

aa. COMPLAINT, DECLARATION OR PETITION.[3]

1. Under the statute, Pep. & L. Dig. Pa. (1894), p. 297, § 41, which provides that "any banker who shall receive money from a depositor with the knowledge that he the banker is at the time insolvent, shall be guilty of embezzlement," an indictment is sufficient which charges that defendant being a banker, knowing that he is insolvent, received money from a depositor. Com. *v.* Rockafellow, 163 Pa. St. 139.

2. For the formal parts of indictments and informations, generally, consult the titles INDICTMENTS; INFORMATIONS. The words enclosed by [ ] do not appear in the reported case, but have been added to render the form complete.

Intent to cheat and defraud must be alleged, in *Michigan*. How. Anno. Stat. (Supp. 1890). § 3208*b3*.

3. For the formal parts of bills in equity, complaints, petitions and declarations, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

Necessary Allegations. — Complaint, declaration or bill, in a proceeding against the bank, should state whether it is a foreign or domestic institution. Northampton First Nat. Bank *v.* Doying, 13 Daly (N. Y.) 509. And should also allege every material or component part of the cause of action, or offense complained of. Wallace *v.* State Bank,

7 Ark. 61; Gaffney *v.* Colvill, 6 Hill (N. Y.) 567; Delafield *v.* Kinney, 24 Wend. (N. Y.) 345; Kearny *v.* Buttles, 1 Ohio St. 362; State *v.* Williams, 8 Tex. 255.

Allegation of General Deposit. — An allegation in pleading that a bank held cash belonging to D, "on deposit and payable to his order," amounts in law to an allegation of a general deposit, creating the relation of debtor and creditor. Dawson *v.* Real Estate Bank, 5 Ark. 283.

Averment of Previous Demand and Return of Certificate of Deposit is Unnecessary. — In an action of assumpsit to recover money deposited, the second count of the declaration, omitting the formal commencement and conclusion, alleged: "That on the *9th* of *March*, 18*61*, in consideration *C. M. Chase*, at the special instance and request of defendants, would deposit in the bank of defendants for *three* months from and after that date, *two hundred and eighty* dollars and *fifty* cents in currency, the defendants, by the firm name of *E. T. Hunt & Co.*, undertook and did promise *Chase*, in and by a certain instrument in writing named and called a certificate of deposit of that date, to pay to the order of said *Chase*, on return of certificate of deposit, *three* months after the date thereof, the sum of *two hundred and eighty* dollars and *fifty* cents in currency — that *Chase* assigned the certificate to the plaintiff, etc." It was contended that no suit can be maintained on this instrument without a previous demand of payment and the return of the certificate; that such return is a condition precedent to any right to recover. Justice Breese, delivering the opinion of the court, said: "The certificate of deposit is merely a declaration of the consideration of the promise. The promise to pay is no more qualified or legalized by the certificate of deposit than it would be by any other expression of a sufficient consideration. The substance and effect of the instrument are precisely the same as they would be, had it declared that for value received the bank agreed to pay the amount in currency on the return of the instrument with his indorsement four months from date. If such was the legal effect of the instrument, it is simply a promissory note. There being no place named where this money was to be paid and the certificate returned, the return of the certificate cannot be a condition precedent to recovery. If it is produced on the trial, ready to be delivered up to the makers, the holder will have performed his obligation. In every promissory note there is an implied undertaking by the payee or holder to return it to the maker, on payment of the money. An express undertaking to return it would have no greater force, nor could it change or modify the legal effect of the instrument. All that the maker can demand is that he shall be protected against the reappearance of the instrument, and against another recovery upon it. This is effectually accomplished by producing the instrument on trial for cancellation if need be; at any rate placing it in the power of the maker. So if it is made payable at a particular time and place it is not necessary to aver or prove a demand at the place in order to recover." Hunt *v.* Divine, 37 Ill. 137, *citing* Peru Bank *v* Farnsworth, 18 Ill. 565; Laughlin *v.* Marshall, 19 Ill. 390; Swift *v.* Whitney, 20 Ill. 144.

Action Against Members of Unincorporated Bank. — In Porter *v.* Kepler, 14 Ohio 128, the declaration contained two counts. The first, after commencing in the usual form in debt, set forth that "heretofore, to wit, on *April 6*, 18*39*, the defendants were stockholders, shareholders, and partners in a certain institution, bank and moneyed association, not incorporated as a bank by any law of the State of *Ohio*, nor authorized by any law of the State to lend money or otherwise act as a bank, which association was by them styled the *Orphans' Institute Bank*, otherwise called the *Stark County Orphans' Institute Bank*; and afterwards, to wit, on *April 6*, 18*39*, at said county, the said unincorporated bank did, by their agents and officers (*naming them*), issue certain notes, bills, contracts, and checks, calculated and intended to pass and circulate by delivery to a large amount, to wit, to the amount of $*30,000*; and, being thus associated, and having thus issued their notes, bills, contracts, and checks, the defendants issued their certain other bill called a certificate of deposit, which is as follows: '*Dolls. 212, Orphans' Institute Bank, Canal Fulton, April 6.* 18*39*. This certifies that Messrs. *Kepler & Caprans* have, for themselves, deposited in this office $*212*, to be paid to their order on return of this certificate. *R. Hubbell, Jr.*, treasurer.' By reason of which, the defendants became, and

Form No. 7386.

(Precedent in Ihl *v.* St. Joseph Bank, 26 Mo. App. 129.)[1]

[(*Title of court and cause as in Form No. 5921.*)][2]

Plaintiff states that defendant is a corporation organized under the laws of the state of *Missouri*, and is now, and was, at all times hereinafter named, engaged in business in said county as a banking institution; that, on the *twentieth* day of *July*, 1*881*, plaintiff drew his draft upon *Vergho, Ruhling & Company*, of *Chicago, Illinois*, payable to defendant's order, for the sum of *five hundred* dollars, and delivered the same to defendant; and, also, upon the *twenty-first* day of *July*, 1*881*, drew another draft upon said *Vergho, Ruhling & Company* payable to defendant's order, for the sum of *one thousand* dollars, and delivered same to defendant; that both of said drafts were so delivered to defendants for collection, and were paid to, and collected by, defendant, for, and on account of, plaintiff; that defendant at the time of delivery aforesaid, agreed to pay plaintiff, on the proceeds of said drafts, interest at the rate of *six* per cent. per annum, from the time the same should be paid to defendant, and during the time the same should be deposited with defendant; that the sum of *fifteen hundred* dollars, as aforesaid, was paid to the defendant on the *twenty-fifth* day of *July*, 1*881*, and has been deposited with defendant from that date until the present time; that, on the ——— day of ———, 1*882*, defendant paid to plaintiff *ninety* dollars ——— one year's interest on said deposit; that, on the ——— day of ———, 1*883*, plaintiff demanded payment of said deposit, together with interest, except the sum of *ninety* dollars, paid as aforesaid, and defendant failed and refused to pay the same, and said deposit is now due and unpaid to plaintiff; wherefore, plaintiff prays judgment for the sum of *fifteen hundred* dollars with interest, as aforesaid, from the *twenty-fifth* day of *July*, 1*881*, after allowing said payment of *ninety* dollars, and his costs in this behalf. [(*Signature of plaintiff's attorney.*)][2]

were liable to pay to the plaintiffs the said sum of $*212*, above demanded, when thereupon requested, and in consideration of the premises, the defendants promised to pay the sum aforesaid." The second count was as follows: "And, for that, whereas. heretofore, to wit, on *April 6*, 1*839*. at said county of *Stark*, the said defendants were indebted to the plaintiffs in the sum of $*212*; for so much money before that time had been received by the defendants, and for the use of the plaintiffs; and being so indebted, in consideration thereof, afterwards promised," etc. "Yet the defendants, although often requested so to do, have not paid the said sums above demanded, nor any part of them, but have therein wholly failed, to the damage," etc.

A plea of *nil debet* was filed in this case. A judgment for plaintiff was sustained on appeal, the court holding that where the plaintiff shows a good cause of action in his declaration, even though it may be informally and defectively set up, judgment will not be arrested after verdict.

1. This case was taken up to the court on the question of alleged error in the instructions to court below. There was no question as to the sufficiency of the petition.

2. The words to be supplied in [ ] will not be found in the reported case, but should be added to render the form complete.

For defendant's answer in this case see *infra*, Form No. 7390.

Form No. 7387.

(Precedent in Simpson *v.* City Sav. Bank, 56 N. H. 466.)

[(*Commencement as in Form No. 6945.*)][1] In a plea of the case, for that whereas, in consideration that the plaintiff, at said *Nashua*, to wit, at said *Amherst*, at and on divers days and times between *June 1*, A. D. 1*868*, and the *second* day of *October*, A. D. 1*874*, had deposited divers sums of money, to wit, *nineteen hundred and sixty-six* dollars and *forty-seven* cents, in said *City Savings Bank*, upon the terms, regulations, stipulations, and conditions named and set forth in the rules, regulations, and by-laws of said bank, the defendants then and there stipulated, agreed and promised the plaintiff to allow and pay all such deposits, as well as such interest, dividends, or accumulations as might arise, accrue or become payable on such deposits, pursuant to such rules, regulations, and by-laws of said bank; and the plaintiff avers that the defendants further promised and agreed that the plaintiff might and could withdraw such said deposits, accumulations, interest, and dividends, by giving *ninety* days' written notice upon all sums exceeding *one thousand* dollars, as by said terms, stipulations, and regulations of said bank, published and made known to the plaintiff by the defendants at the time of said deposits, will appear; and whereas, on the *second* day of *October*, A. D. 1*874*, the plaintiff gave the defendants written notice, and, among other things, the plaintiff requested of the defendants to withdraw the funds of the plaintiff so deposited, and then and there requested payment of the defendants of the same, although the *ninety* days' written notice, so required by the regulations of said bank of the plaintiff to be given, have long since expired, the defendants have not paid the same, but neglect it.

Also, in a plea of the case, for that the said defendants, at said *Amherst*, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of *three thousand* dollars for money by the plaintiff before that time lent and advanced to said defendants at their request, and for other money before that time paid, laid out, and expended for the defendants at their request; and for other money before that time had and received by the defendants to the plaintiff's use; and for interest on certain sums of money before that time due and owing from the defendants to the plaintiff, — in consideration thereof then and there promised the plaintiff to pay the same sum on demand, yet, though often requested, the said defendants have never paid the same, but neglect and refuse so to do, to the damage of the said plaintiff (as he says) the sum of *three thousand* dollars. [(*Concluding as in Form No. 6945.*)][1]

Form No. 7388.[2]

(*Commencement as in Form No. 6951*) on the *twelfth* day of *February*, 1*812*, the general assembly of *Virginia* passed a law and

1. The words to be supplied in [ ] are not found in the reported case, but should be added to make the precedent complete.

For defendant's plea in this case see *infra*, Form No. 7389.

2. This declaration contains substantially the same statement of facts as

granted a charter, incorporating a company under the style and denomination of *The Farmers' Bank of Virginia*, to be under the control of a president, directors and company, and among other things was enacted and ordained that there should be established in the town of *Petersburg*, an office of discount and deposit of the said *Farmers' Bank of Virginia*, which said office of discount and deposit of said *Farmers' Bank of Virginia* was established in said town of *Petersburg* according to said law, and whereas the said *Peyton Mason*, plaintiff, became a dealer at the said office of discount and deposit, to wit, on the *first* day of *January*, 1829, and on divers days and times subsequent to the date aforesaid, amounting to the sum of *fifty thousand* dollars, and the said sum of money being so deposited, the said president, directors and company became indebted to the plaintiff in the said sum of *fifty thousand* dollars, and being so indebted assumed upon themselves and then and there, to wit, on the day, month and year aforesaid at the town of *Petersburg* aforesaid, undertook and promised to pay to the plaintiff the aforesaid sum of *fifty thousand* dollars when the defendant should be thereto afterwards required. By reason whereof and of the act of assembly in such case made and provided, an action hath accrued to the plaintiff to demand and recover from the defendants the aforesaid sums of money. Nevertheless the defendants not regarding their said several promises and undertakings, but contriving to deceive and defraud the plaintiff in this behalf, have not as yet paid the said several sums of money or any part thereof to the plaintiff though often requested to do so, but the defendants to pay him the same have hitherto wholly neglected and refused and still do refuse. (*Concluding as in Form No. 6591.*)

bb. ANSWER OR PLEA.[1]

(*aa*) *Depreciation of Assets.*

Form No. 7389.

(Precedent in Simpson *v.* City Sav. Bank, 56 N. H. 467.)[2]

[(*Caption.*)][3] The said defendants come and defend, etc., when, etc., and confess the plaintiff's said action, and that the plaintiff is entitled to recover damages therein to the amount of *six hundred and fifty-five* dollars and *twenty-two* cents, and no more.

And as to the residue of the plaintiff's claim, the said defendants

are set forth in Mason *v.* The Farmers' Bank, 12 Leigh (Va.) 87. There the suit was brought against the president and directors of a branch bank, to wit, the Farmers' Bank of Petersburg, a branch of the Farmers' Bank of Virginia. The court held that the suit could not be maintained against the president and directors of the branch, but it must be brought against the principal bank by its corporate name. Mason *v.* Farmers' Bank, 12 Leigh (Va.) 87; Tompkins *v.* Branch Bank, 11 Leigh (Va.) 387.

1. **For the formal parts** of answers and pleas, generally, see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; PLEAS.

2. **Demurrer** to this plea was overruled. **For plaintiff's declaration** in this case see *supra*, Form No. 7387.

3. The words to be supplied in [ ] will not be found in the reported case, but should be added to make the form complete.

come and defend, etc., when, etc., and say the plaintiff his action aforesaid for said residue thereof against them ought not to have and maintain, because they say that, since the commencement of his aforesaid action by said plaintiff, and since the said causes of action mentioned in said declaration accrued, to wit, on the *ninth* day of *April*, A. D. 1875, at said *Nashua*, to wit, at said *Amherst*, upon the representation of the bank commissioners for the state of *New Hampshire* to the Hon. *Isaac W. Smith*, a justice of the *Superior* Court *of Judicature* of said state, the assets of said *City Savings Bank* had by depreciation been and then were reduced in value below *ninety* per cent. of the total amount of deposits then in said bank, so that the depositors therein must be subjected to loss, and, upon the petition of said bank commissioners, that said justice, in connection with said commissioners, should reduce the deposit account of each depositor so as to divide such loss equitably amongst the said depositors, agreeably to sections 10th and 11th of chapter 71 of the Laws of the State of New Hampshire, passed at the June session of the legislature, A. D. 1874,[1] entitled "An Act for the further protection of savings banks and savings bank depositors," the said justice, in connection with said commissioners, did, upon examination into the condition of said bank, find the total amount of deposits in said bank to be *$372,430.28*, and that the assets of said savings bank had become and were reduced in value below the amount of said deposits in the sum of *$124,143.43*, such reduction being equal to *33 1-3* cents of each and every dollar of said deposits; and did thereupon, of their own motion, order and decree that the deposit account of each depositor in said savings bank be reduced to the amount of *66 2-3* per cent. of the amount of each and every deposit therein, so as to divide the loss occasioned by the reduction of said assets equitably amongst the depositors, and that the said plaintiff's deposit account, on the said *ninth* day of *April*, A. D. 1875, amounted in all to *$982.83*, and no more, and that, by said order and decree, it was reduced to *$655.22*, —and this they are ready to verify.

Wherefore they pray judgment, if the plaintiff's action aforesaid as to the said residue of the said plaintiff's claim, ought to have or maintain against the said defendants, and for their costs.

[*C. H. Burns*, Atty for Defdt.][2]

(*bb*) *Payment.*

Form No. 7390.

(Precedent in Ihl *v.* St. Joseph Bank, 26 Mo. App. 130.)[3]

[(*Title of court and cause as in Form No. 1329.*)][2]

Defendant for amended answer, denies each and every allegation contained in plaintiff's petition. And for further defense, defendant

1. N. H. Pub. Stat. (1891), c. 165, §§ 26, 27.

2. The words to be supplied in [ ] will not be found in the reported case, but should be added to render the form complete.

3. For plaintiff's petition in this case see *supra*, Form No. 7386.

Another precedent of such an answer may be found in Judy *v.* Farmers', etc., Bank, 81 Mo. 408, in which case the answer, omitting the formal parts,

charges the facts to be, that, on or about the *twenty-first* day of *July*, 1*881*, *Christian Frenger* deposited to his credit, in the defendant bank, the drafts mentioned in plaintiff's petition, with instructions to defendant to forward same to *Chicago* for collection, and to receive the proceeds thereof, and when so received by defendant, to place the same to the credit of said *Frenger*, in defendant bank; that defendant, at the time aforesaid, received said drafts from said *Frenger*, under the instructions, aforesaid, given by him, and, in pursuance to said instructions, forward the same to *Chicago* for collection, and, on the *twenty-fifth* day of *July*, 1*881*, received the proceeds of said draft, and placed the same to the credit of said *Frenger*, in said defendant bank, and on the day last aforesaid paid out the same to said *Frenger*. Defendant having fully answered, asks to be discharged with its costs.

[*Jeremiah Mason*, Attorney for Defendant.][1]

(*b*) *By Administrator of Depositor.*

aa. Declaration or Petition.[2]

(*aa*) *Generally.*

Form No. 7391.

(Precedent in Wichita Nat. Bank *v.* Maltby, 53 Kan. 567.)[3]

[(*Title of court and cause, and commencement as in Form No. 5917.*)][1] That he has been duly appointed administrator on the *19th* day of *August*, 1*889*, by the probate court of *Sedgwick* county, *Kansas*, of the estate of *Charles Warren*, deceased, late of *Sedgwick* county, *Kansas*, who died *August 26*, 1*888*; that the defendant is a corporation under the laws of the United States carrying on in the city of *Wichita* a general banking business; that the deceased, *Charles Warren*, aforesaid, at the time of his death, had on deposit in said defendant's bank, belonging to him and for which he held a certificate of deposit,

was as follows: "That said sum of $*2,500* was received on the *4th* of *January*, 1*875*, as deposit money, and placed to the credit of *John P. Clark*. That plaintiff afterwards, while said money was still in bank to *Clark's* credit, was informed of the fact, and, also, that *Clark* could draw it out, and he made no objection thereto. That it remained in the bank to *Clark's* credit for *six* months without any objection from plaintiff. That afterward it was paid to and used by *Clark*. That the bank received it as a deposit only, and, by direction of plaintiff and *Cassidy*, placed it to *Clark's* credit."

In this case, however, the verdict for the plaintiff was sustained, the court holding that the deposit had been received by the bank under an agreement to apply it to the payment of a debt due a designated person, and could not therefore divest it from the purposes of the trust by paying it to a different person.

1. The matter to be supplied in [ ] will not be found in the reported case, but should be added to complete the form.

2. **For the formal parts** of bills in equity, complaints, petitions and declarations, see the titles Bills in Equity, vol. 3, p. 417; Complaints, vol. 4, p. 1019; Declarations, *ante*, p. 244.

3. In this case plaintiff filed a motion for judgment on the pleadings, which was sustained, but on appeal the judgment was reversed on the theory that the defendant was entitled to a trial upon the issue.

executed and delivered to him by said bank, the sum of $*500*, of which he was the owner and holder at the time of his death; that said certificate of deposit was left for safe-keeping with the proprietor of the *Union* hotel, at *McPherson*, *Kas.*, and was by him turned over to the widow of said deceased, and was without indorsement of the deceased, in whose favor it was drawn; that the widow presented the same for payment at the defendant's bank, and the same was refused until said widow executed to said bank a good and sufficient indemnifying bond; that the money was then drawn by an agent of said widow, and the defendant bank came into the possession of said certificate of deposit, and defendant has now possession of said certificate, and plaintiff is therefore unable to set out a copy thereof.

Plaintiff alleges that, by reason of his appointment as administrator of the estate of *Charles Warren*, to which said money evidenced by said certificate belonged, he is entitled to the possession of said $*500*; that defendant unlawfully and wrongfully came into possession of said certificate of deposit, and that defendant is justly indebted to this plaintiff as administrator of said estate in the sum of $*500*; that plaintiff as such administrator made demand upon the defendant bank for said money and payment was refused; that said demand was made on the president of said defendant bank by plaintiff's attorney, and afterward by a draft by plaintiff for $*500*, which was duly presented for payment and protested for non-payment by *Free E. Waller*, notary public, on the *26th* day of *September*, 1*889*, and the same remains unpaid, in whole or in part, though the same is long past due.

Wherefore, plaintiff demands judgment against said defendant for $*500*, and interest on the same from *August 26*, 1*888*, and the costs of this suit, and such other and further relief as he may be entitled to. [(*Signature of attorney as in Form No. 5917.*)][1]

RECOVERY OF DEPOSIT IN SAVINGS BANK BY DAUGHTER OF DECEASED DEPOSITOR.

Form No. 7392.

(Precedent in Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 285.)[2]

1. The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

2. **The answer to this declaration** was as follows: "The defendants say, that this suit was not commenced by the authority of the said *Foss*, and they deny each and every allegation in the writ and declaration contained, except that said *Foss* is administrator; and they say that if said *Parthenia* deposited any money, they have paid the same and the income thereof, to the extent of $*500*, to said *Foss*, administrator, and they deny that they owe the plaintiff, for the benefit of said *Abra J. Hubbard*, said sum of $*486.42* with interest thereon, or any part of said sums."

In this case it was held that the daughter could recover the amount of the deposit in the action against the bank, brought in the name of the administrator for her benefit without his assent. But it was also held, that, under the pleadings in the case, it was not open to the defendants to contend that they had assented to the assignment, and that therefore the action should have been brought in the daughter's own name.

[(*Commencement as in Form No. 6942.*)][1] And the plaintiff says that his intestate, *Parthenia Foss*, during her lifetime, deposited in the bank of the defendants the sum of $*486.42*, and received therefor a book certifying such deposit, and the defendants promised to pay the same on demand with interest; and that the plaintiff's intestate, during her lifetime, assigned and delivered to *Abra J. Hubbard*, for whose benefit this suit is brought in the name of the administrator of said *Parthenia*, said book and the sum therein stated as deposited, wherefore the plaintiff says the defendants owe him, for the benefit of said *Abra J. Hubbard*, said sum of $*486.42* and interest thereon. [(*Concluding as in Form No. 6942.*)][1]

(*bb*) *To Recover Deposit-book and Compel Payment of Deposit.*

Form No. 7393.[2]

(*Commencing as in Form No. 4272.*)

1. That she is the widow of *James Cannon*, late of *Baltimore city*, who died intestate in the month of *April*, 1871, leaving the complainant, his widow, and *five* surviving children, viz.: *Florence*, an infant daughter of the complainant, and *four* children by a former marriage, viz., *Louisa J.*, the wife of *William W. Kone*, *Mary E.*, the widow of *Oliver P. Murray*, *James Cannon* and *Susie Cannon* and a grandson, *Louis Arnett*; that on the *12th* day of *May*, 1871, letters of administration on the estate of the said intestate were issued to the complainant by the *Orphans* Court of *Baltimore city*.

2. That in the course of her administration she discovered that her intestate had deposited money in the *Savings Bank of Baltimore*, to the amount of about *four thousand* dollars and that it was standing in his name and to his credit at the time of his death.

3. That in some way to the complainant unknown, the book of deposit has been taken possession of by *William W. Kone* and *Louisa*, his wife; that the complainant has applied to the bank to pay her the money, but the bank has refused to pay it, unless she should produce the book of deposit; that *Kone* and wife have refused to give up the book.

4. That thereupon on the *14th* day of *May*, 1871, your oratrix applied to the *Orphans* Court, by petition, for an order requiring *Kone* and wife to surrender to the complainant as administratrix the book of deposit which they had concealed and withheld; that in answer to her said petition filed the *22d* day of *May*, 1871, they stated that before the filing of said petition they had delivered the book to *Mary*

1. The matter to be supplied in [ ] is not in the reported case, but should be added to complete the precedent.

2. This bill contains substantially the same statement of facts as is set forth in Murray *v.* Cannon, 41 Md. 466. A decree requiring the Savings Bank of Baltimore, on the receipt of the proper vouchers, to pay to the complainant, as administratrix, the money in bank to the creditor of her intestate, was affirmed, the court holding that the proof was insufficient to establish a perfected gift of the money in question to his daughter, the appellant, in his lifetime, and that the delivery of the book of deposit did not constitute a delivery of the money, and that the complainant was therefore entitled to it as of the estate of her intestate.

E. Murray, and they denied that the money deposited in the bank belonged to the intestate's estate, but averred that it had been given by the intestate in his life-time to *Mary E. Murray* on certain trusts; that *Mary E. Murray* on the *20th* day of *June*, 1871, also answered the petition and averred that *Kone* and wife had given her the book, and that the money deposited in the bank had been given to her by the intestate in his life-time upon certain trusts.

5. That your oratrix denies that *Kone* and wife had delivered the book to *Mary E. Murray* before the petition was filed, and avers that the money belongs to the estate of the said intestate.

6. That the *Orphans* Court dismissed the petition, holding that it had no jurisdiction to determine the question of title to the said property; that the bank still refuses to pay the money to the complainant on the claim of *Kone* and wife, and *Mary E. Murray*, that they were the only persons entitled to the same and that the bank could not safely assume to decide upon said inequitable claim.

To the end therefore:

1. That this court may take jurisdiction in the premises and that your oratrix may have a decree requiring that the book of deposit shall be delivered and the money in the savings bank paid to the complainant, as administratrix of the said intestate.

2. That your oratrix may have such further and other relief (*concluding as in Form No. 4272*).

bb. ANSWER OR PLEA.[1]

1. **For the formal parts** of answers and pleas, generally, see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; ANSWERS IN EQUITY, vol. 1, p. 854; PLEAS.

The separate answers of Kone and wife and Mary E. Murray in answer to the bill of complaint in Murray *v.* Cannon, 41 Md. 466 (which bill of complaint is set out in Form No. 7393, *supra*), averred "that the book of deposit was given to the latter (*Mary E. Murray*) by her father before his marriage with the complainant, and that at the time the account was opened to the credit of '*James Cannon*, subject to his order, or to the order of *Mary E. Cannon*;' that there was some money already entered in the book at the time it was given *Mary E. Murray*, and that the intestate gave her that money and such money as might thereafter be credited in the book, in trust, for herself and her brothers and sisters, equally; that other money was given to *Mary E. Cannon* (who intermarried with *Alfred P. Murray*) by the intestate, to be deposited in the bank, and that she continued in possession of the book from the time that she got it until her marriage, and the removal to *Portsmouth*, *Virginia*, in the *Spring* of 1862, when, at the request of the intestate, she left the book with *Mrs. Kone*, the intestate, saying that it would be more convenient to leave it with *Mrs. Kone* so that she might deposit such other money as he might give; that while it was in *Mrs. Kone's* possession, the intestate, from time to time, gave her other sums of money for *Mrs. Murray*, and told her to deposit it in bank, and have them credited in the book for her." Mrs. Kone also alleged: "That she retained possession of the book delivered to her until she returned it to *Mrs. Murray*, after the death of the intestate." The answer also alleged: "That the intestate never at any time asked for the return of the book, or claimed the money," and Mrs. Murray claimed that she "was lawfully entitled to the book of deposit and to have the money therein credited, amounting, with the credits and interest to *April*, 1871, to the sum of $3,809.54, for the uses and purposes stated by the donor."

The Savings Bank answered that it had no knowledge of the facts stated in the bill except as to the deposits with the bank in the name of James

(*aa*) *Payment.*

Form No. 7394.

(Precedent in Wichita Nat. Bank *v.* Maltby, 53 Kan. 567.)[1]

[(*Title of court and cause as in Form No. 1325.*)

The defendant answering the complaint of plaintiff herein alleges:][2]

1. That it denies each and every allegation in said petition contained, except such as are hereinafter admitted.

Cannon, and in reference to that averred, "that the account stood on their books thus: '*James Cannon*, subject to his order or the order of his daughter, *Mary E. Cannon*,' and that on the *first* of *April*, 1874, the balance to the credit of that account was $4,688.78."

Setting Off Claim Against Deceased Depositor. — In Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, to an action brought by plaintiff to recover balance of deposit, the answer contained the following: "And for a further, separate and distinct defense these defendants allege, that the said *Cornelius Poillon*, at the city of *New York*, on or about the *27th* day of *July*, 1876, made his certain promissory note, of which the following is a copy (*setting out note*): That the same was duly indorsed by said payee and delivered to these defendants, and on the *28th* day of *July*, 1876, at the request of said *Cornelius Poillon*, the same was discounted by these defendants, and the proceeds thereof (being the sum of $1,963.95) duly credited to said *Poillon* in his account with these defendants, which was all subsequently paid out as aforesaid, prior to the *12th* day of *October*, 1876, except the sum of $845.51. That when the said note became due and payable it was not paid, but was duly protested for non-payment, whereupon these defendants, on the *1st* day of *November*, 1876, applied to the payment thereof the said sum of $845.51 and charged the same in their account against the moneys standing to the credit of said *Cornelius Poillon*. And these defendants respectfully insist that they were and are entitled to set-off the said sum of $845.51 against any claim or demand whatsoever which said *Cornelius Poillon*, in his lifetime, or this plaintiff had, has or might have against these defendants, and to extinguish and satisfy so much of their demand arising from the aforesaid note of said *Cornelius Poillon*, due and owing to these defendants." Judgment for defendant was reversed by the general term, which ruling was affirmed by the court of appeals, the court holding that a bank has not the right to retain a balance of a customer deposited, to pay or apply upon an indebtedness of such customer to the bank, which indebtedness has not yet matured. The action was commenced prior to the adoption of the code of procedure in 1877.

1. On appeal in this case, it was held that a motion for judgment for plaintiff on the pleadings should have been denied, on the theory that in an action upon a certificate of deposit, which is in form a negotiable instrument and is not in possession of the plaintiff, and where ownership is alleged by the plaintiff, an unverified answer, denying that plaintiff is the owner and holder of the certificate and alleging that another was the owner and had drawn the same from the bank with authority, presents an issue for trial.

2. The matter enclosed by [ ] will not be found in the reported case, but should be added to make the form complete.

Another precedent of such an answer found in Hazleton *v.* Union Bank, 32 Wis. 37, omitting formal parts, is as follows: "The defendant denies that *Walter Buchanan* did on or about the *20th* day of *August*, 1865, deposit and leave with this defendant *twenty-five hundred* dollars or that he left said sum of money in said bank and with said defendant when he died, as alleged in said complaint. The defendant, further answering said complaint, alleges that on the *23d* of *August*, 1865, one *William Gardiner* deposited with this defendant a sum of money and took his certificate of deposit therefor in the name of *Walter Buchanan*, by which certificate said sum of money was made payable to the order of said *William Buchanan* on return of said certificate properly endorsed; and that in due course of business said certificate of deposit was presented to this defendant, properly

2. Further answering, said defendant says that it admits it is a corporation, and admits the decease of *Charles Warren* aforesaid, and admits that there was money deposited in said bank, but which did not belong to the deceased, and that said widow and children drew the money out of the bank, upon the execution of a requisite bond by them therefor.

3. Defendant further alleges, that the widow and children of the said deceased, Mrs. ——— *Warren*, widow, *H. R. Warren*, *Helen Warren* and *Charles Warren*, were the sole and only persons who owned the money, and who had the right to draw the same from said bank, and that the said agent, who it is alleged in plaintiff's petition drew said money, was duly authorized and empowered to draw such money. At the time that they so drew the money from the bank, no executor or administrator had been appointed; wherefore they had the lawful right to draw said money. Defendant further alleges, that said money was exempt from appropriation to the payment of any of the debts of the said *Charles Warren*, deceased.

[(*Jeremiah Mason*, Defendant's Attorney.)][1]

(*bb*) *That Deposit was Made for Defendant's Use.*

Form No. 7395.

(Precedent in Blasdel *v.* Locke, 52 N. H. 238.)[2]

[(*Venue and title of court and cause as in Form No. 1465.*)][3]

Sarah E. Locke answers under oath [and says] that she believes said deposits were made for her use, and she now claims the amount; that she believes the first deposit was by direction of her grandmother, and for the use of her the said *Sarah*; that said *Eliza* did on the same days make deposits in her own name; that the said *Eliza*, during her last sickness, said to her (the said *Sarah*) that there were *three* savings bank books in the trunk, and that one was for her (the said *Sarah*); and that that was the first information the defendant

endorsed by said *Walter Buchanan*, and payment thereof demanded, and was duly paid by this defendant, and said certificate delivered up and cancelled. And this defendant, upon its best knowledge, information and belief, alleges that the foregoing is the only business transaction of the said bank in which the name of the said *Walter Buchanan* in any wise appears, or in which said *Buchanan* had any interest whatever."

1. See *supra*, note 2, p. 633.

2. This is an answer to a bill in equity which alleged that plaintiff's intestate, "*Eliza Powers*, at various times deposited in said savings bank money in the name of *Sarah E. Locke* of *Maine*, but for her own use, assented in writing to the by-laws of the bank, and took and retained a duplicate book of the deposits, which is now in possession of the plaintiff; that the bank, though requested, refuses to pay to him; that he has been informed that the defendant, *Sarah E. Locke* claims said deposits, though she has at various times, since the decease of said *Eliza*, declared that she was never informed of said deposit during the life of said *Eliza*; and the plaintiff believes that said *Eliza* never gave or intended to give said deposit to said *Sarah*," and prayed for an answer to the several matters charged and that the bank be directed to pay over the money to him. The bill was dismissed and the title declared to be in the defendant.

3. The words to be supplied in [ ] will not be found in the reported case, but should be added to render the form complete.

had of the deposits; — but she has since been informed, and believes, that said *Eliza* did long previously declare to others that said deposits were for the benefit of said *Sarah*; that she does not know who had possession of the deposit-book, but believes it was retained by said *Eliza* until her death, and that, as alleged in the bill, it has since come into the hands of the plaintiff; that she never lived in the state of *Maine*, and has not declared that she was not informed of said deposits during the life of said *Eliza*. [(*Signature by solicitor as in Form No. 1465.*)][1]

(*c*) *By Cestui que Trust.*

aa. COMPLAINT.

Form No. 7396.

(*Commencing as in Form No. 5915.*)[2] on the *tenth* day of *March*, 1*880*, one *Joseph C. Wilson* deposited in the *National Bank of Monticello, Indiana*, for and on behalf of said plaintiff, the sum of *eleven thousand* dollars, which said sum of money was the property of the said plaintiff, and was so deposited by said *Joseph C. Wilson*, as trustee, for plaintiff, and afterwards, to wit, on the *twelfth* day of *April*, 1*880*, the said *First National Bank of Monticello, Indiana*, suspended payment, and refused to pay said sum of money, or any part thereof, to the plaintiff; that at the time of said suspension of payment by said bank there remained in said bank of said sum of *eleven thousand* dollars belonging to said plaintiff the sum of *nine thousand five hundred* dollars, which was yet due and remained unpaid; that on the *fifteenth* day of *April*, 1*880*, the defendant *Richard Roe* was duly and legally appointed the receiver for said bank and qualified as such receiver, and took possession of the assets of said bank, with all the books, moneys, rights, credits and effects thereof, and proceeded to the settlement and discharge of all liabilities of said bank except the liability of said bank to the plaintiff for said sum of *nine thousand five hundred* dollars due the plaintiff by said bank as aforesaid: That the defendant *Richard Roe*, as such receiver, has declared a dividend of *thirty* per centum in favor of the creditors of said bank, and has proceeded to pay said dividend to all of said creditors except the plaintiff, to whom he has failed and refused to pay said dividend, or any part thereof, and has failed and refused to recognize the plaintiff as one of the creditors of said bank. Wherefore plaintiff prays that he may be recognized as one of the creditors of said bank, and that he have judgment for *ten thousand* dollars against the defendant *Richard Roe* as such receiver, and the said *First National Bank* to be paid out of the assets of said bank in his hands as such receiver, and that he share equally with the other creditors of said bank in the distribution of assets, and for all other proper relief. (*Concluding as in Form No. 5915.*)[3]

1. The words to be supplied in [ ] will not be found in the reported case, but should be added to render the form complete.

2. For the formal parts of bills in equity, complaints, petitions and declarations, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The facts upon which this form is

bb. ANSWER.[1]

Form No. 7397.

(Precedent in Bundy *v.* Monticello, 84 Ind. 121.)[2]

(*Title of court and cause as in Form No. 1323.*)

The defendant, *Richard Roe*, answering the complaint of the plaintiff, *John Doe*, herein says:

1. (*General denial.*)

2. That whilst said money mentioned in the complaint was on deposit in said bank, and under the control of the said *Joseph C. Wilson*, and when no trust attached to said money in favor of the [plaintiff], to wit, on [the *fifteenth* day of *March*, 1*880*,] the said *Joseph C. Wilson* was liable to said bank in a sum much larger than the sum mentioned in the complaint, for money which had before that time come into the hands of the said *Joseph C. Wilson*, as the president of the said bank, which had been by him converted to his own use, and for which he was liable to account to said bank, having received the same in his relation to the said bank as its president, said money so converted having belonged to said bank; — [that] the said *Joseph C. Wilson* appropriated and ordered said money in the complaint mentioned to be applied to, and in discharge of, so much of his said liability to said bank for the money so converted by him as aforesaid, and on said day last aforesaid, executed a paper writing, of which the following is a copy, to wit, (*setting out paper*),[3] and delivered said paper writing to *A. D. Lynch*, who was then and there receiver of said bank, who recognized same as valid; and the defendant *Richard Roe*, the successor of said *Lynch*, claims and asserts his right to appropriate said money in the complaint mentioned in discharge of such liability of said *Joseph C. Wilson* to the said bank. Third, as to the *forty-eight hundred* dollars mentioned in the complaint, the defendant says that of the money for which the plaintiff seeks recovery the said sum of *forty-eight hundred* dollars was the proceeds of a note executed by *A. W. Reynolds* to said bank, and by said *Joseph C. Wilson* deposited in said bank, as part and parcel of the sum sought to be recovered by the plaintiff; that after said deposit in said bank, on *March eleventh*, 1*880*, the said *Joseph C. Wilson* directed and ordered said money to be applied to, and in discharge of, a liability to said bank for money wrongfully converted by him as president of said bank. (*Concluding in the usual manner with signature of defendant's attorney.*)

based are taken from Bundy *v.* Monticello, 84 Ind. 119. After answer, the case was submitted to the court on an agreed statement of fact, which is set out in the reported case. The court found for the plaintiff and rendered judgment upon the finding, which judgment was affirmed on appeal. The answer is set out in Form No. 7397, *infra*.

1. **For the formal parts** of answers and pleas, generally, see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; PLEAS.

2. The facts on which this form is based are taken from Bundy *v.* Monticello, 84 Ind. 119.

General denial was replied to the second and third paragraphs of the answer.

For the complaint in this case see Form No. 7396, *supra*.

3. **The paper writing referred to in text** was as follows:

"To *A. D. Lynch*, *Receiver First National Bank*, *Monticello*, *Indiana*: There is in the *First National Bank* of *Monti-*

(*d*) *By Clerk of Court.*

Form No. 7398.

(Precedent in Townsend *v.* Williams, 117 N. Car. 330.)[1]

[(*Title of court and cause, and commencement as in Form No. 5927.*)][2]

1. That, at the times hereinafter named, the defendant was Vice-President and a Director of the *Bank of New Hanover*, of *Wilmington, N. C.*, as he is informed and believes, which said bank was a corporation, duly created by the laws of *North Carolina.*

2. That, at the times hereinafter mentioned, the plaintiff was Clerk of the *Superior* Court of *Robeson* county and as such clerk had on deposit various sums of money in said bank, which was then, and continued to be until the *19th* day of *June*, 1*893*, a banking concern and doing a general banking business in the city of *Wilmington, N. C.*

3. That, on or about the ——— day of *February*, 1*892*, plaintiff had to his credit on deposit in the said bank of *New Hanover*, of *Wilmington, N. C.*, as Clerk *Superior* Court, a considerable amount of money, and hearing rumors questioning the solvency and safety of said bank he immediately went to *Wilmington* for the purpose of seeing the defendant, and inquiring as to the truthfulness of said rumors, and, if said rumors were well founded, with the intention of withdrawing any deposits that he had in said bank; and at this time in the city of *Wilmington*, plaintiff enquired of defendant into the condition and solvency of said bank, and was informed by him that said bank was perfectly solvent and in no danger of failure or suspension, defendant saying to plaintiff, "We've got all the money you want, you need never have any fears of this bank as long as I am in it." That, relying on these statements and representations of defendant, the plaintiff left said money on deposit in said bank, and relying on said statements and representations, continued to make further deposits from time to time, until the failure of the bank herein mentioned.

4. That said bank was, on the *19th* day of *June*, 1*893*, placed in the hands of a receiver by order of the *Superior* Court of *New Hanover* county, and was at the time of the representations aforesaid, and is now, utterly insolvent, as the plaintiff is informed and believes.

5. That, further complaining, the plaintiff avers that, at the time of said representations and statements by defendant, the said corporation was utterly insolvent, and that the same was well known, or

cello, Indiana, a deposit to my credit as '*J. C. Wilson*, trustee,' $*9,013*. Should there be any legal demands against me as president of said bank, which have been omitted from the books of the bank, I direct the application of this sum, so far as is necessary, to their payment, next to the payment of any balance due the bank from me as appears by its books at the time it passed into the hands of a receiver. *Joseph C. Wilson, August* 5, 1879."

1. **This complaint was demurred to** on the ground of its insufficiency and the lower court overruled the demurrer. On appeal, the supreme court, in affirming the decision, held, among other things, that if the bill of particulars was defective the proper remedy was by application for a more definite bill, and not by demurrer.

2. The words to be supplied in [ ] are not found in the reported case, but should be added to make the precedent complete.

ought to have been known to defendant; and that said representations so made by defendant, by which plaintiff was damaged and incurred the loss of said money, were false and fraudulent and defendant, as plaintiff is informed and believes, well knew, or ought to have known, the same to be so at the time and before the representations and statements were made.

6. That the defendant was, on the ——— day of ———, 1*892*, and since that time, up to the failure of said bank, a Director and Vice-President thereof, and knew, or ought to have known, the condition of its affairs and assets, and omitted, negligently and carelessly failed and refused, to inform plaintiff thereof, well knowing at the time of the statements and representations aforesaid, that the said bank was insolvent and unable to pay its debts, as the plaintiff is informed and believes.

7. That at the time of the failure of the said bank, on the *19th* of *June*, 1*893*, the plaintiff had to his credit on deposit in said bank, the sum of *two thousand two hundred and sixty-three* dollars and *ninety-three* cents, and by his reliance on said representations and statements, plaintiff was damaged to the amount of *two thousand two hundred and sixty-three* dollars and *ninety-three* cents:

Wherefore, plaintiff demands judgment against the defendant —

1. For the sum of *two thousand two hundred and sixty-three* dollars and *ninety-three* cents, with interest thereon from *June 19*, 1*893*, less *20* per cent. dividends paid by the receiver of said bank.

2. For costs, and such other and further relief as to the Court may seem just and proper.

[*McNeill and McLean*,
Attorneys for Plaintiff.][1]

(2) For Payment of Depositor's Check After Notice of Fraud.

Form No. 7399.

(Precedent in Peter Adams Co. *v.* National Shoe, etc., Bank, 23 Abb. N. Cas. (N.Y. Supreme Ct.) 182.)[2]

[(*Title of court and cause, and commencement as in Form No. 5926.*)

1. The words to be supplied in [ ] are not found in the reported case, but should be added to make the precedent complete.

2. **The trial court dismissed the complaint** in this case; but on appeal it was held that the case was erroneously disposed of, and the judgment was reversed and a new trial ordered. Upon a second trial, a judgment was rendered in favor of plaintiffs for the amount claimed, a part of which judgment was as follows: "It is further ordered and adjudged, that this judgment shall be first enforced against the three defendants, *Theodore Conrow*, *James W. Conrow* and *William E. Conrow*, by an execution issued upon the said judgment as against them as aforesaid, for the amount which they are adjudged to pay, with the interest as aforesaid, and costs and additional allowance; and in case such execution shall be returned wholly or partly unsatisfied, then the amount thereof remaining unpaid and unsatisfied shall be enforced by execution against the defendant, the *National Shoe and Leather Bank*, and in the event of the return of said execution against the property of said *Conrows* unsatisfied, in whole or in part, and the payment of the judgment by the bank, the said plaintiff shall execute an assignment of the judgment against the

I. (*Allegations of incorporation and partnership of parties plaintiff and defendant as in Forms Nos. 5947, 5957.*)[1]

II. That heretofore, and on or before *October 14*, 1884, the plaintiff entered into a contract with defendant *Branscom*, whereby the plaintiff agreed to sell to said defendant certain merchandise, and also to advance to him the sum of $4,500 upon the faith of a certain paper, purporting to be a promissory note, (*stating its tenor*,) which said note purported to be signed by *William Oliver*, as Secretary and Treasurer of said *Mississippi Mills*, a corporation organized in the State of *Mississippi*, and which note also purported to be indorsed by the payee named therein, and made payable thereby to the order of the defendant *Branscom*; and that on or about the said *October 14*, 1884, a paper purporting to be the promissory note as above described, was duly delivered to the plaintiff by the defendant *Branscom*, and the plaintiff accepted the same upon the express representation of the said defendant *Branscom*, that the said paper was a good and valid promissory note, in all respects duly made by or on behalf of the *Mississippi Mills*, a corporation as aforesaid; that the signature thereto was genuine, and duly authorized by said corporation by its proper officer, and also duly indorsed by the payee named therein; and that the indorsements in writing thereon, purporting to be made by *Colonel Ed. Richardson*, the payee named in the said note, were duly made by the payee so named.

III. That thereafter, and on or about *October 29*, 1884, at the request of the said defendant *Branscom*. and in pursuance of the aforesaid contract, the plaintiff, relying upon the genuineness and validity of the said alleged promissory note, and the indorsements thereon, advanced and delivered to the defendant *Branscom*, the sum of $4,500, which the defendant *Branscom* received in pursuance of the said agreement, and solely upon the faith of the validity of the said alleged note, and the genuineness of the signature and indorsements thereon, and not otherwise.

IV. That, as plaintiff is informed and believes, the defendant *Branscom* deposited the same sum of $4,500 with the defendant, *National Shoe and Leather Bank*, and that said bank received the same money from the said *Branscom*, and placed it to his credit in an account kept therein with said *Branscom* under the name of "*A. C. Branscom, Manager*," and that, as plaintiff is further informed and believes, of the said sum of money so deposited, a large portion, and about the sum of $2,925, so remained deposited in the said bank to the credit of the defendant *Branscom* until *November 8*, 1884.

V. The plaintiff alleges, upon information and belief, that the above described paper purporting to be a promissory note, with the indorsements thereon, was not a valid promissory note, in that

said *Conrows* to said bank, which shall have the right to enforce the same against said *Conrows*"

1. The words to be supplied in [ ] are not in the reported case, but should be added to complete the complaint.

For the formal parts of bills in equity, complaints or petitions, and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

the signature thereto was not the genuine signature of an officer of the Company styled "*Mississippi Mills*," nor made by any officer or agent of said company having authority to sign the said note, and that the said note was never issued or delivered by the alleged maker thereof or by any officer or agent thereof, duly authorized for that purpose; and also that the said paper was never duly indorsed by *Col. Ed. Richardson*, the payee therein named, and that no indorsement upon said note, excepting that made by the defendant *Branscom*, was genuine, and by reason thereof the said paper, upon the faith of which this plaintiff had advanced to the said defendant *Branscom* the said sum of $*4,500*, was of no value and of no force or effect as against said *Mississippi Mills* or the said *Richardson* whatsoever, all of which the said defendant *Branscom* well knew at the time he delivered the same to this plaintiff and received from this plaintiff the said sum of $*4,500*, but which he did not disclose to the plaintiff, and falsely represented to the plaintiff that said paper was a good and valid promissory note and that the indorsements thereon were genuine, and that he was the lawful holder and owner thereof.

VI. That from the time of the delivery of said pretended promissory note to the plaintiff as aforesaid, at all times until on or about *November 5*, 1*884*, the plaintiff believed the said note, the execution and delivery thereof, and the indorsements thereon were each and all genuine and valid, and that on the said *November 5*, 1*884*, for the first time, this plaintiff was informed that said note was not genuine as to its signature; that it had not been duly made or delivered by the said *Mississippi Mills*, and that the indorsements thereon prior to that of the defendant *Branscom* were not genuine, and that the said note was of no force or effect as against the makers or indorsers other than defendant *Branscom*.

VII. That immediately upon being so informed, the plaintiff rescinded and annulled the aforesaid agreement between it and the defendant *Branscom*, and also gave notice of all and singular the aforesaid matters and things to the defendants other than *Alexander C. Branscom*, and in particular notified them, and each and every of them, that the aforesaid sum of $*4,500* had been obtained by the defendant *Branscom* from the plaintiff by trick and device, fraud and false pretenses with respect to the aforesaid paper purporting to be a promissory note, and the pretended indorsements thereon; and also notified them, and each of them, that the said sum of money so remaining on deposit in the said bank to the credit of the said *Branscom*, was a part of the same money which this plaintiff has so advanced to the said *Branscom* by reason of the said false pretenses and fraudulent representations, and that the said agreement under which the same had been so advanced, had been rescinded by the plaintiff, and also by the voluntary act of the defendant *Branscom*, and that this plaintiff was the sole owner of the said sum of money remaining on deposit in said bank to the credit of said *A. C. Branscom*, manager, and that the said defendant *Branscom*, had no right, title, or interest in, or to the said moneys, but that he held the same solely for the use and benefit of the plaintiff, and as its trustee thereof.

VIII. That thereafter, as plaintiff is further informed and believes,

and on or about *November 8*, 1884, with full knowledge of all and singular the matters and things hereinbefore alleged, the three defendants *Conrow* acting in their own behalf, and also by their agent and attorney, represented to the defendant *Branscom* that they were acting on behalf of themselves, and of this plaintiff, for the settlement of the claims of the said *Conrow Bros.* and this plaintiff, respectively, which the said *Branscom* believed and thereby was induced to draw and deliver to them his check, dated on said day directed to the said *National Shoe and Leather Bank* for the sum of $2,915 — payable to the order of *Conrow Brothers*, defendants as aforesaid, who indorsed said check, and on or about the same day presented the same to the said bank, or caused it to be so presented for payment, and that the said bank paid over to the said *Conrow Brothers*, or to their order, the sum of money mentioned in said check, to wit, $2,915 — as plaintiff is informed and believes; and that, as this plaintiff is further informed and believes, the said *Conrow Brothers* had and received the said sum of money, and still hold the same, with full knowledge and notice from the plaintiff of all and singular the matters and things hereinbefore alleged, and without any present consideration then moving from the said defendants *Conrow*, or either of them, unto the defendant *Branscom*, or otherwise; but that, as plaintiff is further informed and believes, the said money was so obtained by the said defendants *Conrow* from the said bank by connivance between the defendants *Conrow* and the defendant *Branscom*, in order to enable the defendants *Conrow*, copartners as aforesaid, to get possession of the said sum of $2,915 — and apply the same upon the account of some debt or demand which the said *Conrow Brothers* had or claimed to have, against the defendant *Branscom*, and in fraud of the plaintiff's right to have the said sum of money returned to it by reason of the matters and things hereinbefore set forth, of which the said defendants *Branscom* and *Conrow* were duly notified as aforesaid.

IX. That, as plaintiff is further informed and believes, the defendant, *Alexander C. Branscom*, is wholly insolvent, and has no property within the State of *New York* or elsewhere, out of which a judgment for any sum of money whatever could be collected or satisfied, and that a judgment for the said sum of $4,500 advanced and paid to him as aforesaid, or any part thereof, would be of no value to the plaintiff and that the plaintiff has no remedy or means in law of collecting the said sum of $4,500 or any part thereof, except by establishing its right to the specific sum of money deposited by the said defendant *Branscom* as aforesaid, with the defendant bank, and so remaining on deposit until *November 8*, 1884.

Wherefore, plaintiff demands judgment:

1. That the contract between the plaintiff and defendant, *Alexander C. Branscom*, entered into on or about *October 14*, 1884, hereinbefore described, is null and void, and that said defendant produce said writing and deliver the same up to be cancelled.

2. That the sum of $4,500 was delivered by the plaintiff to the defendant, *Alexander C. Branscom*, *October 29*, 1884, in pursuance of the aforesaid supposed contract, and without any consideration moving from the said defendant *Branscom* to the plaintiff.

3. That the defendant *Alexander C. Branscom*, acquired no right in, or title to, the said sum of $4,500 so delivered to him by the plaintiff on *October 29*, 1884, or any part thereof, but held the same only as the trustee of the plaintiff, and to the plaintiff's sole use.

4. That prior to *November 8*, 1884, the plaintiff gave to the defendants, and each and every of them, due notice that the said sum of $4,500 had been obtained from the plaintiff by the defendant *Branscom* by fraud and deceit, and that by reason thereof, plaintiff had rescinded the contract under which it was obtained and had demanded the return of said money and every part thereof, and also that the sum of about $2,915, then on deposit to the credit of the defendant, *Alexander C. Branscom*, with the defendant, the *National Shoe and Leather Bank*, was a part of the said sum of $4,500 obtained by fraud and deceit, as aforesaid, and that the plaintiff demanded that the said sum so deposited with said bank be paid to it.

5. That on *November 8*, 1884, the defendant *Branscom* and the three defendants *Conrow* conniving together, caused the said sum of $2,915 to be paid out of said bank to the defendants *Conrow*, copartners as aforesaid, or to their order, and that for the said money the defendants *Conrow* gave no present consideration to said *Branscom*.

6. That the plaintiff recover of the defendant, *Alexander C. Branscom*, the sum of $4,500 with interest thereon from *October 29*, 1884.

7. That the plaintiff recover of the defendants other than said *Branscom* the sum of $2,915 — with interest from *November 8*, 1884.

8. For the costs of this action.

Smith & Bowman, Plaintiff's Attorneys.

(3) For Refusal to Pay Depositor's Check.[1]

Form No. 7400.

(Precedent in Eichner *v.* Bowery Bank, 20 Misc. Rep. (N. Y. Supreme Ct.) 91.)[2]

1. As to special statutory liability of a bank in *Rhode Island* for damage in refusing to pay out deposits after five days' demand, see Gen. Laws (1896), c. 178, § 37.

Bill of Particulars. — A claim against a bank for injury to a depositor's credit by improperly refusing to honor his checks is matter of general damage, and therefore a plea of particulars showing the items of such damage cannot be required. Commercial Nat. Bank *v.* Hand, 9 N. Y. App. Div. 614. Consult the title Bills of Particulars, vol. 3, p. 473.

Averment of Indorsement of Payee. — A complaint in an action against a bank to recover damages caused by a failure to pay a depositor's check must allege that the check was indorsed by the payee. Eichner *v.* Bowery Bank, 20 Misc. Rep. (N. Y. Supreme Ct.) 90; Rowley *v.* National Bank of Deposit, 63 Hun (N. Y.) 550; Lynch *v.* Jersey City First Nat. Bank, 107 N. Y. 179.

An averment that the check was presented for payment in the usual course of business is not equivalent to an allegation of indorsement. Eichner *v.* Bowery Bank, 20 Misc. Rep. (N. Y. Supreme Ct.) 90.

Where, however, the bank refuses to pay the check on the ground that it was not indebted to the drawer in any such amount, it is unnecessary to allege or prove an indorsement or a presentation of the check; so held in an action for refusal to pay a check. Eichner *v.* Bowery Bank, 20 Misc. Rep. (N. Y. Supreme Ct.) 91.

2. There was interposed a demurrer to this complaint on the ground that it failed to set forth facts sufficient to constitute a cause of action, in that it

[(*Title of court and cause as in Form No. 5926.*)][1]

The plaintiff, complaining of the above-named defendant, shows to this court and alleges:

I. On information and belief, that the defendant was at all times hereinafter mentioned and is a corporation organized under the laws of this state for the purpose of carrying on the banking business in the city of *New York.*

II. That the plaintiff was, at the times hereinafter mentioned, a merchant, carrying on business in the city of *New York*, and that up to the time of the occurrence of the event hereinafter mentioned was in good standing and credit.

III. That between the *26th* day of *January*, 1*895*, and the *20th* day of *April*, 1*896*, the plaintiff was a depositor in the defendant bank, and had and kept a banking account with the defendant.

IV. That on the *12th* day of *April*, 1*896*, the plaintiff had a balance in said bank due and owing to him, exceeding the sum of $*9*, and that plaintiff, at the times hereinafter mentioned, continued to have and had a balance in said defendant bank exceeding said sum of $*9*, subject to plaintiff's check.

V. That on the *12th* day of *April*, 1*896*, the plaintiff drew his check on the defendant bank for the sum of $*9*, payable to the order of *Field, Chapman & Fenner*, and delivered the same to said *Field, Chapman & Fenner*, for an indebtedness due and owing from plaintiff to them.

VI: That said firm of *Field, Chapman & Fenner* was and is a firm of auctioneers in the city of *New York*, who extended credit to this plaintiff, and who had a high esteem for this plaintiff, and with whom plaintiff had large and profitable dealings, which esteem and credit were of great value to plaintiff.

VII. That said firm of *Field, Chapman & Fenner* caused said check to be presented for payment at defendant's bank during business hours and in the usual course of business, but defendant, notwithstanding the defendant had sufficient funds belonging to plaintiff on deposit with it, refused to pay said check, stating that the same was "no good," whereupon said check was returned to said *Field, Chapman & Fenner* dishonored.

VIII. That *Field, Chapman & Fenner* gave notice to plaintiff of such dishonor, whereupon this plaintiff informed *Field, Chapman & Fenner* that the bank must have made some mistake and instructed them to again present the same for payment.

fails to allege that the check was indorsed by the payees, and as it was payable to their order this was necessary before the bank could be required to pay it. It was held, first, that the complaint in the action against a bank to recover damages caused by a failure to pay a depositor's check must allege that the check was indorsed by the payee; second, that an averment that the check was presented for payment in the usual course of business is not equivalent to an allegation of indorsement; third, that where after the bank refused to pay the check, on the ground that it was not indebted to the drawer in any such amount, it is not necessary to allege or prove an indorsement or presentation of the check.

1. The matter to be supplied in [ ] is not found in the reported case, but should be added to render the precedent complete.

IX. On information and belief, that *Field, Chapman & Fenner* did again present said check to defendant for payment, informing the bank that they must have made a mistake, but said bank persisted in their refusal to pay said check and insisted that the same was no good, and that they were not indebted to plaintiff in any such amount, and the defendant refused to honor said check.

X. That the acts of defendant caused this plaintiff injury in his good name and credit, and the said firm of *Field, Chapman & Fenner* withdrew from this plaintiff their esteem and credit and refused to extend plaintiff further credit, whereby plaintiff suffered great loss and was injured in his good name and reputation in his business as a merchant with *Field, Chapman & Fenner*, and with others, and his standing in the community as a reputable merchant greatly lowered, to his damage $*500*.

Wherefore, plaintiff demands judgment against the defendant for the sum of $*500*, besides the costs and disbursements of this action.

[(*Signature of attorney as in Form No. 5926.*)][1]

(4) Interpleader[2] to Ascertain Legal Title to Deposit.

Form No. 7401.[3]

(Precedent in Ferguson *v.* Kansas City Bank, 25 Kan. 334.)

[(*Venue and title of court and cause as in Form No. 1325.*)][4]

1st. And now comes the defendant in the above-entitled cause, and for its answer to said plaintiff's petition filed therein, denies each and every allegation therein contained, save and excepting what is hereinafter admitted.

1. The matter to be supplied in [ ] is not found in the reported case, but should be added to render the precedent complete.

2. **For the formal parts** of bills of interpleader, generally, see the title Interpleader.

3. This answer, which was duly verified, was sustained as against the demurrer thereto. Ferguson *v.* Kansas City Bank, 25 Kan. 333.

4. The matter to be supplied in [ ] will not be found in the reported case, but should be added to complete the form.

Answer to Bill of Interpleader. — In Augusta Sav. Bank *v.* Fogg, 82 Me. 538, to a bill of interpleader brought by the bank to ascertain the legal title to a deposit made by Hodgkins, the claimants being John B. Fogg, as executor of Hodgkins's estate, and Dorothy J. Dearborn, a sister of the testator, as his donee, defendant Fogg filed a separate answer as executor, the material parts of which are as follows: "That all said moneys deposited by said testator as aforesaid were the sole property of the testator at the time when the same were deposited, and that he caused the same to be deposited in the manner specified in the bill of complaint and the depositor's book to be issued as therein specified, in order that he might draw interest thereon and might avoid the rule of said bank and provisions of revised statutes limiting the amount of deposit from any one person to *two thousand* dollars, and for no other purpose, inasmuch as during all of said time said testator had in said bank in his own name a deposit of *two thousand* dollars. He further alleges and affirms that said *Amos C. Hodgkins*, during the whole of his lifetime, after he made said deposits, had and exercised the absolute and unqualified ownership, possession and control of said depositor's book and of the funds specified therein and the interest accruing thereon, and that neither *Dorothy J. Dearborn*, nor any other person, ever had any right whatsoever to said book or said property or any part thereof,

2d. This defendant, for its further answer to said petition, and by way of cross-bill in support of its request for equitable relief as hereinafter prayed for, states that at the times hereinafter stated, this defendant was and still is a banking corporation, duly created under the laws of the state of *Missouri*, and was and is doing business as a bank at *Kansas City*, *Missouri*, and that during said time it had and still has an office for the transaction of business at the stock-yards in *Kansas City*, *Kansas*, in said *Wyandotte* county; that on the *7th* day of *May*, 1879, *A. M. Ferguson*, the husband of this plaintiff, deposited in defendant's bank, in his wife's name, the sum of $*5,012.60*; that afterward, and prior to *October 4*, 1879, all of said money was withdrawn from defendant's bank, excepting the sum of $*403.46*, which still remains with this defendant, and upon its books stands to the credit of this plaintiff, *S. E. Ferguson*; that upon the last said date, *Homer N. Hibbard*, began in the *Circuit* Court of *Jackson* county, at *Kansas City*, *Missouri*, a suit by attachment against the husband of this plaintiff, wherein said *Hibbard* seeks to recover a judgment against the said plaintiff's husband, in the sum of $*1,350*, and costs, alleged to be due to him from the husband of the plaintiff upon a certain

during the lifetime of said *Amos C. Hodgkins*. He further claims that said *Amos C. Hodgkins* made no disposition whatever of said deposits or any part thereof in his lifetime, and at his decease the same became and still are a part of his estate and as such should be transferred to said *John B. Fogg*, executor as aforesaid, to be disbursed by him according to said will and testament."

The material portions of the answer of *Dorothy J. Dearborn*, in the same case, were as follows: "That said funds were deposited in said bank, in the name and manner before set out, for the express purpose and with the legal effect of creating a trust therein by which the same should be held by said *Hodgkins* from the date of said deposit in trust for his own use during his lifetime, so far as the same might be necessary, and all that should remain undrawn at the decease of said *Hodgkins*, to be held in trust for said defendant absolutely. That at the decease of said *Hodgkins*, there remained undrawn in said bank, on said deposit, the sum of *one thousand three hundred twenty-two and thirty-three one hundredths* dollars, which then and there under the terms of said trust became the absolute property of said *Dorothy J. Dearborn*.

That she is a sister of said *Hodgkins*, and, as she is informed and believes, said *Hodgkins* deposited said money in said bank, and had the book issued as above, for the use and benefit of said defendant, and with the full intention and purpose of transferring to her said funds and the absolute ownership and title thereto. That a few days prior to his decease, said *Hodgkins* delivered said bank book to *John B. Fogg*, the executor named in his last will and testament, with full and complete instructions to hold the same for, and to deliver the same to this defendant as her own goods and property, as he wished to give this defendant more than his other brothers and sisters.

That at the time of said delivery to said *Fogg*, said *Hodgkins* parted with all control over said bank book and the funds in said bank thereby represented, and then and there transferred said funds to this defendant and the absolute ownership therein and title thereto, and that now, and ever since said time, said property has belonged solely and exclusively to this defendant. That said *Fogg*, after the decease of said *Hodgkins*, and in accordance with his instructions, delivered said bank book to this defendant, and she now holds and claims by virtue of the gift aforesaid, to retain the same as her own proper goods and chattels.

That by virtue of the facts hereinbefore stated and by virtue of the gift of said moneys to her by said *Hodgkins* in his lifetime, this defendant now claims the same and denies the right, title and claim of said *John B. Fogg* as executor aforesaid, or of said estate to any part thereof."

promissory note, the payment of which he alleges has not been made, and upon which there is due to him, the said *Hibbard*, from plaintiff's husband, said sum of $*1,350*, and costs; and upon the same day the said *Hibbard* caused to be issued out of said *Circuit* Court a writ of garnishment in aid of said attachment, which was served upon this defendant, and by which it was notified to hold for said *Hibbard* the sum of $*1,332.91*, with interest and costs of suit; and it was further notified to be and appear before the said *Circuit* Court upon the first day of the next term thereof, it being the *twelfth* day of *April*, 1*880*, then and there to answer such allegations and interrogatories as might be exhibited by the said *Hibbard*; that said attachment issued out of said court upon the grounds that the said plaintiff's husband was a nonresident of the state of *Missouri*; and second, that he fraudulently concealed, removed or disposed of his property or effects, to defraud his creditors; and third, that he fraudulently conveyed or assigned his property or effects, so as to hinder or delay his creditors; that the statutes of *Missouri* authorize an attachment of the property of every defendant, if any of the alleged grounds of attachment are sworn to and a bond with good security for double the amount of the debt sued for, to be approved by the clerk of said court, is given; that in said cause such affidavit, alleging the three causes aforesaid for attachment, was made, and a bond as aforesaid given and approved; that said court under the constitution and laws of said state, has jurisdiction of the subject-matter of said cause; that upon the same day, to wit, *October 4th*, 1*879*, this defendant was notified by the attorney of said *Hibbard*, that all moneys standing upon the books of defendant bank to the credit of the plaintiff herein, *S. E. Ferguson*, belonged to her husband, and were placed in her name to defraud the husband's creditors, and especially the said *Hibbard*, and that if the same were paid to her, the said *Hibbard* would hold this defendant liable therefor, under and by virtue of the garnishment proceedings aforesaid, and that afterward, on or about the *20th* day of *October*, 1*879*, a similar notice in writing was served upon this defendant; that afterward the said *S. E. Ferguson*, the plaintiff herein, made demand upon the defendant for said sum of money ($*403.46*), claiming the same to be her property, and not that of her husband, and this defendant refusing to pay the same to her unless indemnified or protected against the claims of said *Hibbard* thereto by virtue of the attachment and garnishment proceedings aforesaid, and she refusing so to do, she did, on the ——— day of ———, 18—, institute suit against this defendant in the *Circuit* Court of *Jackson* county, aforesaid, at *Kansas City*, and at the said *April* term thereof; that at said *April* term of said court said *Hibbard* propounded certain interrogatories to the defendant as garnishee, summoned as aforesaid, and among others exhibited against it, it was interrogated as to whether or not, at or before the time it was summoned as garnishee in this cause, the said *A. M. Ferguson* did deposit with the defendant bank, in the name of his wife, or any other person, any money; and if so, it was required to state when and how much he so deposited, and in whose name, and that afterward, according to the practice of said court and the laws of said state of *Missouri*, this defendant, as such garnishee, did, upon

oath, on the *23d* day of *April*, 1*880*, answer and state the facts of such deposit by this plaintiff's husband as hereinbefore stated to be the case; and at the same term of said court, in answer to the said petition of this plaintiff against the defendant, did allege and show that the money sued for by her was claimed by the said *Hibbard* under his said proceedings, by attachment and garnishment, and at the same term of said court the defendant made an application to said court, showing that it claimed no interest in or title to said sum of $*403.46*, and that it be permitted to pay the same into said court, and that the court order the said *Hibbard* and *A. M. Ferguson* and wife to interplead for said sum, and this defendant be discharged with its fees and costs; but before any action was taken by said court upon said application, this plaintiff dismissed her said suit in said court against this defendant, and began the present action by attaching defendant's property in this court.

This defendant further states, that said suit by the said *Hibbard* is still pending in said *Circuit* Court, and the said *Hibbard*, by virtue thereof, is making claim to said sum of $*403.46*, upon the grounds and through the proceedings aforesaid; that this defendant makes no claim whatever to said sum, but desires merely to be protected against the double claims made against the sum as aforesaid, and that if the same be paid to one of said claimants, it be protected against liability on account of the other; that the said *A. M. Ferguson* and *S. E. Ferguson* reside at present at *Fredonia*, *Wilson* county, *Kansas*; that the said *Hibbard* resides in the state of *Illinois*, but is willing, and so he declares, to interplead for said fund in this court, and to submit himself to its jurisdiction herein, provided he is allowed to prosecute to judgment his action begun as aforesaid in said *Circuit* Court for *Jackson* county, *Missouri*, for the reason that the statute of limitations for the state of *Kansas* would bar his claim on said note, and the said statute of *Missouri* will not, the limitation in said state being upon all contracts in writing ten years, and the notes upon which said *Hibbard* brought said suit having become due *April 17*, 1*874*.

Wherefore this defendant prays that the court order and decree that the said *A. M. Ferguson* be summoned as a party to this action, and that the said *Hibbard* be allowed to enter his appearance herein upon the terms aforesaid; that this defendant be permitted to pay said sum of $*403.46* into court, and that the said *Hibbard* and the said *S. E. Ferguson* and *A. M. Ferguson* be required to interplead for said fund; that this defendant be allowed his attorney-fees and costs in this action; that this action be stayed until the said *Hibbard* obtain judgment, or until his case is prosecuted to final judgment in said *Circuit* Court in *Jackson* county, *Missouri*; that the court order and decree that the defendant, upon the payment of said sum into court, be released from all further liability to either of said *Fergusons* or the said *Hibbard*; and that such other and further relief be granted to this defendant as it may upon the pleadings and proofs be entitled to.

[(*Signature of defendant's attorney.*)][1]

1. See note 4, *supra*, p. 644.

(5 To Compel Distribution of Funds for Benefit of Depositors.

Form No. 7402.[1]

(*Commencement as in Form No. 4272.*)

1. That at the *December* session, 1826, the General Assembly of Maryland passed an act incorporating certain persons, and all other persons becoming members of the *Maryland Savings Institution*, a body politic; granting them among other powers, that to regulate the manner of making and receiving deposits, the forms of certificates to be issued to depositors, and the transfers thereof — to provide for the investment of funds and admission of members.

2. That the said corporation, by its charter, was capable of receiving from any free person or persons any deposit of money, and that all money so received, should be invested in public stocks or other security, at the discretion of the directors, and in the manner deemed most safe and beneficial; and prohibiting expressly the loan of any of the said funds to any officer or director of the said corporation.

3. That in every year the directors should make a dividend of profits and pay the same to the depositors.

4. That the said corporation was prohibited from doing any act inconsistent with the privileges secured to the existing banking institutions of the state.

5. That the company was organized and, under third and fifth sections of the first article of the by-laws, the complainant became a weekly depositor, and so continued until the receipt of a circular from the treasurer of the said institution requiring him to discontinue depositing, at which time his deposits amounted to $*520.00*.

6. That the depositors, upon receipt of such circular, did submit to the proposition in the resolution therein contained, to change the original character of their deposits, though the same was not done of their free will or advisedly, but in consequence of the penalty attached by the resolution aforesaid to a noncompliance with the law referred to therein, and that the depositors did not thereby intend or design relinquishing their character and claims as depositors, and that the said resolution and by-laws were void; that loans were made to directors and officers of the said corporation, and that the said resolution and by-laws were made to conceal such loans, and in fraud of the right of depositors; that the certificates issued by such corporation bearing interest are void and were entered into to enable said company to use banking privileges, contrary to its char-

1. **Based on the facts** in Maryland Sav. Inst. *v.* Schroeder, 8 Gill & J. (Md.) 94. In that case the chancellor ordered a writ of injunction to issue, which order, however, on appeal, was reversed, the appellate court holding that the depositor was not entitled to invoke the restraining power of the court under the circumstances of the case, as a party reaping profits by his own voluntary act, founded upon a contract with another, cannot, as against the creditors of such other party, vacate his own contract to their prejudice, and claim to participate in equity and commissions upon the insolvency of such other party equally with his creditors in his estate, and in opposition to the terms and effect of the original agreement.

ter, through the aid of the sums deposited; that it did in fact erect itself into a bank, and assumed banking powers in the discounting of notes and circulation of bank paper.

7. That complainant never became a member of such corporation, that said corporation is insolvent, and in *May*, 1834, suspended payment.

8. That complainant is a depositor in said company, and claims to be entitled to the amount of his deposit, either to the exclusion of the holders of certificates of special deposit or in common with them, which right the said corporation denies.

9. That the said institution and its directors are engaged solely in settling up its business and disposing and distributing the funds and effects held by it, which belong to its depositors, and that settlements are continually effected by giving unjust and improper preferences, and that it is paying or intends paying as far as practicable the whole amount of the certificates of special deposit, whereby all the funds and effects held by said institution will be exhausted to your orator's utter and irremediable injury.

To the end therefore:

1. That equity may be done in the premises by an equal and just distribution of all the funds and effects held by said institution among all its depositors.

2. That your orator may have such further and other relief (*concluding as in Form No. 4272*).

(6) Where Deposit has been Lost or Destroyed.

(*a*) *Declaration.*[1]

Form No. 7403.

(Precedent in Ross *v.* Burlington Bank, 1 Aik. (Vt.) 43.)[2]

1. For the formal parts of bills in equity, complaints, or petitions and declarations, see the titles Bills in Equity, vol. 3, p. 417; Complaints, vol. 4, p. 1019; Declarations, *ante*, p. 244.

2. In this case it was held that proof of the loss of a bank bill and of notice and demand at the bank was not sufficient to enable the owner to recover of the bank in an action of assumpsit, but that proof of the actual destruction of the bill with notice and demand was sufficient for that purpose. There were three other counts in the declaration, as follows:

Second count. "Also, for that whereas, the defendants, on the same *25th* day of *August*, 1819, at said *Burlington*, in consideration of certain large sums of money before that time advanced and delivered to the defendants, made, executed, and delivered to sundry persons, sundry notes, commonly called bank bills, amounting in the whole to *3200* dollars, to wit, *800* notes for the sum of *two* dollars each, *160* notes for the sum of *five* dollars each, and *eighty* notes for the sum of *ten* dollars each; and in and by said notes, by the name of *The President, Directors, and Company of the Bank of Burlington*, promised to pay to the several persons named in said notes respectively, or to the bearer, the sums of money in each bill respectively mentioned, on demand; which said notes afterwards, to wit, on the *4th* of *September*, were, for a good and valuable consideration, transferred and delivered to the plaintiff, of which the defendants on the same day and year last aforesaid, at, etc., had notice. By reason of which, the defendants became liable, etc., and being so liable, undertook, etc." (*Demand of payment, and destruction of the bills, as averred in the first count.*)

[(*Commencement as in Form No. 6950.*)][1]

For that, whereas, the defendants, on the *25th* day of *August*, 18*19*, at *Burlington*, in the said county of *Chittenden*, in consideration that the plaintiff before that time had, at the special instance and request of the defendants, deposited and delivered to them, at the bank of *Burlington*, a large sum of money, to wit, the sum of *eight hundred* dollars, made and executed sundry notes, commonly called bank bills, bearing the same date and year aforesaid, amounting in the whole to the sum of *eight hundred* dollars; in and by which notes the defendants, by the name of *The President, Directors and Company of the Bank of Burlington*, promised to pay the several persons named in said notes, respectively, or to the bearer, the sum of money in said notes, respectively mentioned, on demand: and then and there delivered the said notes to the said *William D. Ross*, and thereby became liable to pay the said *William D.* the sum of *eight hundred* dollars, specified in the notes aforesaid, according to the tenor and effect of the said notes. And the defendants, so being liable, undertook, etc., and the said *William D.* avers that afterwards, to wit, on the *30th* of *December*, 18*19*, at the bank in said *Burlington*, he did request and demand payment of the said sum of *eight hundred* dollars. And the said *William D.* further says that all and singular the notes aforesaid were destroyed and consumed by fire, to wit, on the *5th* day of *September*, 18*19*, of which the defendants were duly notified, at the time and place of making the aforesaid demand.

[(*Concluding as in Form No. 6950.*)][1]

(*b*) *Answer Setting Up Robbery.*[2]

Form No. 7404.

(Precedent in Keen *v.* Beckman, 66 Iowa 673.)[3]

[(*Title of court and cause as in Form No. 1324.*)

Third count was a general count for money had and received.

Fourth count was for money paid, laid out and expended.

A special demurrer was filed in the case to the first two counts, and general issue pleaded to the last two counts. The first two counts being adjudged sufficient, the demurrer was withdrawn, and the general issue pleaded to the whole declaration, and judgment for the plaintiff was sustained on appeal.

1. The words to be supplied in [ ] are not in the reported case, but should be added to make the precedent complete.

2. **For the formal parts** of answers and pleas, generally, see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; PLEAS.

For another answer, setting up robbery as a defense in such an action, see *infra*, Form No. 7415.

3. **A demurrer to this answer** was filed, upon the ground that it set up as a defense a parol agreement altering and varying a written contract. In delivering the opinion of the court, Chief Justice Beck says: "In our opinion the demurrer was erroneously sustained. It will be observed that the instrument sued on was simply an acknowledgment of the receipt of money on deposit, without any stipulation for payment by the defendants, or for the payment to them of compensation in any way. It simply shows that they did receive the money mentioned on deposit. The word deposit used in the receipt does neither imply that the defendants are bound to pay absolutely the amount mentioned in the receipt nor that they are to return the indentical money they received. The parties settled the meaning of the word by

1. (*General denial.*)[1]

2. For further answer, defendants aver that at the time said money was received from plaintiff and said receipt was given, defendants were, and still are, merchants in the town of *Clayton*, in the county of *Clayton*, *Iowa*; that the money mentioned in said petition was, in pursuance of an oral understanding and agreement between the parties, left by plaintiff with defendants for the accommodation of the plaintiff and to be put in defendants' iron safe, and without any right in defendants to use the same, or to any compensation; that the money was placed in the safe and not mingled with other money, and, while being so kept, the said safe was broken open and robbed by persons unknown, and the said moneys, with others, feloniously carried away, without any fault or neglect on the part of defendants. Wherefore defendants ask judgment for costs.

[(*Signature of defendants' attorney.*)][1]

(7) Where Deposit was Made for Specific Purpose.

(*a*) *Petition.*[2]

aa. Generally.

Form No. 7405.

(Precedent in LeRoy Bank *v.* Harding, 1 Kan. App. 391.)[3]

[(*Title of court and cause as in Form No. 5917.*)][4]

their agreement. It is a familiar rule that a contract may be partly reduced to writing and partly exist by verbal agreement. In such a case, the whole contract may be shown and the rule that a written contract cannot be varied by oral evidence is not violated by the introduction of such evidence showing the parts of the contract not reduced to writing. The defendants' answer presented a good defense and they ought to have been permitted to allege and prove the real and whole agreement upon which the money was deposited with them."

1. The words to be supplied in [ ] will not be found in the reported case, but should be added to render the form complete.

2. **For the formal parts** of bills in equity, complaints, petitions and declarations, see the titles Bills in Equity, vol. 3, p. 417; Complaints, vol. 4, p. 1019; Declarations, *ante*, p. 244.

3. In this case the petition was attacked on the ground that it should be made more definite and certain, but the court held that it sufficiently apprised the defendant of the precise nature of the action against him.

For answer in this case see *infra*, Form No. 7407.

For reply in this case see *infra*, Form No. 7408.

4. **Motion to make petition more specific,** which was overruled, was filed in this case and, omitting the formal parts, was as follows: "Comes now the said defendant, by *Redmond & Junkins*, its attorneys, and moves the court to require said plaintiff to make his petition herein definite and certain in the following particulars, to wit: First. That plaintiff state whether, at the time of making said alleged deposit with the defendant, he (the plaintiff) received from defendant any certificate or other written evidence of such deposit; and, if so, that the plaintiff set out in his petition a copy of the same. Second. That plaintiff state whether he directed the said defendant to pay said money to divers persons, as alleged in his petition, orally or in writing; and, if in writing, that he attach to or set out in his petition a copy of such written direction; and, if orally, then that the plaintiff set out the particulars fully as to amounts and names of persons to whom said moneys, by plaintiff's said

The said plaintiff, *H. B. Harding*, for his petition and cause of action against the said defendant, the *Bank of Le Roy*, alleges that it, the *Bank of Le Roy*, is a corporation duly organized under the laws of the State of *Kansas*;[3] that in the month of *December*, 1887, the said plaintiff deposited with the said defendant the sum of $*2,800* and directed the said defendant to pay said moneys to divers persons, whose names and the amount to be paid to each were furnished to the said defendant by the said plaintiff at the time. Among others, the plaintiff directed the defendant to pay *I. S. De Ford* and *John Wackman* $*829.94*, which said payment was to be made upon the joint check of said *De Ford* and *Wackman* and not otherwise; that the said *De Ford* and *Wackman* refused to draw said money so deposited as aforesaid, and refused to accept the same, but, upon the contrary, brought suit against the plaintiff and obtained judgment against him for all of the moneys due from the plaintiff to said parties, which judgment the plaintiff paid in full; but before the bringing of this suit the plaintiff demanded of the said defendant the said sum of money and the defendant refused to pay the same to the plaintiff, or any part thereof. Wherefore an action hath accrued to the plaintiff. He therefore brings suit and prays for a judgment against said defendant for said sum of money, to wit, $*829.94* with interest thereon at *7* per cent. per annum from the *1st* day of *January*, 1887, and the costs of this suit. [(*Signature of plaintiff's attorney.*)][1]

bb. To Compel Proper Disposition of Deposit.[2]

Form No. 7406.[3]

(*Title of court and cause as in form No. 5921.*)

Plaintiff states that on the *fourteenth* of *October*, 1872, he borrowed of one *Dyson two thousand* dollars for *three* years, and executed his note of that date, payable *three* years after, with *ten* per cent. interest per annum compounded annually, and a deed of trust conveying

direction, were to be paid. Third. That plaintiff state in what court said *De Ford and Wackman* brought suit against said plaintiff, and who were parties plaintiff and defendant therein, and what judgment was rendered therein, together with the date of such judgment, and that plaintiff state when and to whom he paid such judgment."

For motions to make pleadings more definite and certain, generally, see the title Definiteness and Certainty in Pleading, *ante*, p. 273.

1. See note 2, *supra*, p. 651.

2. **Precedent of petition** in an action for an unauthorized disposition of deposits is given in Ilgenfritz *v.* Pettis County Bank, 21 Mo. App. 560, which, omitting the formal parts, is as follows: "The plaintiff further states, that on the said *ninth* day of *November*, 1881, he deposited with said *Pettis County Bank* the sum of *one hundred and fifty* dollars, with instructions to send said sum of money to *D. R. Francis* at *St. Louis, Missouri*; that defendant failed to send said money to *D. R. Francis* at *St. Louis*, but sent said money by mistake to one '*J. W. Francis*' at *St. Louis, Missouri*, and said money was returned to defendant; that plaintiff has frequently demanded said sum of *one hundred and fifty* dollars from defendant, but that defendant has failed and refused and still fails and refuses to pay the same over to him."

3. **Founded on facts** in Judy *v.* Farmers, etc., Bank, 81 Mo. 407. A decree in conformity with the prayer of the petition was sustained in that case.

The defendant's answer to this petition set up substantially "that said sum of $*2,500* was received on the *4th* day of *January*, 1875, as deposit money and

about *one thousand* acres of land, as security therefor. About the *first* of *January*, 1875, he applied to one *Cassidy* to borrow for a term of years *five thousand* dollars, and proposed to secure it by a deed of trust on the same land, to which said *Cassidy* assented on the condition that out of the money so borrowed plaintiff should cause the *Dyson* note to be paid, and procure a release of the deed of trust, given to secure it. That thereupon plaintiff executed a note for *five thousand* dollars to said *Cassidy*, payable in *five* years, and a deed of trust, conveying said land to secure it, which were delivered to *Cassidy*, who then authorized plaintiff to draw on him for the money through some bank upon the express condition that said bank should hold *twenty-five hundred* dollars of the amount, and place it to *Dyson's* credit, and hold it for the use of *Dyson* to pay for the said note. That plaintiff went to defendant bank, which took the draft, agreeing to collect it and pay to plaintiff *twenty-five hundred* dollars and place the balance to *Dyson's* credit, and pay it to him, and take his release of said deed of trust, and to notify *Dyson* when the money should be received. That said bank collected the money, but has never paid said *Dyson's* note, and that said note and deed of trust has become due, and *Dyson* is now about to proceed to sell said land. Wherefore plaintiff prays that defendant bank be compelled to pay for and discharge said *Dyson's* note and procure a release of said deed of trust, and for general relief. (*Signature of plaintiff's attorney as in Form No. 5921.*)

(*b*) *Answer*[1] — *Lis Pendens.*[2]

Form No. 7407.

(Precedent in Le Roy Bank *v.* Harding, 1 Kan. App. 391.)[3]

[(*Title of court and cause as in Form No. 1325.*)][4]

Comes now said defendant, and for answer to plaintiff's petition says: First. This defendant denies each and every allegation, averment, matter and thing in plaintiff's petition contained. Second. And said defendant for a second and further answer herein says: That on the *27th* day of *December*, 1886, one *John Wackman* deposited with this defendant the sum of $*2,828.96*, and at the same time said *John Wackman* deposited with this defendant his directions in writing, signed by him, said *John Wackman*, and therein and thereby

placed to the credit of *John P. Clark*. That plaintiff afterward, while said money was still in bank to *Clark's* credit, was informed of the fact, and also that *Clark* could draw it out, and he made no objection thereto; that it remained in the bank to *Clark's* credit for *six* months, without any objection from plaintiff; that afterward it was paid to, and used by *Clark*; that the bank received it as a deposit only, and, by direction of plaintiff and *Cassidy*, placed it to *Clark's* credit." Plaintiff denied defendant's answer, and the issues were found in favor of plaintiff.

1. **For the formal parts** of answers and pleas, generally, see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; PLEAS.

2. **Lis Pendens.** — For forms relating to another suit pending as a defense see the titles ABATEMENT, PLEAS IN; LIS PENDENS.

3. **For petition** in this case see *supra*, Form No. 7405.

For reply in this case see *infra*, Form No. 7408.

4. The words to be supplied in [ ] will not be found in the reported case, but should be added to make the form complete.

directed said defendant to pay said moneys to divers persons, whose names and the amount to be paid to each were furnished to said defendant in said direction in writing, a copy of which said direction in writing is hereto attached, marked "Exhibit *A*,"[1] and by incorporation made a part of this answer; that thereafter, and in pursuance of said direction, this defendant paid out said moneys to the several persons in the several sums as therein directed, all save and except the said sum of $*829.94*, so as aforesaid directed to be paid out upon the order of *I. S. De Ford* and *John Wackman*; that no order of *I. S. De Ford* and *John Wackman*, or either of them, for said last mentioned sum of money, or any part thereof, has ever been presented to this defendant, nor have said *I. S. De Ford* and *John Wackman* ever demanded of this defendant said money or any part thereof; that after said moneys were deposited with this defendant as aforesaid, and while there still remained with this defendant said $*829.94* thereof, on the *15th* day of *January*, A. D. 1887, one *J. R. Ahlefeld* commenced, before *G. Wilkinson*, a justice of the peace of *Le Roy* township, in said county, an action against said *John Wackman* upon account, and in said action a garnishee summons was duly served upon this defendant *January 15th*, 1887, and before any order of *I. S. De Ford* and *John Wackman*, or either of them, had been presented for said moneys, and before any demand by said *De Ford* and *Wackman*, or either of them; and therefore this defendant appeared on *January 18th*, 1887, before said justice and answered upon oath as garnishee in regard to said moneys of said *John Wackman* in hands of this defendant as aforesaid; and upon such answer and on conclusion of the hearing of said case, on the *18th* day of *January*, 1887, it was duly adjudged by said justice that said *J. R. Ahlefeld* have and recover of said *John Wackman* the sum of $*300* and costs, $*5.40*, and it was then and there duly ordered by said justice that this defendant the *Bank of Le Roy*, pay into the court the sum of $*305.40*; and thereupon, in pursuance of said order and judgment of the court, this defendant did pay into court, of said moneys, the sum of $*305.40*, all and every of which proceedings will more fully appear

1. **Exhibit A in the text mentioned** was as follows, to wit:

"*Le Roy, Kas., December, 27*, 1886.

Memorandum.

Whereas, I have this day made settlement with *H. B. Harding & Co.*, for all claims against them on account of the firms of *De Ford & Wackman* and *I. S. De Ford & Co.*, as a partner in both firms; and whereas, there is a disagreement as to accounts between *I. S. De Ford* and myself, as partners in the aforementioned firms of *De Ford & Wackman* and *I. S. De Ford & Co.*: Now, therefore, this is to witness that I have agreed to and do place in the hands of the cashier of the *Bank of Le Roy, Kas.*, the full sum of $*2,828.96*, being the full balance due from said *Harding & Co.*, to the aforesaid-mentioned firms, to be held by said cashier for disbursement as follows, to wit: $*2,001.92* to be paid to the creditors of said *I. S. De Ford & Co.*, viz.:

Goddard, Peck & Co.	$*821 14*
Gauss & Co.	*408 50*
Gauss, Shelton & Co.	*39 25*
Crow, Hagardine & Co.	*538 58*
Chambers	*82 78*
Wade	*116 67*
	$*2,001 92*

Upon their drafts for the same, or upon receipts properly signed by them, the said creditors, and the balance of $*827.04* to be paid out by said cashier only upon orders signed jointly by myself and *I. S. De Ford*.

John Wackman."

by reference to the records and files of said justice's court; that after said moneys were so deposited with this defendant as aforesaid, and while there still remained with this defendant said *$829.94* thereof, on the *15th* day of *January*, 1*887*, one *John Fallakey* commenced, before *J. Wilkinson*, a justice of the peace in *Le Roy* township, in the said county, an action against said *John Wackman* upon account, and in said action a garnishee summons was duly served on this defendant on *January 15th*, 1*887*, and before any order of said *I. S. De Ford* and *John Wackman*, or either of them, had been presented for said moneys, and before any demand thereof by said *De Ford* and *Wackman*, or either of them had been made; and thereafter this defendant appeared, on *January 18th*, 1*887*, before said justice and answered upon oath as garnishee in regard to said moneys of said *John Wackman* in hands of this defendant as aforesaid; and upon such answer and on conclusion of the hearing of said case, on the *18th* of *January*, 1*887*, it was duly adjudged by said justice that said *John Fallakey* have and receive of said *John Wackman* the sum of *$300*, and costs, *$5.40*, and it was then and there duly ordered by said justice, that this defendant, the *Bank of Le Roy*, pay into court the sum of *$305.40*; and thereupon in pursuance of said order and judgment of the court, this defendant did pay into court of said moneys the sum of *$305.40*, all and every of which proceedings will more fully appear by reference to the records and files of said justice's court; that after said moneys were so deposited with this defendant as aforesaid, and while there still remained with this defendant said *$829.94* thereof, on the *15th* day of *January*, 1*887*, one *Charles W. Becker* commenced before *G. Wilkinson*, a justice of the peace of *Le Roy* township, in said county, an action against said *John Wackman* upon account, and in said action a garnishee summons was duly served on this defendant on *January 15th*, 1*887*, and before an order of said *De Ford* and *John Wackman*, or either of them, had been presented for said moneys, and before any demand thereof by said *De Ford* and *Wackman*, or either of them; and therefore, this defendant appeared, on *January 18th*, 1*887*, before said justice and answered upon oath as garnishee in regard to said moneys of said *John Wackman* in the hands of this defendant as aforesaid; and upon such answer and the conclusion of the hearing of said case, on the *18th* day of *January*, 1*887*, it was duly adjudged by said justice that said *Charles W. Becker* have and recover of said *John Wackman* the sum of *$224* and costs, *$5.40*, and it was then and there duly ordered by said justice that this defendant, the *Bank of Le Roy*, pay into court the sum of *$219.14*, and thereupon in pursuance of said order and judgment of the court, this defendant did pay into court of said moneys the said sum of *$219.14*; all and every of which proceedings will more fully appear by reference to the records and files of said justice's court; that said several sums of moneys so paid into said justice's court, in said three several actions against said *John Wackman*, amounting to the sum of *$829.94*, are the same moneys and funds so as aforesaid originally deposited with this defendant as aforesaid, and are the same funds which plaintiff now claims in this action; that before the said several actions were commenced against said *John Wackman* the said plaintiff was informed

and had due notice that said several actions were about to be commenced against said *John Wackman*, and that said funds in the hands of this defendant would be garnished and appropriated in said action as the property of said *John Wackman*, and said plaintiff was inquired of as to whether he, the said *H. B. Harding*, had or claimed any interest in said funds, and upon said information, notice and inquiry, said *H. B. Harding* then and there disclaimed any right, title or interest in said funds, of all which information, notice and inquiry and of the said disclaimer of said *H. B. Harding* thereto, this defendant was fully informed and had due notice before said moneys were paid over as garnishee as aforesaid; that before the said several actions were commenced against said *John Wackman*, the said *I. S. De Ford* was informed and had due notice that said several actions were about to be commenced against said *John Wackman*, and that said funds in the hands of this defendant would be garnished and appropriated in said action as the property of said *John Wackman*, and said *I. S. De Ford* was inquired of as to whether he, the said *I. S. De Ford*, had or claimed any interest in said funds, and upon such information, notice and inquiry, said *De Ford* then and there disclaimed any right, title or interest in said funds, of all which information, notice and inquiry, and of the disclaimer of *I. S. De Ford* thereto, this defendant was fully informed and had due notice before said moneys were paid over as garnishee aforesaid. Wherefore this defendant prays judgment against said plaintiff for its costs. [(*Signature of defendant's attorney.*)][1]

(*c*) *Reply.*

Form No. 7408.

(Precedent in Le Roy Bank *v.* Harding, 1 Kan. App. 397.)[2]

1. The words to be supplied in [ ] will not be found in the reported case, but should be added to make the form complete.

2. **For form of the petition** in this case see *supra*, Form No. 7405.

For form of the answer in this case see *supra*, Form No. 7407.

Motion to make this reply more definite and certain was, omitting formal parts, as follows: "Comes now said defendant and moves the court to require the said plaintiff to make his reply more definite and certain in the following particulars, to wit:

First. That said plaintiff separately state and number his several replies and pretended defenses to the answer of the defendant: (1) By separating and numbering that part of his said reply from the beginning thereof to and including the words 'Exhibit *A*' in the *sixth* line of the body of said reply; (2) by separately stating and numbering that portion of his said reply following the words 'Exhibit *A*' in said *sixth* line to and including the words 'notice,' in the *eleventh* line of the body thereof; (3) by separately stating and numbering that part of his said reply beginning with the last two words of said *eleventh* line, to and including '*De Ford*,' in the *twenty-first* line of the body of said reply; (4) by separately stating and numbering that part of the reply following the said words '*De Ford*,' in the *twenty-first* line thereof, to and including the word 'notice,' in the *eighth* line of the *second* page of said reply; (5) by separately stating and numbering that part of said reply following the said word 'notice' in the *eighth* line of the *second* page thereof, to and including the word 'herein' in the *eighteenth* line of the *second* page thereof; and (6) by separately stating and numbering the remaining part of said reply from the said word 'herein' in the *eighteenth* line of the *second* page to the end of said reply.

[(*Title of court and cause, and venue as in Form No. 5917.*)][1]

Comes now the plaintiff, and for his reply to the answer of the defendant filed herein says: He denies each, all and singular, the allegations in said answer contained, save and except what is herein specifically admitted. The plaintiff admits the execution of the paper, a copy of which is attached to said answer and marked "Exhibit *A*," but alleges the fact to be that the said moneys mentioned and described in said paper were not deposited by the said *John Wackman*, but were deposited in said bank by this plaintiff, who had made settlement with the said *John Wackman*, and were deposited by said plaintiff for the specific purposes mentioned in said exhibit, of all of which said bank had due and legal notice. The plaintiff, further replying to said answer, says: That before the making of said deposit and on, to wit, the *11th* day of *November*, 1*886*, the said *John Wackman* sold and transferred to the said *I. S. De Ford* all of his rights and interest in and to the then existing partnerships of *De Ford & Wackman* and *De Ford & Co.*, for a valuable consideration; and at the time said pretended settlement, set forth and stated in the answer of said defendant, the said *Wackman* had no interest whatever in the several sums of money due from the said *H. B. Harding* to the said firms of *De Ford & Wackman* and *I. S. De Ford & Co.*; that subsequent to the deposit of the money with the defendant bank, and some time in the month of *December*, 1*886*, the said *I. S. De Ford*, by virtue of the sale and assignment to him as aforesaid, commenced an action in the *district* court of *Wilson* county, *Kansas*, against the said *H. B. Harding* to recover the moneys due the late partnerships of *De Ford & Wackman* and *I. S. De Ford & Co.*, less the amount paid to the creditors of said firms mentioned in "Exhibit *A*" attached to defendant's answer; that, subsequent thereto, judgment was rendered in said action in favor of said *De Ford* for the sum of $*1,000*, which the said plaintiff was compelled to pay, and did pay to the said *I. S. De Ford*, of all of which the defendant bank had notice. The plaintiff, further replying to said answer, says: That the said several suits mentioned and set forth in said answer, commenced before *G. Wilkinson*, a justice of the peace of *Le Roy* township, in said county, against *John Wackman*, and the several garnishee summonses issued in said suits, were brought by the respective plaintiffs and against the said defendant by collusion, with full knowledge upon the part of the respective parties that the

Second. That defendant asks the court to require said plaintiff to make his reply more definite and certain by stating therein who is meant by the words 'said defendant' at the beginning of the *fourteenth* line of the *second* page of said reply.

Third. The defendant asks the court to require said plaintiff to make his reply more definite and certain by stating who is meant by the words 'said defendant' at the end of the *seventeenth* line and beginning of the *eighteenth* line of the *second* page of said reply."

Upon the hearing of this motion, the court sustained the said motion as to the first, second and third counts thereof and overruled the fourth count of said motion, which is not here given.

For forms of motions to make pleadings more specific, generally, see the title DEFINITENESS AND CERTAINTY IN PLEADING, *ante*, p. 273.

1. The matter to be supplied in [ ] does not appear in the report of the case, but should be added to complete the form.

For the formal parts of replies, generally, consult the title REPLIES.

said *John Wackman* was not indebted to said parties in any sum whatsoever, it being the objective purpose and intention of the several plaintiffs and the said defendant to defraud the plaintiff herein; that the said bank gave the said plaintiff no notice of service of garnishee proceedings upon it, nor did it give the said *I. S. De Ford* any notice of service of garnishee summons, although the bank, at the time each of the garnishee summonses was served upon it, had actual knowledge that the said *De Ford* had commenced a suit against the said *H. B. Harding*, claiming that the said *Wackman* had assigned to the said *De Ford*, for a valuable consideration, his (the said *Wackman's*) entire interest in the said partnerships of *I. S. De Ford & Co.* and *De Ford & Wackman*, and that said suit was still pending at the time the defendant claims it paid the money out on the orders of the justice of the peace, as stated in said answer. [(*Signature of plaintiff's attorney as in Form No. 5917.*)][1]

b. With Hospital.

Form No. 7409.[2]

(*Title of court and cause, and commencement as in Forms Nos. 5910, 5940, 5947.*)[3] That at all times mentioned in this complaint the said defendant did maintain and conduct a house known as *St. Mary's Hospital*, wherein it received, boarded, lodged and cared for, persons for pay or hire; that on the *tenth* day of *July*, 1882, *Collins* became

1. See note 1, *supra*, p. 657.

2. **Founded on the facts** in Rankin *v.* Sisters of Mercy, 82 Cal. 88. To the complaint in that case a demurrer was interposed, and overruled for want of prosecution. The defendant then answered, and upon a verdict and judgment for the plaintiff the defendant appealed. In support of the appeal, it was claimed that the complaint did not state facts sufficient to constitute a cause of action because there was no averment of nonpayment, the averment being that "defendant has neglected and refused to pay, etc." It was held sufficient and equivalent to a statement that the defendant had failed and refused to pay.

Defendant's answer was as follows: "Denying that at the time named, or at any other time, '*Collins* deposited with the defendant the sum of *two thousand* dollars in United States gold coin, or ever deposited any sum of *two thousand* dollars with the defendant, except as hereinafter stated'; denies that said sum of *two thousand* dollars was deposited with or received by the defendant for the purposes, or on the terms and conditions stated in the complaint; denies that *ten* dollars per week would be a reasonable compensation for the board, lodging, and care of *Collins* while an inmate of the house, or that *fourteen hundred* dollars or any sum whatever is due or payable to plaintiff by defendant.

And for a further and separate defense to this action, the answer alleges: That the said *Collins*, on or about the date and time stated in the complaint, entered into a contract with the defendant, whereby the defendant agreed to admit the said *Collins* into the said hospital, and take care of, support, and maintain him during the remaining period of his natural life, and provide him with a home in said hospital, and in consideration therefor the said *Collins* agreed to pay, and did pay to the defendant, the sum of *two thousand* dollars, and thereupon entered the said hospital as his home under said agreement, and was cared for, boarded, and lodged therein by the defendant until the said time of his death, according to the terms of the aforesaid agreement."

3. **For the formal parts** of bills in equity, complaints, petitions and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

an inmate of said house, to be boarded, lodged, and cared for by defendant, and on the same day the said *Collins* deposited with defendant the sum of *two thousand* dollars in gold coin; that the purpose of the said deposit so made was to have the money safely kept by defendant, and a reasonable portion thereof applied in payment of the board, lodging, and the care furnished to him, and the balance thereof returned whenever he should depart from or cease to be an inmate of the said house; that defendant received the money on the terms and conditions aforesaid and agreed to observe the same; that *Collins* remained an inmate of the house and was cared for by the defendant until he died; that *ten* dollars a week would be a reasonable compensation for the board, lodging, and care furnished the said *Collins* while he was an inmate of the house, and that the balance of said sum of *two thousand* dollars, to wit, the sum of *fourteen hundred* dollars, is due and payable to the plaintiff from the defendant, and the defendant has neglected and refused to pay the same or any part thereof, though requested to do so by the plaintiff; wherefore (*concluding as in Form No. 5940*).[1]

c. With Private Person.

(1) Generally.

BY ASSIGNEE OF CERTIFICATE OF DEPOSIT.

Form No. 7410.

(Precedent in Smilie *v.* Stevens, 41 Vt. 322.)[2]

[(*Commencement as in Form No. 6950*)][3] the defendant, at *New York*, to wit, at *St. Johnsbury*, on the *17th* day of *August*, 1865, by his certain other certificate of deposit of that date by him subscribed, which said certificate of deposit is in the words and figures following, to wit: '$*500. New York, August 17*, 1865. I certify that *James Smilie, Jr.*, has deposited with me *five hundred* dollars payable to his order on demand, with interest from *February 15*, 1864, on return of this certificate and my guarantee of his note to his brother, *John Smilie*, dated *February 15*, 1864, for the sum of *five hundred* dollars. *Simon Stevens.*' Promised one *James Smilie, Jr.*, to pay to his order *five hundred* dollars on demand, with interest from the *15th* day of *February*, 1864, on the return of the said certificate and the guarantee of him, the said *Simon Stevens*, of the note of the said *James Smilie, Jr.*,

1. **For the formal parts** of bills in equity, complaints, petitions and declarations, generally, see the titles Bills in Equity, vol. 3, p. 417; Complaints, vol. 4, p. 1019; Declarations, *ante*, p. 244.

2. **Defendant demurred to this count** of the declaration in the county court on the ground that the instrument declared upon is not a negotiable instrument, so that the plaintiff can sustain a suit direct in his own name, and secondly that no sufficient consideration is set out to sustain the promise relied upon, but the demurrer was overruled and the decision of the county court was affirmed on appeal.

The second count was not set out in the reported case, as no question was raised upon it.

3. The words to be supplied in [ ] are not to be found in the reported case, but should be added to make the form complete.

to the brother of him, the said *James Smilie, Jr.*, to wit, *John Smilie*, the plaintiff, dated *February 15*, 1864, for the sum of *five hundred* dollars, and, the said *James Smilie, Jr.*, having on the *first* day of *September*, 1865, indorsed and delivered the said certificate of deposit to the plaintiff, who thereby became and was the sole owner thereof, and was on the day of the date of this writ, and still is, such sole owner thereof, and ordered in writing, by him, the said *James Smilie, Jr.*, subscribed upon the said certificate, the contents thereof to be paid to the plaintiff, of which the defendant then and there had due notice, the defendant then and there, in consideration thereof and in consideration of the sum of *five hundred* dollars which the defendant then and there had of the plaintiff's money, undertook, and specially promised the plaintiff, to pay him the sum of *five hundred* dollars and interest thereon, according to the tenor of said certificate; and the plaintiff avers that he, to wit, on the *9th* day of *September*, 1865, at *Barnet*, to wit, at *St. Johnsbury*, tendered to the said *Simon Stevens* the return of the said certificate of deposit and the said guarantee of him, the said *Simon Stevens*, of the note of the said *James Smilie, Jr.*, to him, the said plaintiff, dated the *15th* day of *February*, 1864, for the sum of *five hundred* dollars. Yet the said *Simon Stevens*, not regarding his said promise to the plaintiff, has never paid the plaintiff the sum of *five hundred* dollars and interest, or part thereof, but neglects and refuses so to do, [(*concluding as in Form No. 6950*).][1]

(2) With Vendor of Realty.

Form No. 7411.

(Precedent in Lewis *v.* Rothchild, 92 Cal. 627.)[2]

[(*Title of court and cause, and commencement as in Form No. 5910.*)][1] That during the fiscal years 1878–79, and for many years prior thereto, one *H. Cummings* was the owner of said premises, and was assessed for said fiscal years, for his personal property situated in the city and county of *San Francisco*, $7.30 for state, city, and county purposes, which plaintiff alleges have not been paid, and constitute a valid lien upon said premises; and plaintiff further alleges that one *Elizabeth Mitchell* was the owner of said premises during the fiscal years 1884–85, and for many years prior thereto, and that she was

1. The words to be supplied in [ ] do not appear in the reported case, but should be added to render the form complete.

For the formal parts of bills in equity, complaints or petitions, and declarations generally, see the titles Bills in Equity, vol. 3, p. 417; Complaints, vol. 4, p. 1019; Declarations, *ante*, p. 244.

2. **A demurrer to this complaint** was sustained in the lower court, but on appeal the ruling was reversed and the cause remanded, with direction to the court below to overrule the demurrer. In this case, the purchaser deposited with the vendor a certain part of the purchase price, which the latter was to return if any valid lien should be found to exist upon the premises, unless such liens were removed within a stipulated time after notice to the vendor of their existence. Liens upon the property for taxes remaining unpaid were held to be such liens as come within the purview of the contract, and upon the refusal of the vendor to remove them the purchaser was entitled to recover the deposit paid.

assessed for said fiscal years, for her personal property situated in said city and county, $2.72 for state, city, and county purposes, which has never been paid, and constitutes a valid lien upon said premises; and plaintiff further alleges that *ten* days before the commencement of this action he notified defendant, in writing, of the existence of said liens, and requested him to remove the same, which he refused and neglected, and still refuses and neglects, to do, and that said taxes remain wholly unpaid and unsatisfied, and the premises unsold for the payment thereof; and on the *second* day of *November*, 1889, plaintiff demanded the return of said $350 deposited by him with defendant, but defendant refused and neglected, and still refuses and neglects, to return the same, and that the same or any part thereof has never been returned, wherefore he brings this action to recover the same, [and prays judgment (*concluding as in Form No. 5910*).][1]

2. Relating to Deposits Other than Money.[2]

a. To Recover Note or Proceeds thereof.

(1) Generally.

Form No. 7412.

(Precedent in Burgin *v.* Riggins, 3 N. J. L. 234.)[3]

1. See note 1, *supra*, p. 660.

2. **Precedent.**— In Wallace *v.* State Bank, 7 Ark. 61, the suit was founded upon four certificates of deposit. The first special count was substantially as follows: "*Alfred Wallace*, by attorney, complains of the *Bank of the State of Arkansas* of a plea of trespass on the case upon promises. For that whereas on the *25th* of *October*, 1842, the plaintiff deposited with said bank, at the branch of said bank at *Fayetteville*, subject to his order on the return of the certificate of deposit issued therefor, a large number of the notes payable, issued by said bank at her said branch, to the amount in the whole of $872, by the whole of which notes the said bank promised to pay, at her said branch at *Fayetteville*, and the said plaintiff, as the holder thereof, was thereon entitled to receive from the said bank, in current money of the United States, the sum, in the aggregate, of $875; and the plaintiff then received therefor the certificate of said bank, which is now here shown to the court, signed by the cashier of her said branch, certifying that the plaintiff had so deposited the same, and that the same was subject to his order on the return of said certificate. And the plaintiff avers that afterwards, to-wit: on the *25th* of *October*, 1842, he presented said certificate of said bank, at her said branch at *Fayetteville*, and then offered to return said certificate to said bank; and demanded the amount thereof aforesaid to be paid to him, in current money of the United States, which the defendant absolutely refused to do, or so to pay any part or portion thereof. By means whereof the defendant then became liable to pay the plaintiff the said sum of money in this count mentioned on request, and being so liable, the defendant, in consideration thereof, on the day and year last aforesaid, undertook and promised to pay him said sum on request."

The three other special counts were like the first special count, differing only as to dates and sum corresponding with the other three certificates of deposit. The breach was in the usual form. On appeal, it was held that the circuit court erred in sustaining a demurrer to the declaration and rendering judgment for the defendant, the court holding that the deposits were not special but general, and that the plaintiff was entitled to specie upon the certificates.

3. **This state of demand was criticised** as not having been drawn in technical form, but was upheld by the court as substantially stating all that was neces-

[(*Title of court and cause, and statement of venue.*)][1] The plaintiff demands of the defendant *ninety-eight* dollars for this, to wit:—The plaintiff left two notes of hand, or sealed instruments, commonly called notes of hand, against one *Ebenezer Horton*, amounting to *ninety-eight* dollars, bearing date the *12th* of *July*, 1*808*, and at the special agreement of the defendant to return the same on a certain time, or was accountable to pay the amount thereof to the plaintiff. The plaintiff having demanded the said instruments, so called notes of hand, of the defendant, at different times, and the defendant refused the same to return, the plaintiff has at different times had the cash offered to him for the said notes, whereby damages occurred to the plaintiff for the amount of said notes, being *ninety-eight* dollars, for which plaintiff prays judgment. [(*Signature by attorney.*)][2]

(2) Deposited for Collection.

Form No. 7413.[3]

sary, namely, that plaintiff deposited with defendant two notes; that defendant promised to return them or pay the amount; that plaintiff demanded the notes, and that defendant refused to deliver them, whereby plaintiff suffered damages.

1. The words to be supplied in [ ] are not found in the reported case, but should be added to complete the form. For the formal parts of a state of demand, in *New Jersey*, see *ante*, note 2, p. 263.

For the formal parts of bills in equity, complaints or petitions, and declarations generally, see the titles Bills in Equity, vol. 3, p. 417; Complaints, vol. 4, p. 1019; Declarations, *ante*, p. 244.

2. Signature.—It is proper for a demand to be signed by the plaintiff or his attorney and the date of the return of the summons to be stated, but this is unnecessary. Longstreet *v.* Taylor, 2 N. J. L. 250; N. J. Gen. Stat. (1895), p. 1869, § 23.

3. Founded on facts set out in Leadville First Nat. Bank *v.* Leppel, 9 Colo. 595.

The answer admitted that defendant was a corporation as named in the complaint, but denied the deposit with it, for collection, of the note mentioned, and denied that any demand was ever made for said note or its proceeds, or that defendants refused to deliver the same or the proceeds thereof, and also denied that the defendant had converted the note or its proceeds to its own use. And for further answer defendant alleged: "That said note is not the property of the plaintiffs, but avers said note is really the property of *David Heller*; that said note was payable to *Isidore Heller* as part pay for the sale of the *Washburn* lode claim; that *David Heller* owned the interest in said *Washburn* lode for which this note was given, and caused the note to be given by *Isidore Heller*, his son, for the purpose of defrauding the creditors of said *David Heller*; that *M. Leppel & Co.* knew well this fraud at the time of and before the assignment of this note; that a case is now pending in the *district* court for the *fourth* judicial district, where *John W. Zollars* is plaintiff, and *David Heller* and others are defendants; and, among other things, this case seeks to subject this note to the payment of a debt due by *David Heller* to *John W. Zollars*. Defendant asks judgment for its costs."

An amended answer alleged all the matters set out in the original answer, and also that the "note was tendered to plaintiffs; that plaintiffs were parties to and cognizant of the fraud alleged to have been committed by the *Hellers*; that defendant had been garnished and commanded to hold said note, or proceeds thereof, to satisfy any judgment which might be given in a case pending in said *district* court wherein *John W. Zollars* is plaintiff and *David Heller* and *Cohn* are defendants; that *Clark*, the maker of said note, was insolvent, and said note is therefore valueless."

The case was tried by the court, and

(*Venue, title of court and cause, and commencement as in Form No. 5911.*)[1]

I. (*Allegation of partnership as in Form No. 5957.*)

II. (*Allegation of incorporation as in Form No. 5947.*)

III. That both the said firm of *M. Leppel & Co.* and the said *First National Bank of Leadville* were doing business in the city of *Leadville*, in the state of *Colorado*, on the *twenty-seventh* day of *June*, 1879.

IV. That on the *twenty-seventh* day of *June*, 1879, plaintiffs deposited in defendant's bank, for collection, a promissory note, executed by *F. W. Clark* and *Isidore Heller*, and by them indorsed to *M. Leppel & Co.*, which said note was for the sum of *four hundred* dollars, payable *thirty* days from date thereof.

V. That at the maturity of said note said plaintiffs demanded from said defendant said note or the proceeds thereof, but that the said defendant refused, and still refuses, to deliver said note or the proceeds thereof to the said plaintiff, and that the said defendant has converted the same to its own use.

Wherefore, (*concluding as in Form No. 5911*).[1]

b. To Compel Assignee of Insolvent Bank to Return Drafts, etc.

Form No. 7414.[2]

(*Commencement as in Form No. 4282*)[1] that the said *First National Bank of Alexandria* is a banking association, located in the city of *Alexandria*, *Va.*, which, for many years prior to the *9th* day of *January*, 1885, had had for their correspondents a banking firm—*Payne & Co.*—composed of *Charles E. F. Payne* and *James Keith*, their place of business being in *Warrenton*, in the county of *Fauquier*, *Va.*, where also were their private residences, and that the said the *First National Bank of Alexandria* was the correspondent of *Payne & Co.* in *Alexandria*. That the relations between the two banking concerns were such as are usual between corresponding banks and bankers keeping running accounts with each other. Collections in *Warrenton* for the *First National Bank of Alexandria* were made by *Payne & Co.*, and collections in *Alexandria* for *Payne & Co.* were made by the *First National Bank of Alexandria*, each placing to the credit or debit of the other the amount respectively collected or paid for such other, and from time to time settling balances as they

judgment for the plaintiffs rendered, which judgment, on writ of error to the supreme court, was affirmed on the theory that a bank with which a note is deposited by payee for collection has refused to return the note or its proceeds to the depositor on the ground that it was given to defraud creditors of a third person unless the bank is one of those creditors.

Special notice is necessary to hold a bank with which a note is deposited for collection, as garnishee, with respect to said note, specifying the note in question as the property of a person other than the depositor. Leadville First Nat. Bank *v.* Leppel, 9 Colo. 594.

1. **For the formal parts** of bills in equity, complaints or petitions, and declarations, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

2. Founded on the facts set out in Alexandria First Nat. Bank *v.* Payne, 85 Va. 891, the appellate court reversed a decree adverse to the complainant, rendered in the circuit court.

should be ascertained. That during the day of *January 8*, 1885, the said *First National Bank of Alexandria* received from its other correspondents and customers divers checks drawn on *Payne & Co.*, to wit: *sixteen* checks, amounting in the aggregate to $*929.13*; also *three* drafts on *Fletcher & Bro.*, of *Warrenton*, aggregating $*81.03*. These several checks and drafts, in anticipation of their payment and collection, were, when received by the said *First National Bank of Alexandria*, credited to the respective parties from whom they were received. At the same time, in anticipation likewise of their payment and collection by and through *Payne & Co.*, the checks and drafts were also charged to the account of the said *Payne & Co.*, thus increasing the previous apparent balance due from the said *Payne & Co.* to the said bank. These credits and charges, respectively, were subject to cancellation by cross-entry, according to the established and well known usage of business, in case the checks and drafts should be dishonored when forwarded for payment. Said checks and drafts were on the same day, in the evening (*January 8th*), inclosed in a letter to *Payne & Co.*, with the usual direction to place the proceeds to the credit of the *First National Bank of Alexandria*. That on the early morning of the *9th*, before the commencement of the business hours of that day, and before the arrival of the letter in *Warrenton*, the firm of *Payne & Co.* was dissolved by the death of *Payne*. That the condition of the firm at that time was one of deep insolvency — a condition which had existed for not a short time previously, though wholly unknown or suspected by the *First National Bank*. The letter, with the stated enclosures, reached the bank of said *Payne & Co.* on the *9th*, when, without direction from any source, as if no legal interruption had occurred to the receipt of deposits as usual by the firm, the clerk of *Payne & Co.* paid the checks by charging them against the accounts of the drawers, and placed the proceeds of the same ($*929.13*) to the credit of the *First National Bank of Alexandria* upon the books of the dissolved firm. That on the *12th* of *January* following, *James Keith*, the surviving partner of *Payne & Co.*, made an assignment to *A. D. Payne*, *R. T. Scott* and *Albert Fletcher*, in trust for the benefit of the creditors of the late firm, without preference. That the said assignees have taken possession of the assets of the said firm of *Payne & Co.*, among which was the said sum of $*929.13*, which came to the hands of said assignees with notice of above mentioned facts. That there was no authority of law, nor by said *First National Bank of Alexandria*, warranting the deposit of the proceeds of said checks with the dissolved firm, and that, being so deposited, they continue to be, and are now, in equity, the moneys of the *First National Bank of Alexandria*, whether in the hands of the surviving partner of *Payne & Co.*, or their said assignees. Forasmuch therefore (*concluding as in Form No. 4282*).[1]

1. **For the formal parts** of bills in equity, complaints or petitions, and declarations, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

c. Where Deposit has been Stolen.

ANSWER SETTING UP ROBBERY.[1]

Form No. 7415.

(Precedent in Griffith *v.* Zipperwick, 28 Ohio St. 389.)[2]

[(*Venue and title of court and cause as in Form No. 1336.*)

First. (*Specific denials of the material allegations of the petition.*)

Second. For a second defense the defendants say that][3] they do not know whether the plaintiff on the *8th* day of *November*, A. D. 1867, was the owner of the bonds described in the petition or not, and they therefore deny the same, to compel strict proof to be made thereof. And defendants say that some time previous to the said *8th* day of *November*, A. D. 1867, *Ann J. Begges*, the mother of the plaintiff, brought to their office, in *New Lisbon*, *Ohio*, which is a broker's and exchange office, a tin box which plaintiff claims contained her said bonds; [that] said box was locked with a padlock, and the key of the same was kept in the possession of the said *Begges*. Said *Begges*, at said time, asked of defendants the privilege of placing said tin box, so locked as aforesaid, in their vault in said office, which they granted, and said tin box was, in accordance with said request, placed in their said vault, and remained there, with the knowledge and consent of said *Begges*, except when taken out by her, until the *8th* day of *November*, 1867, when the said vault, without the knowledge or consent of the defendants, or their fault, was broken open in the night season, and said box was broken open. Defendants further say that the said *Ann J. Begges* had resided in *New Lisbon* a great many years, and was acquainted with their said vault and its security; that they were not to receive and did not hope or expect to receive any compensation or reward for keeping the said tin box; that the keeping of bonds and other valuables as special deposits was no part of their said business, but that in some instances they have received them for the accommodation of friends and kept the same gratuitously and at the risk of the owners thereof; and that in receiving said box, and placing the same in their said vault, they acted in good faith; and that by reason of the premises they are not liable for any loss that plaintiff may have sustained. [(*Signature of defendant's attorney.*)][3]

1. **Robbery by burglars**, of securities deposited for safe keeping in the vaults of a bank, does not show negligence on the part of the bank upon which to found an action on the part of the owner of the securities against the bank for the loss of such securities. Wylie *v.* Northampton Bank, 119 U. S. 361, in which case the complaint is set out somewhat at length. The case was originally commenced in the superior court of the city of New York, but subsequently removed into the circuit court of the United States.

2. The exculpatory matters alleged in this defense were traversed by a reply. A trial of these issues resulted in a judgment for defendants, which was sustained on appeal, on the theory that in the case of a deposit of property to be kept by the bailee without reward and returned to the depositor on demand, the law holds such a bailee liable only for gross negligence.

For another answer setting up robbery as a defense in such an action see *supra*, Form No. 7404.

3. The words to be supplied in [ ] will not be found in the reported case, but should be added to render the form complete.

For the formal parts of answers and pleas, generally, see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; PLEAS.

DESERTION OF WIFE.[1]

I. COMPLAINT, INDICTMENT OR INFORMATION, 667.
1. *In General*, 668.
2. *For Vagrancy*, 671.
II. WARRANT, 671.
III. ORDER DIRECTING PAYMENT FOR SUPPORT, 672.
IV. BOND TO SECURE PAYMENT FOR SUPPORT, 673.

CROSS-REFERENCES.

For Forms relating to the Prosecution of the Offense of Abandonment of Children and Wife, see the title ABANDONMENT OF CHILDREN, vol. 1, *Forms Nos. 31 to 33.*

For Forms relating to Divorce and Separate Maintenance on the ground of Desertion of Wife, see the title DIVORCE AND SEPARATION.

See also the GENERAL INDEX to this work.

1. **Statutory provisions** making the desertion of a wife by her husband a criminal offense exist in the following states:

Alabama. — Crim. Code (1886), § 4047 (vagrancy).

Arkansas. — Sand. & H. Dig. (1894), § 1916 (vagrancy).

Colorado. — Laws (1893), c. 74.

Connecticut. — Gen. Stat. (1888), §§ 1527, 3402.

Delaware. — Rev. Stat. (1893), c. 131 (18 Laws, c. 229), c. 132 (18 Laws, c. 230).

Florida. — Laws (1897), c. 4553; Rev. Stat. (1892), § 2642 (vagrancy).

Illinois. — Laws (1897), p. 236; Starr & C. Anno. Stat. (1896), c. 38, pars. 1–4.

Indiana. — Horner's Stat. (1896), § 2133.

Kansas. — Gen. Stat. (1897), c. 100, § 311 (vagrancy).

Kentucky. — Stat. (1894), § 4758 (vagrancy).

Louisiana. — Rev. Laws (1897), § 3877 (vagrancy).

Maryland. — Laws (1896), c. 73.

Massachusetts. — Stat. (1885), c. 176; Stat. (1893), c. 262, *amending* Stat. (1882), c. 270.

Michigan. — How. Anno. Stat. (1882), § 1985; How. Anno. Stat. (Supp. 1890), § 1997*a* (vagrancy).

Minnesota. — Stat. (1894), §§ 6535, 6536.

Mississippi. — Anno. Code (1892), § 1322 (vagrancy).

Missouri. — Rev. Stat. (1889), § 3501.

New Jersey. — Gen. Stat. (1895), p. 1203, §§ 28–35; p. 1200, § 13 *et seq.*

New Mexico. — Comp. Laws (1897), § 1335.

New York. — Cook's Code Crim. Proc. 899 (Birds. Rev. Stat. (1896), p. 879, § 7).

North Carolina. — Pub. Laws (1893), c. 83; Code (1883), §§ 970, 971.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 673 *et seq.*

Rhode Island. — Gen. Laws (1896), c. 281, § 24 (vagrancy); State *v.* Sutcliffe, 18 R. I. 53.

South Carolina. — Crim. Stat. (1893), § 384 (vagrancy).

Texas. — Pen. Code (1895), arts. 412, 413 (vagrancy).

Vermont. — Stat. (1894), § 5157.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4587*c*.

Meaning and significance of "abandonment" and "desertion" as used in the

I. COMPLAINT, INDICTMENT OR INFORMATION.[1]

statutes, see list of statutes cited *supra*, note 1, p. 666. See also the following cases:

Indiana. — Deserting a wife who has sufficient provision for her comfortable support, whether furnished by husband or not, does not constitute an offense under the statute. State *v.* Rice, 106 Ind. 139.

Missouri. — Actual abandonment without cause is the abandonment contemplated by statute; a constructive abandonment, as where the husband refuses to receive or support his wife after she has left him without cause, will not suffice. State *v.* Bruening, 60 Mo. App. 51; State *v.* Doyle, 68 Mo. App. 219; State *v.* Satchwell, 68 Mo. App. 39. And where the wife lived upon her husband's means at the time of the information, although abandoned by him, there can be no conviction. State *v.* Fuchs, 17 Mo. App. 458.

New York. — There is no abandonment, within the meaning of the statute, where the husband lives apart from the wife in obedience to a judgment of separation. People *v.* Cullen, 153 N. Y. 629.

Where a wife abandons her husband and removes to New York county, and the husband also moves to another county in New York state, a refusal by him to support her does not constitute abandonment in New York county. People *v.* Vitan, 20 Abb. N. Cas. (N. Y. Gen. Sess.) 298.

North Carolina. — "Wilful abandonment" was held to include the act of separation, not merely its continuance. State *v.* Deaton, 65 N. Car. 496.

Pennsylvania. — There must be actual personal violence, or reasonable apprehension of it, or such a course of treatment as endangers health and life, to justify the desertion of wife by husband. Com. *v.* Porter, 4 Pa. Dist. Rep. 503.

A second complaint for the same cause is good where the husband has appealed from the decision adjudging him a disorderly person, and his arrest thereunder will be granted. The subsequent neglect is the commission of a new offense, for which he is liable to arrest and trial. People *v.* Hodgson, 126 N. Y. 647.

Jurisdiction of the Offense. — See list of statutes cited *supra*, note 1, p. 666. Consult also the following cases:

New Jersey. — The residence of the deserting husband must be shown by the complaint, which can only be made in the city or township in which he resides. Decker *v.* McLorinan, 42 N. J. L. 413.

North Carolina. — Justices of the peace may entertain jurisdiction of proceedings brought for wilful abandonment and neglect of wives by husbands. State *v.* Deaton, 65 N. Car. 497.

Pennsylvania. — Before any magistrate information may be made, and the jurisdiction of the offense is not confined to the court of the county of defendant's residence. Demott *v.* Com., 64 Pa. St. 302. But the act of desertion must have been committed within the state to enable the wife to proceed against her husband for desertion. Philadelphia *v.* Bailey, 8 Phila. (Pa.) 485.

To enable the guardians of the poor to proceed against a husband for desertion upon the complaint of the wife, she must have a settlement within the district, which she cannot have if her husband's domicile is within another state. Philadelphia *v.* Bailey 8 Phila. (Pa.) 485.

1. Who may Make Complaint. — See list of statutes cited *supra*, note 1, p. 666; also title CRIMINAL COMPLAINTS, vol. 5, p. 930. Consult also the following cases:

Missouri. — State *v.* Newberry, 43 Mo. 433.

New Jersey. — An overseer of the poor has a discretion in refusing to make a complaint to compel a husband to provide for his family, where there is no reasonable ground to believe, upon fair inquiry by the overseer, that the application is a proper one. State *v.* Powless, 37 N. J. L. 145.

New York. — Any person may make a complaint against a husband as a disorderly person, under section 899 of the Code of Criminal Procedure, for failure to support his wife. People *v.* Meyer, 12 Misc. Rep. (N. Y. Gen. Sess.) 613.

Requisites, Generally. — See list of statutes cited *supra*, note 1, p. 666. Consult also the following cases:

Indiana. — An indictment charging one with abandoning his wife "without making provision for her comfortable support," instead of charging that he deserted her "without provision for her comfortable support," as provided

1. In General.

Form No. 7416.[1]

(*Commencing as in Form No. 6667*)[2] did wilfully abandon (or *desert*) and neglect (or *refuse*) to support his wife, *Jane Doe*, and cohabited and lived with another woman, to wit, *Mary Ryan*. (*Concluding as in Form No. 6667.*)[2]

Form No. 7417.[3]

State of *Illinois*, } In the *County* Court of *Greene* County, *October*
Greene County. } Term, A. D. 1*898*.

Be it remembered that *Daniel Webster*, state's attorney for the said county of *Greene* and state of *Illinois*, who prosecutes in this behalf,

by the statute, may be quashed on motion. State *v.* Rice, 106 Ind. 139.

New York. — That a demand was made on the husband to support his wife need not be shown in the complaint charging the husband with disorderly conduct, nor is it essential to the proceedings that such a demand was made. People *v.* Meyer, 12 Misc. Rep. (N. Y. Gen. Sess.) 613.

New Jersey. — That the township may become chargeable by reason of the desertion must be alleged in the complaint of the overseer of the poor, under the act concerning disorderly persons. State *v.* Dey, 44 N. J. L. 576.

North Carolina. — The gist of the offense is the act of separation, not merely its continuance. Thus an indictment charging the defendant with the same offense after he has once been convicted of abandonment is void. State *v.* Dunston, 78 N. Car. 418.

Charging wilful abandonment prior to the ratification of the act to punish abandonment is void. State *v.* Deaton, 65 N. Car. 497.

Charging abandonment four years previous to its finding is void under the statute of limitations, as the offense is not a continuing one by reason of the continued separation. State *v.* Davis, 79 N. Car. 603.

Rhode Island. — State *v.* Wood, 14 R. I. 151.

Texas. — Walton *v.* State, 12 Tex. App. 117.

Wisconsin. — In State *v.* Witham, 70 Wis. 473, the information filed by the district attorney in the municipal court of Rock county, Wisconsin, under Sanb. & B. Anno. Stat. (1889), § 4587*c.*, charged in the first count: "That the defendant did on the *first* day of *May*, 18*85*, at the city of *Janesville*, abandon his wife, leaving her in a destitute condition, and has since that date continued to leave her in a destitute condition;" in the second count, the information charged: "That at the time above mentioned the defendant, being of sufficient ability, [unreasonably] refused and neglected, and continues to refuse and neglect, to provide for the support of his wife."

Charging in the language of the statute or substantially in such language is sufficient. State *v.* Rice, 106 Ind. 140; Com. *v.* Burlington, 136 Mass. 436; Com. *v.* Barrett, 108 Mass. 302; Com. *v.* Tiffany, 119 Mass. 300; Com. *v.* Malloy, 119 Mass. 347; State *v.* Davis, 70 Mo. 467; State *v.* Brinkman, 40 Mo. App. 284; State *v.* Bassette, 51 N. J. L. 502.

1. *Connecticut.* — Gen. Stat. (1888), § 1527. See also list of statutes cited *supra*, note 1, p. 666.

Consult also note 1, p. 666.

Proceedings under Conn. Gen. Stat. (1888), § 3402, for neglecting to support wife and children, is a criminal one, and not a civil one in criminal form. State *v.* Schweitzer, 57 Conn. 537. In this case, it was held that a complaint which charges the defendant with unlawfully neglecting and refusing to support his wife is sufficient, without containing an averment of marriage. Consult Forms Nos. 31 to 33 for indictments for a similar offense.

2. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

3. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 38, par. 2. See also list of statutes cited *supra*, note 1, p. 666.

Consult also note 1, p. 666.

in the name and by the authority of the people of the state of *Illinois*, in his own proper person comes now here into court, and in the name and by the authority of the people aforesaid gives the court to be informed and understand that *John Doe*, on the *first* day of *September*, A. D. 1*898*, at and within said county of *Greene* in the state of *Illinois*, did[1] without good cause abandon his wife, *Jane Doe*, and neglected (or *refused*) to maintain or provide for her, his said wife, the said *Jane Doe*, he, the said *John Doe*, then and there being the lawful husband of her the said *Jane Doe*, and still neglects (or *refuses*) to maintain and provide for her the said *Jane Doe*, his said wife; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Illinois*.

Daniel Webster, State's Attorney.[1]

State of *Illinois*, } ss.
Greene County. }

Samuel Short, being first duly sworn according to law, upon his oath says, that the foregoing information is true in substance and matter of fact.

Samuel Short.

Subscribed to and sworn before me this *first* day of *September*, A. D. 1*898*.

Carroll Johnson, County Judge.

Form No. 7418.[2]

(*Commencing as in Form No. 6681*)[1] unreasonably did neglect to provide for the support of his wife, to wit, *Sarah Ella Simmons*, from said *third* day of *November*, 1*894*, to the *seventeenth* day of *December*, 1*894*, and still unreasonably neglects to provide for the support of his said wife, to wit, the said *Sarah E. Simmons*. (*Concluding as in Form No. 6681.*)[1]

Form No. 7419.[3]

(*Commencement as in Form No. 6674*)[1] did then and there unlawfully

Indictment or Information. — The language of section two of this act must be construed to mean that the persons guilty of that offense shall be subject to indictment and trial, and not as excluding the procedure by information provided by general law for all misdemeanors. But the offense must be prosecuted by information when in the county court. Cornshock *v.* People, 56 Ill. App. 467.

1. For the formal parts of criminal complaints, indictments and informations, in general, see the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. *Massachusetts.* — Laws (1893), c. 262, *amending* Laws (1882), c. 270. See also list of statutes cited *supra*, note 1, p. 666.

Consult also note 1, p. 666.

Complaints to a police court, made by a wife against her husband for unreasonably neglecting to support her and her minor children, are independent of the proceedings for a divorce instituted by the husband against the wife just before the complaints were made, and are to be tried and disposed of upon the facts appearing upon the allegations contained in them. Com. *v.* Simmons, 165 Mass. 358.

3. *Indiana.* — Horner's Stat. (1896), § 2135. See also list of statutes cited *supra*, note 1, p. 666.

Consult also note 1, p. 666.

Leaving Wife Without Provision for Support. — Commence complaint as in the text and add after the * the following: "without provision for her comfortable support." Horner's Stat Ind. (1896), § 2133.

and without cause desert his wife, *Jane Doe*, then and there being, and then and there left the said *Jane Doe*, his said wife,* a charge upon the said county of *Posey* in the state of *Indiana*. (*Concluding as in Form No. 6674.*)[1]

Form No. 7420.[2]

(*Commencement as in Form No. 6697*)[1] did then and there *[3] abandon his wife, to wit, *Jane Doe*, then and there leaving her the said *Jane* in danger of becoming a public charge. (*Concluding as in Form No. 6697.*][1]

Form No. 7421.[4]

(Copied from the record in People *v.* Cullen, 153 N. Y. 629.)

Police Court, *Second* District.
City and County of *New York*, ss.

Eliza Cullen, of No. *479 Ninth Avenue*, being duly sworn, deposes and says: That she is the lawful wife of *William Cullen*; that she has been married to him *thirty-two* years, and that her said husband has abandoned deponent in said city without adequate support and in danger of becoming a burden upon the public, and has neglected to provide, according to his means, for his family. Deponent prays that her said husband may be arrested and dealt with as the law directs.

her
Eliza × *Cullen.*
mark

Sworn to before me this *28th* day of *May*, 1894.
John J. Ryan, *Police* Justice.

1. **For formal parts** of criminal complaints, indictments and informations, generally, see the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. *Rhode Island.*—Gen. Laws (1896), c. 281, § 24 *et seq.* See also list of statutes cited *supra*, note 1, p. 666.

Consult also note 1, p. 667.

3. **Neglecting to Provide According to Means.** — Instead of the complaint as in Form No. 7420, *supra*, after * add: "Neglected to provide according to his means for the support of his wife, to wit, *Jane Doe*, and hitherto has continued to so neglect and still does so neglect to provide according to his means for the support of her, the said *Jane Doe*, his said wife." (*Concluding as in Form No. 6697.*) R. I. Gen. Laws (1896), c. 281, § 24.

That "the defendant did neglect to provide according to his means for the support of his wife and children" is a good complaint under R. I. Gen. Laws (1896), c. 281, § 24, providing that "every person who shall neglect to provide according to his means for the support of his wife or children * * * shall be imprisoned," etc. State *v.* Wood, 14 R. I. 151. See also State *v.* Sutcliffe, 18 R. I. 53.

Being Habitual Drunkard and Neglecting to Support, etc. — Instead of the complaint in Form No. 7420, after * add, "being an habitual drunkard, then and there did neglect (or *refuse*) to aid in the support of his family, and hitherto has so neglected (or *refused*) and still does so neglect (or *refuse*) to aid in the support of his said family. (*Concluding as in Form No. 6697.*) R. I. Gen. Laws (1896), c. 281, § 24.

4. *New York.* — Cook's Code Crim. Proc., § 899 (Birds. Rev. Stat. (1896), p. 879, § 7), relating to disorderly persons. See also list of statutes cited *supra*, note 1, p. 666.

Consult also note 1, p. 667.

For the formal parts of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. For Vagrancy.[1]

Form No. 7422.[2]

(Precedent in Hall *v.* State, 100 Ala. 86.)

[State of *Alabama*, } *Circuit* court, *October* term, A. D. 1890.
County of *Coffee*. }

The grand jury of said county charge that before the finding of this indictment,][3] *Charley Hall*, who was then and there an able-bodied person and by his labor able to support his family, did abandon his family and leave them in danger of becoming a burden to the public, [against the peace and dignity of the state of *Alabama*.

Daniel Webster,
Solicitor of the *Third* Circuit.][3]

Form No. 7423.[4]

(*Commencing as in Form No. 6678*)[3] then and there violate the statute of the state of *Louisiana*, to wit, section 3877 of the Revised Laws of Louisiana, in this, to wit, that on the date last aforesaid and for a long time prior thereto he, the said *John Doe*, was and still is a vagrant, in that being a habitual drunkard he did then and there abandon his family, and hence hitherto has abandoned, refused and neglected, and still abandons, neglects and refuses to aid in the support of his said family. (*Concluding as in Form No. 6678.*)[3]

II. WARRANT.[5]

1. Vagrancy. — In many of the states, the manner of proceeding against a husband for desertion is prescribed by statute to be a prosecution against him as a vagrant. See list of statutes cited *supra*, note 1, p. 666.

Requisites Generally. — See list of statutes cited *supra*, note 1, p. 666; also note 1, p. 667.

Abandonment must be Alleged. — It is not sufficient to charge that the defendant is "a vagrant" within the meaning of the law. Walton *v.* State, 12 Tex. App. 117.

2. *Alabama.* — Crim. Code (1886), § 4047; also see list of statutes cited *supra*, note 1, p. 666.

Consult also note 1, p. 667.

Insufficiency of Indictment — *Alabama.* — An indictment which charges that the defendant "having a family, did abandon his family, and left and leaves them in danger of becoming a burden to the public," is insufficient; it should also charge his ability to contribute to their support by his means or, being an able-bodied person, by his industry. Boulo *v.* State, 49 Ala. 22.

Mere refusal to live with wife or a failure to contribute to her support is not sufficient allegation to sustain an indictment under the Vagrancy act. Boulo *v.* State, 49 Ala. 22.

3. For the formal parts of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS. The matter in [ ] is not found in the reported case, but has been added to complete the indictment.

4. *Louisiana.* — Rev. Laws (1897), § 3877. See also list of statutes cited *supra*, note 1, p. 666.

An indictment for violation of a city ordinance charging defendant with "failing to provide for his lawful wife and family" is void, as the statute of the state (§ 3877) provides that "habitual drunkards who shall abandon, neglect or refuse to aid in the support of their families, and who may be complained of by their families, shall be deemed vagrants." State *v.* Burns, 45 La. Ann. 35.

See also *supra*, note 1, p. 667.

5. For formal parts of warrants of arrest, generally, consult the title WARRANTS OF ARREST.

Form No. 7424.[1]

(Copied from the record in People *v.* Cullen, 153 N. Y. 629.)

Second District *Police* Court.
City and County of *New York*, ss.

In the name of the People of the State of *New York.* To the Sheriff of the County of *New York* or to any Marshal or Policeman of the City of *New York.*

Whereas, complaint on oath has been made before the undersigned, one of the *police* justices in and for said city, by *Eliza Cullen*, of *479 Ninth Avenue*, that at the city of *New York*, in the county of *New York*, her husband, *William Cullen*, has threatened to abandon and has abandoned her without adequate support, and in danger of becoming a burden upon the public, and has neglected to provide, according to his means, for his family; the said complainant having prayed that her said husband may be apprehended and held to answer for said offense and to be dealt with according to law. These are, therefore, in the name of the People of the State of *New York* to command you the said sheriff, marshals and policemen and each and every of you, without delay, to apprehend the said defendant and forthwith bring him before me, at the *Second* District *Police* Court, in said city, or, in case of my absence, before the nearest and most accessible *police* justice in said city, to answer the said charge and to be dealt with according to law.

Dated at the city of *New York*, the *28th* day of *May*, 1894.

John J. Ryan, *Police* Justice.[2]

III. ORDER DIRECTING PAYMENT FOR SUPPORT.[3]

Form No. 7425.

(Copied from the record in People *v.* Cullen, 153 N. Y. 629.)

City and County of *New York*, ss.

Order made by *John J. Ryan*, Esq., one of the *police* justices in and for the city of *New York*, the *28th* day of *May*, in the year of our Lord one thousand eight hundred and *ninety-four*.

Whereas, *Eliza Cullen*, of No. *479 Ninth Avenue*, in said city, hath by her complaint in writing and upon oath, before the said justice, on the *28th* day of *May*, 1894, declared that her husband, *William Cullen*, had threatened to abandon and had abandoned his family in the city of *New York* without adequate support and in danger of becoming a burden upon the public, and had neglected to provide according to his means for his family.

And whereas, the said justice did thereupon issue his warrant for apprehending the said *William Cullen*, and upon his being brought

1. *New York.* — Consolidation act (Laws (1882), c. 410, § 1454 *et seq.*). See also list of statutes cited *supra*, note 1, p. 666.

2. **For the formal parts** of warrants of arrest generally, consult the title WARRANTS OF ARREST.

3. *New York.* — Consolidation act (Laws (1882), c. 410, § 1454 *et seq.*).

New Jersey. — Gen. Stat. (1895), p. 1200, § 14.

See also list of statutes cited *supra*, note 1, p. 666.

Subsequent proceedings after the year

before said justice upon said warrant, said justice, after examination and inquiry into the facts and circumstances of the case, as well upon the oath of said *Eliza Cullen* in the presence of the said *William Cullen*, as upon hearing of all other proofs offered in relation thereto, did adjudge him, the said *William Cullen*, to be a disorderly person as charged. The said justice therefore orders, as well for the indemnity and relief of the *Commissioners of Public Charities and Correction* of the city of *New York* (they being the overseers of the poor for said city), as for the support of the family of said *William Cullen*, that he shall and do (upon notice of this order) pay or cause to be paid to the *Commissioners of Public Charities and Correction* the sum of *eight* dollars weekly, and every week from the day of the date of this order, for and toward the support of his family during the period of *one* year next ensuing, and shall, during said period, be of good behavior toward the people of the state of *New York*.

Given under my hand at the city of *New York* the day and year first above written.

John J. Ryan, Police Justice.

IV. BOND TO SECURE PAYMENT FOR SUPPORT.[1]

Form No. 7426.[2]

(Copied from the record in People *v.* Cullen, 153 N. Y. 629.)

City and County of *New York*, ss.

Know all men by these presents, that we, *William Cullen*, of No. *339 West Thirty-ninth* street, in the city of *New York*, and *George J. Kenny*, of No. *120 West Fifth-ninth* street, in said city, are held and firmly bound to the People of the State of *New York*[3] in the sum of *four hundred and sixteen* dollars,[4] lawful money of said state, to be paid to the said people, for which payment well and truly to be made

has expired are not barred by an order made directing the defendant to pay a certain sum weekly to the overseer of the poor, for the support of his family, for the space of one year. Overseer of Poor *v.* Clifford, 37 N. J. L. 155.

1. **For other bonds,** undertakings, and recognizances of analogous character, see the title BAIL AND RECOGNIZANCE, vol. 3, p. 1.

2. *New York.* — Consolidation act (Laws (1882), c. 410, § 1454 *et seq.*). See also list of statutes cited *supra*, note 1. p. 666.

The magistrate may require that the person charged give security, by a written undertaking, with one or more sureties approved by the magistrate, in case he is satisfied that defendant is a disorderly person, either by his own confession, or by competent testimony, to the following effect, that the defendant will support his wife and children, and will indemnify the county, city, village or town against their becoming, within one year, chargeable upon the public, or that the sureties will pay the sum mentioned in the undertaking and which must be fixed by the magistrate. Cook's Code Crim. Proc. (1893), § 901.

3. **To Whom Payable.** — May properly be made in the name of the people for the benefit of the municipality concerned. Lutes *v.* Shelley, 40 Hun (N. Y.) 198.

4. **Must comply strictly with the terms and conditions of the order** made under the statute providing for the same, otherwise it will be void. Charities, etc., Com'rs *v.* Hammill, 33 Hun (N. Y.) 348.

Thus, where the order required the offender "to give security in the sum of $250" for his good behavior and for the weekly support of his wife, and a bond is taken in the sum of $500, it is void. Charities, etc., Com'rs *v.* Hammill, 33 Hun (N. Y.) 348.

or done we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Dated at the city of *New York* this *28th* day of *May* in the year of our Lord one thousand eight hundred and *ninety-four*.

Whereas, *Eliza Cullen*, of No. *479 Ninth Avenue*, in said city, hath by her complaint in writing and upon oath before *John J. Ryan*, Esq., one of the *police* justices in and for said city, on the *28th* day of *May*, 1894, declared that her husband, *William Cullen*, had threatened to abandon and had abandoned his family in the city of *New York*, without adequate support, and in danger of becoming a burden upon the public, and had neglected to provide according to his means for his family.

And whereas, the said justice did thereupon issue the warrant for apprehending the said *William Cullen*, and upon his being brought before said justice upon said warrant, said justice, after examination and inquiry into the facts and circumstances of the case, as well upon the oath of said *Eliza Cullen*, as upon all other proofs offered in relation thereto, did adjudge him, the said *William Cullen*, to be a disorderly person as charged; and,

Whereas, in and by an order made by the said justice on the *28th* day of *May*, 1894, the said justice orders, as well for the indemnity and relief of the *Commissioners of Public Charities and Correction* of the *City and* County of *New York* (they being the overseers of the poor for said city), as for the support of the family of said *William Cullen*, that he shall and do (upon notice of such order) pay, or cause to be paid, to the said *Commissioners of Public Charities and Correction*, the sum of *eight* dollars weekly, and every week from the day of the date of said order, for and toward the support of his family during the period of *one* year next ensuing, and shall during said period be of good behavior toward the people of the state of *New York*, and,

Whereas, the said *William Cullen* has appealed from said order to the Court *of Special Sessions of the Peace* to be holden in said city and county;

Now, therefore, the condition of this bond is such that if the said *William Cullen* shall personally appear at the Court *of Special Sessions of the Peace*, to be holden in and for the *City and* County of *New York*, and not depart the said court without its leave, then this bond to be void; otherwise to be in full force and virtue.

William Cullen. (SEAL)[1]
George J. Kenny. (SEAL)

Taken and acknowledged before me the day above mentioned.
John J. Ryan, Police Justice.

1. **That the paper is unsealed** while the law calls for a bond is of no importance. Charities, etc., Com'rs *v.* Hammill, 33 Hun (N. Y.) 348.

Delaware.—The bond required by Laws (1893), c. 48, § 15, may be as follows: (*Commencing with the usual clause of obligation and running to* "the state of *Delaware*," *as* the obligee.) "Now the condition of this obligation is such, that whereas, the said *James Smith* has been brought before the Court *of General Sessions of the Peace and Jail Delivery*, in and for *Kent* county and state aforesaid, to answer the charge of neglecting to maintain his wife and children; and whereas, the said court, upon the hearing of the said cause, ordered that he, the said *James Smith*, should pay to *Jane Smith*, his said wife,

the sum of *fifteen* dollars ($*15.00*) per month, for the support and maintenance of her the said *Jane Smith*, his wife, and children, and should give security for the compliance with the said order, therefore,

The condition of this obligation is such, that if the above bounden *John Doe*, *Richard Roe* and *James Smith*, their heirs, executors or administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto the above-named *Jane Smith*, her certain attorney, executors, administrators or assigns, the just and full sum of *fifteen* dollars ($*15.00*), current lawful money as aforesaid, per month, until otherwise ordered by the said court, without any fraud or further delay, then the above obligation to be void, or else to be and remain in full force and virtue.

And we do hereby authorize and empower any clerk, prothonotary or attorney of any court of record in America, or elsewhere, to appear for us, the said *John Doe*, *Richard Roe* and *James Smith*, our heirs, executors or administrators at the suit of the said state of *Delaware*, or assigns, on the above obligation, as of any time prior or subsequent to the date hereof, and thereupon to confess judgment for the above sum of *five hundred* dollars, debt, besides cost of suit by *non sum informatus*, *nihil dicit*, or otherwise, with stay of execution until the day of payment.

John Doe. (SEAL)
Richard Roe. (SEAL)
James Smith. (SEAL)

Sealed and delivered in the presence of *Abraham Abrams.*
Daniel Webster."

New Mexico. — Security, by a written obligation, with two or more sureties, in such sum as the justice may require, must be given when the justice is satisfied, either by confession of the defendant or from the testimony, that the defendant is a disorderly person. Comp. Laws (1884), § 8.

Pennsylvania. — The bond required by Bright. Pur. Dig. (1894), p. 675, § 5 *et seq.*, may be as follows: "(*Commencing with the usual clause of obligation and running to* " the *commonwealth* of *Pennsylvania*," *as in Form No. 2724.*)

"Whereas, complaint was made that *John Doe* had separated himself from his wife, *Jane Doe*, without reasonable cause, and had failed to make adequate provision for her support and maintenance; and whereas the court, having heard all the evidence in support of said complaint, and of the defendant, and having fully considered the same, did, on the *17th* day of *March*, A. D. 1897, order the said *John Doe* to pay to *Jane Doe*, his wife, the sum of *one hundred* dollars for the maintenance of his said wife from the date of the commencement of the proceedings down unto the date of the said order, and the further sum of *fifteen* dollars each and every week, weekly in advance, for the like purpose of support of the said *Jane Doe*, until further order in the premises. Now the condition of this obligation is such, that if the above bounden *John Doe* shall and do well and truly comply in all respects with the terms and conditions of the said order, then this obligation shall be void; otherwise to be and remain in full force and effect.

John Doe. (SEAL)
Richard Roe. (SEAL)
William Walsh. (SEAL)

Sealed and delivered in presence of *James Smith.*
John Jones."

DETINUE.

By W. R. Buckminster.

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CROSS-REFERENCES.

For Forms connected with the similar actions of Replevin and Trover, see the titles REPLEVIN — CLAIM AND DELIVERY; TROVER.

For Form of Writ of Distringas, see the title DISTRINGAS, WRIT OF.

For matters of Procedure, see the title DETINUE, 6 Encyclopædia of Pleading and Practice, p. 643.

I. At Common Law.[1]

1. The common-law action of detinue still exists in *Illinois* and *New Hampshire*. Robinson *v.* Peterson, 40 Ill. App. 132; Dame *v.* Dame, 43 N. H. 37; Brown *v.* Ellison, 55 N. H. 556. In *Pennsylvania* the action has fallen into almost complete disuse, but the form of declaration is like that from Chitty, *infra*, Form No. 7427. Brews. Pr., §§ 713, 724. The action is also mentioned in the statutes following, although in these states the action seems to have been superseded by that of replevin:

Delaware. — Rev. Stat. (1893), p. 888, § 6.

New Jersey. — Gen. Stat. (1895), p. 1974, § 8, p. 2564, §§ 187, 188.

Rhode Island. — Gen. Laws (1896), c. 234, § 3.

Debt and Detinue. — The plaintiff might declare in debt and detinue, and the following form of declaration is given in 2 Chit. Pl. 286, to wit:

"*John Doe* complains of *Richard Roe* being, etc., of a plea that he render to the said *John Doe* the sum of £50, of lawful, etc., which he owes to, and un-

1. Declaration.

Form No. 7427.[1]

(2 Chit. Pl. 284; 1 Saund. Pl. 435.)

(*Caption as in Form No. 6934.*)

Middlesex, to wit. *Arthur Bacon* complains of *Charles Davis* being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea, that he render to the said *Arthur Bacon* certain goods and chattels (or *deeds and writings*) of him, the said *Arthur Bacon*,[2] of great value, to wit, of the value of *£50*, of lawful money of Great Britain, which he unjustly detains from him. For that whereas the said *Arthur Bacon* heretofore, to wit, on the *sixth* day of *May*, *1776*,[3] at *Middlesex* aforesaid,[4] delivered to the said *Charles Davis* certain goods and chattels, to wit, (*describing them*),[5] of the said *Arthur Bacon*, of great value, to wit, of the value

justly detains from, him, and also that he render to him the said *John Doe* a certain indenture of lease to him the said *John Doe* bearing date, etc., which he unjustly detains from him; for that whereas," etc.

See also Mason *v.* Frick, 105 Pa. St. 162.

1. In General. — "In order to ground an action of detinue, which consists in detaining, four things are necessary: 1st. That the defendant came into possession of the goods; 2d. That the plaintiff have property; 3d. That the goods themselves be of some value; 4th. That they be ascertained in point of identity." Whitfield *v.* Whitfield, 44 Miss. 254; Danley *v.* Edwards, 1 Ark. 437.

In Gentry *v.* McKehen, 5 Dana (Ky.) 34, it is said: "There are two forms of declaring in this action: One special, on the contract to deliver, or on the contract of bailment, where the possession is acquired or held by contract. The other general, on the fiction of the plaintiff having lost, and the defendant having found, the goods. Where the former mode is adopted, as the declaration is founded on contract, and attempts to set forth the contract, it should correctly state it, and follow the property, by special averment, into the possession of the administrator [defendant]; and when, by the terms of the contract, the goods are to be restored on request, it may be necessary to aver a special request. But in the latter form of declaring, these averments are not necessary. And we think the latter form may be adopted in all cases."

2. Plaintiff's Property. — The declaration must allege that the right of property in, and right of immediate possession to, the goods sued for is in the plaintiff. Melton *v.* McDonald, 2 Mo. 45; Kent *v.* Armistead, 4 Munf. (Va.) 72; Burns *v.* Morrison, 36 W. Va. 423. See also Walker *v.* Lauderdale, 17 Ala. 359; Danley *v.* Edwards, 1 Ark. 437; Whitfield *v.* Whitfield, 44 Miss. 254. And omission so to do will be fatal after verdict. Melton *v.* McDonald, 2 Mo. 45; Kent *v.* Armistead, 4 Munf. (Va.) 72. Such right, however, "is not otherwise described in the declaration than by the averment that they were the goods of the plaintiff, or that he was lawfully possessed of them as of his own property." Walker *v.* Lauderdale, 17 Ala. 359.

3. Date. — The date stated as the time of delivery is immaterial. 1 Saund. Pl. 434. Unless it constitute a part of the contract. 2 Chit. Pl. 284, note *c*.

4. Venue. — The venue is transitory unless against justices of the peace. 2 Chit. Pl. 284, note *b*; 1 Saund. Pl. 434.

5. Description of Property — *Generally.* — Much certainty and accuracy are necessary in the description of the things demanded. Kettle *v.* Bromsall, Willes 120; 2 Saund. 74*b*; Boggs *v.* Newton, 2 Bibb (Ky.) 221. But it is not necessary to state the date of a deed. Alcorn *v.* Westbrook, 1 Wils. 115.

Sufficient Descriptions. — A statement before a justice of the peace is sufficiently specific which describes the property as "a six barreled pistol, called a six shooter or revolver." Wright *v.* Ross, 2 Greene (Iowa) 266.

of *£50*,[1] of lawful money of Great Britain, to be redelivered by the said *Charles Davis* to the said *Arthur Bacon* when he the said *Charles Davis* should be thereunto afterwards requested;[2] yet the said *Charles* Davis, although he was afterwards, to wit, on the *twenty-third* day of *January*, *1777*, at *Middlesex* aforesaid, requested[3] by the said *Arthur Bacon* so to do, hath not as yet delivered the said goods and chattels, or any of them, or any part thereof, to the said *Arthur Bacon*, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, and still unjustly detains the same from the said *Arthur Bacon*, to wit, at *Middlesex* aforesaid. And whereas also the said *Arthur Bacon* heretofore, to wit, on the *sixth* day of *May*, aforesaid, at *Middlesex* aforesaid, was lawfully possessed of certain other goods and chattels, to wit, *five* dozen silver knives, *two* cut glass bowls, *three* oil paintings, *three* mahogany tables and *eight* iron safes of great value, to wit, of the value of *£50*, of like lawful money as of his own property, and being so possessed thereof, he the said *Arthur Bacon* afterwards, to wit, on the *twenty-third* day of *January*, aforesaid, at *Middlesex* aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, to wit, on the *twenty-third* day of *January* aforesaid, at *Middlesex* aforesaid, came to the

A declaration for "a set of turner's tools" is too indefinite, but if there be added the words "being the same formerly owned by one *Burkett*," the description becomes sufficiently specific, and capable of being identified. March *v.* Leckie, 13 Ired. L. (35 N. Car.) 172.

See also sufficient descriptions of slaves in Whitfield *v.* Whitfield, 44 Miss. 254; Holladay *v.* Littlepage, 2 Munf. (Va.) 539; Bass *v.* Bass, 4 Hen. & M. (Va.) 478.

Insufficient Descriptions. — A declaration for a "red cow with a white face" is not supported by proof that "the cow was a yellow or sorrel cow." Felt *v.* Williams, 2 Ill. 206.

A declaration was held bad on demurrer, on the ground that it did not describe the said writing or writings with sufficient particularity and certainty to identify the same, when it alleged that the plaintiff "was lawfully possessed, as an heir-at-law of the said *Charles Rubicam*, deceased, of a certain writing or writings, signed by the said *Charles Rubicam* in his lifetime, or by some one in his behalf and at his instance and request, relating to a lot of ground of *four* acres, more or less, at or near *Twenty-sixth* and *Federal* streets, belonging to the said *Charles Rubicam*, dated within *five* years prior to the institution of this suit, and which said writing or writings concerns plaintiff's right, title, and interest in said lot of ground as an heir-at-law to the said *Charles Rubicam*, of the value of *fifteen thousand* dollars, or thereabouts, and came into the possession of the said defendant at the death of the said *Charles Rubicam*, by virtue of his office as executor of the said *Charles Rubicam's* estate." Rementa *v.* Erwin, 2 Penny. (Pa.) 407.

1. Value. — The declaration may mention the value of each particular. 2 Chit. Pl. 284, note *g*. Or of all in gross, and the latter is most usual. 2 Chit. Pl. 284, note *g*; 1 Saund. Pl. 434; Pawly *v.* Holly, 2 W. Bl. 853; Haynes *v.* Crutchfield, 7 Ala. 189. And an entire omission of value is good after verdict. Daniel *v.* Prather, 1 Bibb (Ky.) 484.

2. Contract of Bailment. — The contract of bailment should be truly stated. 2 Chit. Pl. 285, note *h*; 1 Saund. Pl. 434.

3. Request to Redeliver. — An averment of a special request to redeliver is necessary when the action is based on a contract of bailment. Kettle *v.* Bromsall, Willes 118; Bach *v.* Owen, 5 T. R. 409; and see the precedents in 7 Wentw. Pl. 635 *et seq.*; but some precedents referred to in 2 Chit. Pl. 285, note *i*, do not contain such an averment. And in Mortimer *v.* Brumfield, 3 Munf. (Va.) 122, it is said that a general charge that defendant, "although often requested," etc., is sufficient.

possession of the said *Charles Davis*[1] by finding;[2] yet the said *Charles Davis* well knowing the said last-mentioned goods and chattels to be the property of him the said *Arthur Bacon* and of right to belong and appertain to him, hath not as yet delivered the said last-mentioned goods and chattels, or any or either of them, or any part thereof, to the said *Arthur Bacon*, although often requested so to do, but hath hitherto wholly refused so to do, and hath detained, and still doth detain the same from the said *Arthur Bacon*, to wit, at *London* aforesaid. To the damage of the said *Arthur Bacon* of *£50*,[3] and therefore he brings his suit, etc.

(*Pledges to prosecute as in Form No. 6934.*)

Form No. 7428.

(Precedent in Dame *v.* Dame, 43 N. H. 37.)[4]

[(*Commencing as in Form No. 6945.*)][5] In a plea of detinue for that whereas the plaintiff heretofore, to wit, on the *first* day of *July*, 1*856*, at *Farmington* aforesaid, was lawfully possessed of a certain house and a certain barn, both situated on the land of the said *Daniel Dame*, being the house built by the plaintiff in the year 1*842*, said house being about *thirty-six* feet long and about *twenty-six* feet wide, and one story and one quarter high, and of the value of *$300*; and said barn being about *twenty-four* feet long and about *twenty* feet wide, and of the value of *$200*, situated between the house of *Eleazer Rand* and the house now owned by *Benjamin Chesley* on the left hand side of the road leading from the *Bay* road, so called, to the *Ten Rod* road, so called, as one goes toward the *Ten Rod* road, as of his own house and barn, and being so possessed, the said plaintiff afterward, to wit, on the *third* day of *July*, 1*856*, casually lost the same out of his possession, which thereafterward, to wit, on the same day, came into the hands and possession of the said *Daniel Dame*, by finding; and the plaintiff further saith, that although the said *Daniel Dame* well knew that the

1. **Defendant's Possession.** — It is necessary for the plaintiff to aver and prove actual possession of the property by the defendant anterior to the bringing of the suit. Allen *v.* Harlan, 6 Leigh (Va.) 42; Burns *v.* Morrison, 36 W. Va. 423; Anderson *v.* Passman, 7 C. & P. 193, 32 E. C. L. 491. But it may be alleged either that the defendant is in actual possession of the property or has culpably parted with it to avoid the suit. It is not sufficient that he has been deprived of possession by authority of law or parted with it without any intentional derogation of the right of the owner. Ford *v.* Caldwell, 3 Hill L. (S. Car.) 242. See also Tunstall *v.* McClelland, 1 Bibb (Ky.) 186; O'Shea *v.* Twohig, 9 Tex. 336.

2. **Averment of Finding.** — The averment of supposed finding is not traversable. Doc. Pl. 124; Mills *v.* Graham, 1 B. & P. N. R. 140; 2 Chit. Pl. 285, note *k;* 1 Saund. Pl. 434; Mills *v.* Graham, 1 B. & P. N. R. 140.

3. **Damages.** — As the judgment in this action is conditional to recover the specific chattel, or, in case it be not forthcoming, damages for detaining the same, a sum should be here inserted sufficient to cover their real value. 2 Chit. Pl. 286, note *l;* 1 Saund. Pl. 434.

4. On demurrer to this complaint, it was held that the action of detinue can be maintained in *New Hampshire* to recover personal property *in specie*, where the property came rightly into defendant's possession but has been wrongfully detained. See also Brown *v.* Ellison, 55 N. H. 556.

Consult, generally, annotations to Form No. 7427, *supra*.

5. The matter to be supplied within [ ] will not be found in the reported case.

said house and barn were the proper house and barn of the plaintiff, and although requested by the said plaintiff, to wit, at said *Farmington*, on the *nineteenth* day of *May*, 1*860*, to deliver the same to the plaintiff, yet the said *Daniel Dame* hath not delivered up the said house and barn to the plaintiff, but wholly refuses so to do, and still unlawfully detains the same. [(*Conclusion as in Form No. 6945.*)][1]

2. Plea, Non Detinet.[2]

Form No. 7429.

(Saunds. Pl. 435.)

In the *King's Bench* (or *Common Pleas* or *Exchequer*).
Trinity Term, *9 Geo. IV.*

Richard Roe
ats.
John Doe.

And the said defendant, by *Jeremiah Mason*, his attorney, comes and defends the wrong and injury, when, etc.,[3] and saith that he doth not detain the said goods and chattels in the said declaration specified, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him; and of this he, the said defendant, puts himself upon the country, etc.

II. Under Statutes.[4]

1. Declaration.

Form No. 7430.

(Ala. Civ. Code (1886), p. 795, No. 25.)[5]

(*Title of court and cause as in Form No. 5907.*)

1. The matter to be supplied within [ ] will not be found in the reported case.

2. The general issue in detinue is *non detinet*, under which the defendant may bring evidence of a gift from the plaintiff, or any other defense which proves that the defendant does not detain the plaintiff's goods; but the defendant must plead specially that the goods were pawned to him for money remaining unpaid. Co. Lit. 283. A lien must also be specially pleaded. 1 Chit. Pl. 113.

3. See *ante*, vol. 2, p. 109, note 2.

4. **Scope of Section.**—This section takes up the action of detinue in the states of *Alabama*, *Virginia* and *West Virginia*, in which states the action of detinue supersedes that of replevin. See Va. Code (1887), § 2899; W. Va. Code (1891), c. 103, § 4; and Ala. Civ. Code (1886), § 2717 *et seq.*

For a form under the *Maryland* practice which is called a declaration in detinue see Md. Pub. Gen. Laws (1888), art. 75, § 23.

5. **In General.**—The action derived from the statute (Ala. Civ. Code (1886), § 2717 *et seq.*) corresponds to the common-law action of detinue, and lies only when that action could have been maintained, and is governed by the rules, except as otherwise provided by statute, which govern that action. Cooper *v.* Watson, 73 Ala. 252. The gist of the action is the wrongful detention, not the original caption, and it is regarded as wholly unimportant whether the defendant's possession was acquired by a bailment or trespass. Salter *v.* Pearce, 4 Ala. 669; Peirce *v.* Hill, 9 Port. (Ala.) 151; Oliver *v* McClellan, 21 Ala. 675.

The plaintiff[1] claims of the defendant the following personal property, to wit: One chest or box of tools, containing one complete set of carpenters' tools, embracing all tools used in the carpenter's trade; one complete set of carving tools used for scroll work or carving; two complete sets of drawing tools, used for drawing plans of buildings by architects; also one set of turning tools, used by carpenters in turning-lathes,[2] with the value of the hire or use thereof during the detention, to wit: from the *first* day of *January*, 1897, to the *first* day of *April*, 1897.

Jeremiah Mason, Plaintiff's Attorney.

Form No. 7431.[3]

Circuit Court of the *County* of *Loudoun*, to wit: *April* Rules, 1898.

John Doe complains of *Richard Roe* of a plea that he render[4] to the said plaintiff one Goddard buggy of the said plaintiff,[5] of great value, to wit, of the value of *five hundred* dollars, which he unjustly detains from him. For this, to wit, that heretofore, to wit, on the *first* day of *January*, 1898, the said plaintiff delivered to the said defendant[6] the said Goddard buggy of the said plaintiff, of great value, to wit, of the value of *five hundred* dollars, to be redelivered by the said defendant to the said plaintiff when he, the said defendant, should be thereunto afterwards requested. Yet the said defendant, although he was afterwards, to wit,

1. Suit by Administrator. — In suing for the recovery of chattels belonging to his intestate's estate, an administrator may declare in the form prescribed by the code, with the additional averment that he claims as administrator, etc. Crimm *v.* Crawford, 29 Ala. 623.

2. Description of Chattels. — Greater strictness in describing the chattels is requisite than in trespass or trover, in which actions damages only are recoverable. But certainty to a common intent is sufficient. David *v.* David, 66 Ala. 139. "Bonds to the amount of $*2,100*, issued by the county of *Wilson*, State of *Tennessee*, and known as *Wilson* county bonds," without other descriptive words, is not a sufficient description; but the addition of words showing the denomination of the bonds, as "two bonds of $*1,000* each," renders the description sufficiently certain and definite, without specifying the dates, class or numbers; and it is not necessary to allege the authority of the maker to issue them. David *v.* David, 66 Ala. 139 And it was held sufficient to declare for a negro woman by name, without stating her complexion, size, age, etc.; or for a cow, without describing her color, mark, brand, etc ; or for so many knives and forks, without mentioning the maker's name, the character of the handles, metal, etc., in Haynes *v.* Crutchfield, 7 Ala. 189.

The description of the property claimed which is used in the text was held sufficient in Thompson *v.* Pearce, 49 Ala. 210.

3. In General. — Consult, generally, notes to Form No. 7427, *supra*. See also Va. Code (1887), § 2907; W. Va. Code (1891), c. 102, § 1; McCargo *v.* Callicott, 2 Munf. (Va.) 591.

4. "That Defendant Render." — If the declaration in detinue do not contain a demand "that the defendant render to the plaintiff" the property sued for, judgment ought not to be arrested after verdict on a plea of *non detinet*. Boggess *v.* Boggess, 6 Munf. (Va.) 486.

5. Plaintiff's Property. — It is only necessary to allege that the plaintiff is possessed of the property as of his own, for a bailee of chattels may maintain detinue for them upon his right of possession as bailee. Boyle *v.* Townes, 9 Leigh (Va.) 158. But a total omission to aver that the chattel "belonged to" or was the "property of" plaintiff renders the declaration insufficient, and the defect is not cured by verdict. Kent *v.* Armistead, 4 Munf. (Va.) 72.

6. Defendant's Possession. — That it is necessary to allege that the defendant has had possession of the property, see Allen *v.* Harlan, 6 Leigh (Va.) 42.

on the *first* day of *January*, 1*898*, requested by the said plaintiff so to do, has not as yet delivered the said Goddard buggy to the plaintiff, but has hitherto wholly neglected and refused, and still does neglect and refuse so to do, and still unjustly detains the same from the said plaintiff.

And for this also, that the said plaintiff heretofore, to wit, on the *first* day of *January*, 1*898*, aforesaid, was lawfully possessed of certain other goods and chattels, to wit: a Goddard buggy of great value, to wit, of the value of *five-hundred* dollars, as of his own property, and being so possessed thereof, the said plaintiff afterwards, to wit, on the *first* day of *January*, 1*898*, casually lost the said last-mentioned Goddard buggy out of his possession, and the same afterwards, to wit, on the *first* day of *January*, 1*898*, aforesaid, came to the said defendant by finding. Nevertheless, the said defendant, well knowing the said last-mentioned Goddard buggy to be the property of the said plaintiff, and of right to belong and appertain to him, has not as yet delivered the said last-mentioned Goddard buggy to the said plaintiff, although he was afterwards, to wit, on the *first* day of *January*, 1*898*, requested by the said plaintiff so to do, but has hitherto wholly refused, and still does refuse so to do, and has detained, and still does detain, the same from the said plaintiff, to the damage of the said plaintiff *five hundred* dollars. And therefore he brings his suite.

Jeremiah Mason, p. q.

2. Affidavit.

Form No. 7432.[1]

The State of *Alabama*, }
Jefferson County. }

Before me, *Abraham Kent*, a justice of the peace in and for said county, personally appeared *John Doe*,[2] who, having been by me duly sworn, deposeth and saith, that the following property, to wit: One chest or box of tools, containing one complete set of carpenters' tools, embracing all tools used in the carpenter's trade; one complete set of carving tools, embracing all tools used for scroll work, or carving; two complete sets of drawing tools, used for drawing plans of buildings by architects; also one set of turning tools, used by carpenters in turning-lathes,[3] for the recovery of which he has instituted suit this day in the *Circuit* Court of *Jefferson* county against *Richard Roe*, is the property of the affiant.

John Doe.

Sworn to and subscribed before me this *first* day of *April*, 1*897*.

Abraham Kent, Justice of the Peace.

Form No. 7433.[4]

Virginia : In the Clerk's Office of the *Circuit* Court of the *County* of *Loudoun.*

1. *Alabama.*—Civ. Code (1886), § 2717.

2. **Who May Make.**—The affidavit may be made by the plaintiff, his agent or attorney. Ala. Civ. Code (1886), § 2717.

3. See *supra*, note 2, p. 681.

4. *Virginia.*—Code (1887), § 2907. *West Virginia.*—Code (1891), c. 102, § 1.

John Doe, plaintiff,
against
Richard Roe, defendant.

This day personally appeared before me *Calvin Clark*, clerk of the *Circuit* Court of the county of *Loudoun*, *John Doe*,[1] of *Leesburgh*, in said county, who being duly sworn, made oath that there is good reason to believe that the defendant is insolvent, so that the recovery against him for the alternate value of the property and for damages and costs will probably prove unavailing, and that the property for the recovery of which such action is brought will be sold, removed, secreted or otherwise disposed of by the said defendant or his agent, or will be destroyed or materially damaged or injured by neglect, abuse or otherwise if permitted to remain longer in the possession of the defendant, so as not to be forthcoming to answer the final judgment of the said court; that the property claimed by the plaintiff as his property is a Goddard buggy of the value of *five hundred* dollars, and that said affiant verily believes he is entitled to recover the same.

John Doe.

Sworn to and subscribed before me as clerk of the said court, this *first* day of *January*, 1*898*.

Calvin Clark.

3. Bonds.

a. Of Plaintiff.

(1) To Secure Seizure by Sheriff.

Form No. 7434.[2]

The State of *Alabama*,
Jefferson County. } *Circuit* Court.

Know all men by these presents, that we, *John Doe*, *Samuel Short* and *William West*, all of *Birmingham*, in said county, are held and firmly bound unto *Richard Roe* of said *Birmingham* in the sum of *five hundred* dollars,[3] for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this *first* day of *April*, 1*897*.*

The condition of the above obligation is such, that whereas, the above bound *John Doe* has this day commenced suit in the *Circuit* Court of *Jefferson* county against the said *Richard Roe* for the recovery of the following property, to wit: (*describing it as in complaint*), and having made affidavit that the property sued for belongs to him, and, entering into this bond, has obtained an order[4] requir-

1. **Who May Make.** — In *Virginia*, the affidavit may be made by the plaintiff, his agent or attorney. Va. Code (1887), § 2907.

2. *Alabama.* — Civ. Code (1886), § 2717.

Precedent. — For a precedent of such a bond see Miller *v.* Garrett, 35 Ala. 96.

3. **Amount of Bond.** — The bond shall be in such sum as may be approved by the clerk. Ala. Civ. Code (1886), § 2717.

4. **Order to Sheriff.** — The order to the sheriff, which is indorsed on the summons, may be as follows:

"The State of *Alabama*,
Jefferson County. } To any Sheriff of said State, Greeting.

ing any sheriff of the state aforesaid to take the said property sued for into his possession.

Now, if the said *John Doe* shall fail in said suit and pay the defendant all such costs and damages as he may sustain by the wrongful complaint, then this obligation to be void, otherwise to remain in full force and effect.

And for the payment of the above bond, we hereby waive our right of exemption to personal property under the constitution and laws of the state of *Alabama.*

John Doe. (SEAL)
Samuel Short. (SEAL)
William West. (SEAL)

Approved this *first* day of *April*, 1897.

Calvin Clark, Clerk.

Form No. 7435.[1]

Know all men by these presents, that we *John Doe*, *Samuel Short* and *William West* are held and firmly bound unto *Richard Roe* in the sum of *six hundred* dollars,[2] to the payment whereof we bind ourselves, our heirs and personal representatives, jointly and severally, firmly by these presents. Witness our hands and seals this *first* day of *May*, 1898. We hereby waive the benefit of our homestead exemptions as to this obligation.*

The condition of the above obligation is such, that whereas *John Doe* has made affidavit, that in a certain action of detinue, now pending in the *Circuit* Court of the *county* of *Loudoun*, wherein the said *John Doe* is plaintiff and *Richard Roe* defendant, for the recovery of (*Here describe the chattels of which recovery is sought*), of the value of *three hundred* dollars, and that there is good reason to believe that the said defendant is insolvent, and that the said (*describing the chattels*) will be sold, removed, secreted, or otherwise disposed of by the said defendant or his agent, so as not to be forthcoming to answer the final judgment of the court, or will be destroyed or materially damaged or injured by neglect, abuse or otherwise, if permitted to remain in the possession of the said defendant, or other persons claiming under him. And said plaintiff in said action is about to sue out a process of seizure. Now, if the said *John Doe* shall pay all such costs and damages as may be awarded against him in said action, or sustained by any other person by reason of the seizure of said property, and also have the said property forthcoming to answer

The within named plaintiff having made affidavit and given bond as required by law, you are hereby required to take the property mentioned in the complaint into your possession, unless the defendant give bond payable to the plaintiff with sufficient surety, in double the value of the property, with condition that if the defendant is cast in the suit he will within *thirty* days thereafter deliver the property to the plaintiff, and pay all costs and damages which may accrue from the detention thereof. *Calvin Clark*, Clerk."

1. *Virginia.* — Code (1887), § 2907.
West Virginia. — Code (1891), c. 102, § 1.

2. **Amount of Bond.** — The bond shall be in at least double the value of the property. Va. Code (1887), § 2907; W. Va. Code (1891), c. 102, § 1.

any judgment or order of the court respecting the same, then this obligation to be void, otherwise to remain in full force and virtue.

Executed in the presence of	*John Doe.*	(SEAL)
Leonard A. Ford.	*Samuel Short.*	(SEAL)
Charles Mainjoy.	*William West.*	(SEAL)

In the clerk's office of the *Circuit* Court, of the *county* of *Loudoun*, *William West* and *Samuel Short* justified on oath, before me, *Calvin Clark*, clerk of the *Circuit* Court of the *county* of *Loudoun*, in my office, as to the sufficiency of their estate as securities to the above bond, exclusive of their homestead exemption, this the *first* day of *May*, 1*898*.

Calvin Clark, Clerk.

Form No. 7436.

(Precedent in Bratt *v.* Marum, 24 W. Va. 653.)[1]

[(*Commencing as in Form No. 7435, and continuing down to* *.)][2]

The condition of the above obligation is such that whereas the said *David P. Marum* has instituted an action before *Eugene McGinnis*, a justice of the peace of *Preston* county, state aforesaid, to recover the possession of one gray horse of the value of *one hundred* dollars from the said *Bratt*, who holds the same as deputy-sheriff of said county by virtue of tax-receipts against *Calhoun* and *Evans*; and whereas the said *Marum* desires to have immediate possession of said horse; now therefore, if said *Marum* shall pay all costs and damages, which may be awarded against him or sustained by any person by reason of such suit, and shall have the said horse forthcoming to answer any judgment or order of the justice respecting the same made at any time during the pendency of the action, then the above obligation to be void, otherwise shall remain in full force and virtue.

[(*Signed, sealed and witnessed as in Form No. 7435.*)][2]

(2) To Secure Delivery to Self.

Form No. 7437.[3]

(*Commencing as in Form No. 7434, and continuing down to* *.)

The condition of this obligation is such, that, whereas, the above named *John Doe* commenced an action of detinue against the said *Richard Roe* by issuing writ in detinue from the *Circuit* Court of said county on the *first* day of *April*, 1*897*, by which, together with the indorsement thereon, any sheriff of the state of *Alabama* was commanded to take into his possession the following described property, to wit: (*describing it as in complaint*), which said writ was, on the *first* day of *April*, 1*897*, placed in the hands of *Simon Stevenson*, sheriff of said county, for due execution thereof, and which said writ said *Simon Stevenson*, sheriff as aforesaid, executed according to its mandates, by taking possession of the following property, to wit: (*describ-*

1. See *supra*, note 1, p. 864.
2. The matter to be supplied within [ ] will not be found in the reported case.
3. *Alabama.*—Civ. Code (1886), § 2718.
Amount of Bond. — This bond must be in double the value of the property. Ala. Civ. Code (1886), § 2718.

ing it); and whereas, the said *Richard Roe*, defendant in said suit, has failed and neglected, for the space of *five* days from the taking into possession of said property by said *Simon Stevenson*, sheriff as aforesaid, to give bond and take possession of said property as authorized by law.

Now therefore, if the said *John Doe*, plaintiff in said suit, shall deliver the above described property to the said *Richard Roe*, defendant in said suit, within *thirty* days after judgment, together with damages for the detention of property and cost of suit, in case he shall fail to recover the same in his suit, then and in that event this obligation to be void, otherwise to remain in full force and effect.

And we hereby waive the benefit of all laws exempting property from levy and sale under execution or other process for the collection of debt, by the constitution and laws of the state of *Alabama*, and we hereby severally certify that we have property free from all incumbrance, to the full amount of the above bond.

(*Signatures and approval as in Form No. 7434.*)

b. Of Defendant.

Form No. 7438.[1]

(*Commencing as in Form No. 7434, and continuing down to* *.)

The condition of this obligation is such that, whereas the above-named *John Doe* did, on the *fifth* day of *February*, 1*898*, sue out of the *Circuit* Court of *Jefferson* county a writ of detinue directed to any sheriff in said state, and commanding him to take into his possession the following property, to wit: (*enumerating the property for which suit is brought*), which said writ was placed in the hands of *John Lynch*, sheriff of the county of *Jefferson*, on the *tenth* day of *February*, 1*898*, and executed by him on the *eleventh* day of *February*, 1*898*, by taking into his possession the following property, to wit: (*enumerating the property levied upon*). And whereas, the above bounden *Richard Roe*, defendant in this suit, has, within *five* days from the execution of said writ, entered into and executed this bond as required by law, and thereby obtained possession of the said property seized under this writ.

Now if the said *Richard Roe* is cast in said suit, and within *thirty* days thereafter shall deliver the said property to the plaintiff, and pay all costs and damages which may accrue from the detention thereof, then this obligation (*concluding as in Form No. 7434*).

Form No. 7439.[2]

(*Commencing as in Form No. 7435, and continuing down to* *.)

The condition of this obligation is such that, whereas the above-named *John Doe* did, on the *fifth* day of *February*, 1*898*, sue out of the *Circuit* Court of the *county* of *Loudoun* an order directed to the sheriff of said county commanding him to take into his possession the following property, to wit: (*enumerating the property for which suit is*

1. *Alabama.*— Civ. Code (1886), § 2717. *West Virginia.* — Code (1891), c. 102, § 4.
2. *Virginia.* — Code (1887), § 2908.

brought), which said order was placed in the hands of *John Lynch*, sheriff of the said county of *Loudoun*, on the *tenth* day of *February*, 1*898*, and executed by him on the *eleventh* day of *February*, 1*898*, by taking into his possession the following property, to wit: (*enumerating the property seized*). And whereas the above bounden *Richard Roe*, defendant in this suit, has entered into and executed this bond, as required by law, and thereby obtained possession of the said property seized in this writ;

Now, if the said *Richard Roe* shall pay all costs and damages which may be awarded against him in said action, and all damages which may accrue to any person by reason of the return of said property to him the said *Richard Roe*, and shall have said property forthcoming to answer any judgment or order of the court respecting the same, then this obligation (*concluding as as in Form No. 7435*).

4. Process of Seizure.

a. Before Judgment.

Form No. 7440.[1]

The *Commonwealth* of *Virginia*,
To the *Sheriff* of the *County* of *Loudoun*, Greeting:

Whereas, since the institution of an action of detinue in our *Circuit* Court of the *county* of *Loudoun*, brought by *John Doe* to recover (*describing the chattels*), of the value of *three hundred* dollars, there has been filed in the clerk's office of our said court an affidavit that the action is to recover (*describing the chattels*) as above described, of the value as aforesaid; and that the affiant verily believes that the plaintiff is entitled to recover the same, that there is good reason to believe that the said property for which the action is brought will be sold, removed, secreted, or otherwise disposed of, or will be destroyed or materially damaged or injured by neglect, abuse, or otherwise, if permitted to remain longer in the possession of the defendant. Therefore, we command you that you seize and take into your possession the said property, and hold the same subject to the future order of the court, and that you make return hereof at the rules to be held in the clerk's office on the *first Monday* in *March next*. And have there this writ.

Witness, *Calvin Clark*, clerk of our said court, at *the court-house*, this *tenth* day of *February*, 1*898*, and in the *122d* year of the *commonwealth*.

Calvin Clark.

b. After Judgment.

Form No. 7441.[2]

The State of *Alabama*, } *Circuit* Court.
Jefferson County. }
To any Sheriff of the State of *Alabama* — Greeting:

1. *Virginia.* — Code (1887), § 2907. *West Virginia.* — Code (1891), c. 102, § 2.
For a form indorsed on the summons in *Alabama* see *supra*, note 4, p. 683.

2. *Alabama.* — Civ. Code (1886), § 2717 *et seq.*

You are hereby commanded to seize and deliver to *John Doe*, of *Bradford*, the following personal property, to wit: (*describing it*), which the said *John Doe* on the *sixth* day of *May*, 1897, by the judgment of our *Circuit* Court, held for the county of *Jefferson*, recovered of *Richard Roe*, if the same can be had; if not, you are hereby commanded that of the goods and chattels, lands and tenements of the said *Richard Roe* you cause to be made the sum of *two hundred and fifty* dollars, the alternate value of the personal property, to wit: (*describing it*).

Also the further sum of *one hundred* dollars, for the detention of said property by the said *Richard Roe*, besides *fifteen* dollars, cost of suit; and make return of this writ and the execution thereof according to law.

Witness this *sixth* day of *May*, 1897.

Calvin Clark, Clerk.

5. Fi. Fa. for Alternative Value.

Form No. 7442.[1]

The *Commonwealth* of *Virginia*,
To the *Sheriff* of the *County* of *Loudoun*, Greeting:

We command you that of the goods and chattels of *Richard Roe*, in your bailiwick, you cause to be made the sum of *three hundred* dollars which were adjudged unto *John Doe* in our *Circuit* Court of the *county* of *Loudoun* as the alternative value of certain (*describing the chattels*) detained by the said *Richard Roe* from the said *John Doe*, also the sum of *fifty* dollars, which to the said *John Doe* in the same court was adjudged as well for his damages, which he sustained by reason of the detention of the said (*describing the chattels*) as for his costs by him about his suit in that behalf expended, whereof the said *Richard Roe* is convict, as appears to us of record. And that you have the same before the judge of our *Circuit* Court of the *county* of *Loudoun*, at *the court-house* thereof, on the first day of *March* term *next*, to render to the said *John Doe* of the alternative value of the said (*describing the chattels*), damages and costs aforesaid. And have then there this writ.

Witness, *Calvin Clark*, clerk of our said court, at *the court-house*, the *tenth* day of *February*, 1898, and in the *122d* year of the *commonwealth*.

Calvin Clark.

1. *Virginia.* — Code (1887), § 2907. *West Virginia.* — Code (1891), c. 102, § 1.

DE VENTRE INSPICIENDO.[1]

I. THE WRIT, 689.
II. THE RETURN, 690.

I. THE WRIT.

Form No. 7443.

(Precedent in Spooner's Case, 2 Chandl. Am. Crim. Trials, p. 381.)[2]

The Government and People of the *Massachusetts Bay* in *New England*.
(SEAL) To the Sheriff of *Worcester*, Greeting:

Jere. Powell,
Artemas Ward,
Walter Spooner,
Jabez Fisher,
Moses Gill,
Benj. Austin,
Dan'l Davis,
Oliver Prescott,
Timo Danielson,
N. Cushing,
John Pitts,
Oliver Wendell,
Josiah Stone,
A. Fuller,
Sam'l Baker.

Whereas, *Bathsheba Spooner*, late wife of *Joshua Spooner*, of *Brookfield*, in said County of *Worcester*, stands attainted in due form of law before our *Superior* Court *of Judicature, etc.*, held at *Worcester*, within and for the County of *Worcester*, on the *third Tuesday* of *April*, being accessory before the fact to the murder of the said *Joshua Spooner*, for which she has received sentence of Death, and a warrant has issued in due form of law, to have the same sentence duly executed on the *fourth* day of *June next*; and whereas, it has been represented to us in Council, by the said *Bathsheba Spooner*, that she is quick with child: And we, being desirous of knowing the truth of the said Representation, do command you therefore, that, taking with you *two* men midwives, and *twelve* discreet and lawful matrons of your County, to be first duly sworn, you, in your proper person, come to the said *Bathsheba Spooner*, and

1. Definition. — The writ de ventre inspiciendo is a writ to inspect the body where a woman feigns to be pregnant, to see whether she is with child. It lies for the heir presumptive to examine a widow suspected to be feigning pregnancy in order to enable a supposititious heir to obtain the estate. Bouv. L. Dict. 479. It also lay where a woman sentenced to death pleaded pregnancy. 4 Bl. Com. 495. For this purpose the writ has been recognized in America. Spooner's Case, 2 Chandl. Am. Crim. Trials, 381, *infra*, Form No. 7443.

2. Mrs. Spooner was convicted of the murder of her husband in 1778. She did not plead her pregnancy in stay of execution, but after sentence was passed she prayed for a respite; whereupon a warrant was sent from the executive council to sheriff to make the proper examination. This writ is the form given in the text. This form is a transcript of the original in the state archives of Massachusetts. The most striking feature of this case is the fact that a post-mortem examination of Mrs. Spooner's body showed that she actually was five months pregnant of a male child.

cause her diligently to be searched by the said matrons, in the presence of the said men midwives, by the Breasts and Belly, and certify the truth whether she be quick with child or not, and if she be quick with child, how long she has so been, under your seal, and the seals of the said men midwives, into the Secretary's office of *Massachusetts Bay* aforesaid, at or before the *25th* day of *June next*, together with the names of the matrons by whom you shall cause the said search and inspection to be made; hereof fail not, and make true return of this writ, with your doings hereon.

Witness the Major part of the Council of *Massachusetts Bay* in *New England*, at *Boston*, this *twenty-eighth* day of *May*, A. D. *1778*.

By their Honors' Order,

John Avery, D'y Sec'y.

II. THE RETURN.

Form No. 7444.

(Precedent in Spooner's Case, 2 Chandl. Am. Crim. Trials, p. 382.)[1]

Worcester, ss. In strict compliance with the within directions and warrant, I have summoned *two* men midwives and *twelve* lawful matrons, and caused the said matrons to be under oath, and, in my proper person, with the said men midwives and matrons, attended on the said *Bathsheba Spooner*; they have made the searches as required in the within writ. The verdict of the above matrons is, that the said *Bathsheba Spooner* is not quick with child.

Given under our hand and seals, this *eleventh* day of *June*, A. D. *1778*.

William Greenleaf, Sheriff, (SEAL)
Josiah Wilder, Midwife, (SEAL)
Elijah Dix, Midwife, (SEAL)

A list of the Matrons —

Elizabeth Rice,
Mary Todman,
Hannah Perry,
Zurbilch Stowell,
Christian Walker,
Ezebel Quigley,
Margaret Brown,
Mary Bridge,
Lidia Ball,
Hannah Brooks,
Mary Sternes,
Sarah Jones.

1. This return was indorsed on the writ set out *supra*, Form No. 7443. It is copied from the state archives of Massachusetts.

DILATORY PLEAS.

See the title ABATEMENT, PLEAS IN, vol. 1, p. 21.

DIPLOMATIC AND CONSULAR OFFICERS.

See the title ABATEMENT, PLEAS IN, Forms Nos. 62, 63.

DIRECTORS AND CORPORATION OFFICERS.

By Amos Burt Thompson.

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For other Forms in Proceedings by or against Agents, Directors or Officers of Corporations, see the title CORPORATIONS, vol. 5, p. 523, *and the Cross-References there found.*
See also the GENERAL INDEX to this work.

I. CIVIL ACTIONS BY.

1. For Services.[1]

a. Salary.

BY PRESIDENT AND GENERAL MANAGER.

Form No. 7445.

(Precedent in St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 608.)[2]

[(*Venue and title of court and cause as in Form No. 5917.*)][3]

The plaintiff, for cause of action, says:

I. That the defendant is a corporation duly organized under and by virtue of the general laws of the state of *Kansas*. That the defendant is indebted to this plaintiff, upon a promissory note, of which the following is a copy, to wit: (*Here copy of note was set out.*)[4] That said note was for salary as president and vice president and general manager from *February 23d*, 1880, to *March 7th*, 1882, and by mistake the recital was as above set forth.

Wherefore, plaintiff demands judgment on said note as against this defendant in the sum of *ten thousand* dollars, with interest at *ten* per cent. per annum from *March 10th*, 1882.

II. And for a second and further cause of action this plaintiff says, that the defendant is indebted to this plaintiff for salary as president and general manager of this defendant railroad company from *March 7th*, 1882, to *March 7th*, 1884, at an agreed and understood rate of *five thousand* dollars per year; and this plaintiff alleges that he was, and acted and performed the duties and services of, president and acting general manager of said defendant railroad company during

1. **Services.** — For other forms relating to the recovery of compensation for services rendered see the titles SERVICES; WORK AND LABOR; and also the GENERAL INDEX to this work.

2. The cause was tried by the court without a jury upon the pleadings, and the issues decided in favor of the plaintiff, and judgment rendered thereon was sustained on appeal.

3. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The words to be supplied in [ ] are not found in the reported case, but should be added to complete the form.

4. **Promissory note referred to** in the text was as follows:

"*Fort Scott, March 10*, 1882. *One hundred and eighty* days after date, the *St. Louis, Fort Scott & Wichita Railroad Company* promise to pay to the order of *Francis Tiernan, ten thousand* dollars, value received, payable on the *First National Bank, Fort Scott, Kansas*, with interest from date, at *ten* per cent. per annum, the same being for salary from *February 3d*, 1880, to *February 3d*, 1882. *St. Louis, Fort Scott & Wichita R. R. Co.*,

By *A. M. Ayres*, President.
Attest: *Ira D. Bronson*, Secretary.
(SEAL OF COMPANY)"

the whole period of time from *March 7th*, 1882, to *March 7th*, 1884, and that such services were well worth the sum of *five thousand* dollars per year. And this plaintiff alleges that he has received from said railroad company, this defendant, at various times, the following sums and amounts of money, which he hereby credits and applies upon his account for salary from *March*, 1882, to *March*, 1889, to wit: (*Copy of account*).[1]

Wherefore, plaintiff prays judgment against the defendant in the sum of *ten thousand* dollars, with interest at *seven* per cent. on *five thousand* dollars from *March 7*, 1883, and interest on *five thousand* dollars from *March 7*, 1884, less said credit of *four thousand and six hundred and 95-100* dollars.

Wherefore, plaintiff demands judgment against the defendant for *fifteen thousand three hundred and ninety-nine and 5-100* dollars, with interest at *ten* per cent. per annum from *March* 10, 1882, and costs of this action. [(*Concluding as in Form No. 5917.*)][2]

1. Account for salary referred to in text was as follows:

By corn delivered in 1882..	$48.60
" " " in 1883..	52.35
1883, cash received to settle *Whittaker* claim.....	1500.00
October 21st, 1884, cash on account.....	3000.00
Total.....	$4600.95

2. Defendant answered the above petition as follows, omitting the formal parts:

"I. The defendant for answer to the first cause of action in plaintiff's petition set forth, says: That the pretended promissory note therein set forth was not executed by this defendant, and that *A. M. Ayers*, as president, and *Ira D. Bronson*, as secretary of this defendant, were not authorized by this defendant to execute the same, and that the same is not the note or obligation of this defendant.

II. For a second and further answer to the first cause of action in plaintiff's petition set forth, defendant says that it is and has been a duly incorporated railroad company under the laws of the state of *Kansas*, from and since *February 23d*, 1880; that the plaintiff was one of its original promoters, incorporators and directors, and has, from *February 23d*, 1880, continuously remained a director, and is such now, having during all that time assumed and taken upon himself the duties of such director, and continued and acted as such; that on *February 28th*, 1880, the plaintiff was elected president of this defendant, and acted as such to *March 9th*, 1881, at which time he was elected vice president and general manager, and so continued and acted as such to *March 10th*, 1882; that on *May 10th*, 1880, the plaintiff was elected a member of, and chairman of, the executive committee of the board of directors of this defendant, said executive committee being, by resolution of the board of directors, vested with the power of making contracts, transacting business, and appointing officers on behalf of and for this defendant, and from *May 10th*, 1880, to *March 10th*, 1882, said executive committee exercised such powers, and were during that time mainly the managing body of the corporation; that previous to *March 10th*, 1882, no promise, agreement or contract had been made by this defendant to or with the plaintiff to pay him any sum of money for his services as president, vice president, director, or general manager; that he agreed to serve as such without the payment of any salary therefor.

III. The defendant, for answer to the second cause of action in plaintiff's petition set forth, admits the payment to the plaintiff of the sum of $4,600.95 at the times therein stated, but defendant says that this sum of money was paid by the officers of this defendant without authority from this defendant, and when the plaintiff had no just demand therefor against this defendant, and that the plaintiff wrongfully appropriated the same to his own use; and except as herein admitted, defendant denies all, each and every allegation in said second cause of action set forth,

and demands judgment against plaintiff for the sum of $4,600.95, and interest from this date.

IV. The defendant, for further answer to plaintiff's petition and for cause of action against him, says that this defendant was duly incorporated as a railroad company, under and by virtue of the laws of the state of *Kansas*, on *February, 23*, 1880, for the purpose of constructing and operating a line of standard-gauge railroad from a point on the eastern line of said state, east of *Fort Scott*, in *Bourbon* county, to *Kingman*, in said state, a distance of about *250* miles, and that from the time of its incorporation up to this time it has continuously exercised the rights, powers, privileges and franchises of a railroad company under the laws of the state of *Kansas*; that the plaintiff was one of the original promoters, incorporators and directors, and has, from *February 23*, 1880, continuously remained a director, and is such now, having during all that time assumed and taken upon himself the duties of a director, and continued and acted as such; that on *February 28*, 1880, the plaintiff was elected president of this defendant, and acted as such to *March 9*, 1881, at which time he was elected vice president and general manager, and so continued and acted as such to *March 10*, 1882; that on *May 10*, 1880, the plaintiff was elected a member of, and chairman of, the executive committee of the board of directors of this defendant, said executive committee being, by resolution of the board of directors, vested with the power of making contracts, transacting business, and appointing officers on behalf of and for this defendant, and from *May 10*, 1880, to *March 10*, 1882, said executive committee exercised such powers, and were during that time mainly the managing body of the corporation; that as such president, vice president, general manager, member of, and chairman of, the executive committee of the board of directors of this defendant, the plaintiff was the managing and chief administrative officer of this defendant; that on *January 12*, 1881, the plaintiff and one *A. M. Ayers*, who was then a director and vice president of this defendant, and one *J. J. Franklin*, who was then the treasurer of this defendant, purchased of one *M. S. Carter*, the road-bed of what was theretofore known as the '*Fort Scott, Humboldt & Western Railroad Company*,' in the counties of *Bourbon* and *Allen*, in the state of *Kansas*, the same consisting of some grading which had been done some ten years prior thereto on a contemplated line of railroad between *Fort Scott* and *Humboldt*, but which had long been abandoned — the plaintiff, said *Ayers* and *Franklin*, paying to said *Carter* therefor the sum of *fifteen thousand* dollars, which was the full value thereof; that on *January 13*, 1881, at the time when this defendant was greatly indebted beyond its liability to pay, and when very little, if any, of its line of railroad had been constructed, the plaintiff and said *Ayers* wrongfully, fraudulently, and in utter disregard of the duties which, as officers and directors of this defendant, they owed to it, and by collusion with their associate officers and directors, and in fraud of the rights of this defendant, its stockholders, bond-holders and creditors, the public and the state of *Kansas*, procured their said associate officers and directors to purchase of them the said road-bed so purchased of said *Carter*— the plaintiff and said *Ayers* having previously, on *November 12*, 1880, procured the passage of a resolution to that effect at a meeting of the board of directors of this defendant, at which the plaintiff and said *Ayers* were present, and in which they participated, and voted in favor of said resolution. As the purchase-price of said road-bed, the plaintiff, said *Ayers* and *Franklin* procured to be paid to themselves, of the moneys of this defendant, the sum of *two hundred thousand* dollars, the same having been finally paid to them *June 12*, 1882. In addition to the said sum of money so paid to them as aforesaid, the plaintiff, said *Ayers* and *Franklin* procured to be issued to themselves *three million six hundred thousand* dollars of the capital stock of this defendant, the plaintiff receiving as his share of the money so paid the sum of *sixty-six thousand six hundred and sixty-six* dollars, *sixty-six and two-thirds* cents; and of the capital stock of this defendant the sum of *one million two hundred thousand* dollars. This defendant received no other consideration for said sum of money so procured by said parties to be paid to themselves, and the capital stock of this defendant, so procured by them to be issued to themselves, than the said road-bed so purchased by them of said *Carter*. This defendant

further says that its capital stock, at the time it was so procured by the said parties to be issued to themselves, was of the value of *one hundred* cents on the dollar. Wherefore, defendant prays judgment against the plaintiff, for the value of said money and capital stock, in the sum of *three million eight hundred thousand* dollars.

Wherefore, upon all causes of action hereinbefore stated in favor of the defendant and against the plaintiff, the defendant prays judgment against the plaintiff for the sum of *three million eight hundred and four thousand six hundred* dollars and *ninety-five* cents."

The defendant also filed an amendment to its answer, as follows, omitting the formal parts:

"1. Defendant, by leave of court first had and obtained, files this, its amendment to its answer herein, and says that the plaintiff signed the articles of incorporation of the defendant, and became a director thereof, on the *19th* day of *January*, 18*80*, and from that time up to the time of filing said answer continuously remained and acted as a director of the defendant.

2. That the plaintiff *Ayers* and said *Franklin* paid *M. S. Carter* the $*15,000* for the road-bed of the *Fort Scott, Humboldt & Western Railroad* out of the moneys belonging to this defendant."

The plaintiff replied to defendant's answer above set forth as follows, omitting the formal parts:

"The plaintiff, for reply to defenses numbers 1 and 2, in defendant's answer herein, says that he denies each and every allegation therein contained.

For reply to defendant's answer number 4, filed herein, plaintiff denies each and every allegation therein, except as herein specifically admitted; and plaintiff says that he and *A. M. Ayers* and *J. J. Franklin* were the owners of the road-bed and old grade of the *Fort Scott, Humboldt & Western Railroad Company*, prior to the organization of this defendant railroad company; that upon the organization of the present railroad company, defendant herein, it was found desirable and necessary by it, for the success of this defendant corporation in building its proposed line of railway, to acquire said road-bed of the *Fort Scott, Humboldt & Western Railroad Company*, and upon a fair and full presentation of all the facts in the case to the board of directors of this defendant, and without any fraud or collusion, or underhand proceeding whatever, this plaintiff and his associates did sell the same to the railroad company, this defendant, for the notes of this defendant in the sum of *two hundred thousand* dollars. and for a majority of the stock of this defendant company to the nominal amount of its face value of *three million six hundred thousand* dollars; that said notes at that time had no value whatever, and only could become of any value upon the success of the railroad company in building its road. The said stock had no value at the time of said sale, and has no market value now, and never had any value except for the purpose of securing the control of the railroad of the defendant; that only a portion of said notes has ever been paid; that said company, this defendant, only paid a fair price for said old road-bed, and the transaction was a fair and valid one in all respects, and was known to, and ratified and affirmed by, all the stockholders of the defendant corporation.

And for a further reply to said answer number 4, this plaintiff says that more than *two* years have elapsed since said transaction, up to the bringing of this suit; and for a further reply, this plaintiff says that more than *three* years have elapsed between said transaction and the bringing of this action.

And for reply to the third defense set up in defendant's answer, plaintiff says: That he denies that the payment therein admitted and set forth was the unauthorized and mistaken act of the officers of this defendant, but was a duly authorized payment by this defendant to this plaintiff upon account, and for the purpose of being so applied, upon a due presentation of an account for services made by this plaintiff upon the defendant.

Wherefore, plaintiff demands judgment as in his petition."

Defendant filed a denial of plaintiff's reply above set forth, as follows, to wit, omitting the formal parts:

"Defendant, with reference to plaintiff's reply to count number 4 of defendant's answer, denies all, each and every allegation in said reply contained, save and except so far as the same are admissions of the allegations of said count number 4 and of defendant's right to recover of plaintiff for the cause of action therein stated."

b. Services and Money Expended.[1]

BY VICE PRESIDENT FOR MONEY EXPENDED AND SERVICES RENDERED AS MANAGER.

Form No. 7446.

(Copied from the record in Corinne Mill, etc., Co. *v.* Toponce. 152 U. S. 405.)[2]

Territory of *Utah*, County of *Weber*. } ss. In the *District* Court—*First* Judicial District, sitting at *Ogden* City.

Alexander Toponce, Plaintiff,
against
The Corinne Mill, Canal and Stock Company, Defendant. } Complaint.

1. The plaintiff above named complains of the defendant above named, and alleges:

That the defendant is now, and was at all the times hereinafter alleged a corporation, duly organized and existing under and by virtue of the laws of the *Territory* of *Utah*, and engaged in business in said *Territory*.*

That from *January 1*, 1*883*, to about the *1st* day of *December*, A. D. 1*887*, the plaintiff was the vice-president and general manager of the defendant and in charge of its business.

That from the said *1st* day of *January*, 1*883*, to and including the *1st* day of *December*, 1*887*, the plaintiff paid, laid out and expended for defendant, at its request, in and about its business divers and sundry sums of money, aggregating the sum of *forty-eight hundred and eighty-two* dollars and *twenty-three* cents (*$4,882.23*).

That said sum is now wholly due from defendant to plaintiff and remains wholly unpaid.

2. The plaintiff above named, further complaining of the defendant above named, and for a second cause of action, alleges: That (*continuing as in first cause of action to* *). That the defendant is indebted to plaintiff in the sum of *eleven hundred and thirty-three* dollars and *twenty-five* cents (*$1,133.25*), upon an account for feeding, caring for and keeping the horses and stock of defendant at its request from *January 15*, 1*883*, to *December 1*, 1*887*.

That said sum is wholly due and wholly unpaid.

3. The plaintiff above named, further complains of the defendant above named, and for a third cause of action alleges: That (*continuing as in first cause of action to* *). That from *January 1*, 1*883*, to *December 1*, 1*887*, the plaintiff, at its request, rendered services to the defendant as its general manager.

That during all of said time he devoted all his time and attention to the business of said defendant.

That his said services were and are reasonably worth the sum of *two hundred and fifty* dollars per month, and were reasonably worth

1. **Money Expended.** — For other forms relating to the recovery for money paid out and expended, consult the title MONEY PAID, and also the GENERAL INDEX to this work.

2. The plaintiff in this action recovered judgment against the defendant.

For the formal parts of bills in equity, complaints and declarations, gener-

for the whole of said period the sum of *fourteen thousand seven hundred and fifty* dollars (*$14,750*).

That said sum is due from the defendant to plaintiff and remains wholly unpaid.

4. The plaintiff above named complains of the defendant above named, and for a fourth cause of action alleges: That (*continuing as in first cause of action to* *) the *Territory* of *Utah*, and engaged in business in said *Territory*.

That on *January 1*, 1*887*, the defendant was indebted to *Lea Owsley* in the sum of *one hundred and forty-three* dollars and *sixty-eight* cents (*$143.68*), upon an account for work, labor and services done for defendant by said *Lea Owsley*, at its request, in and about its stock ranche prior and up to said *January 1*.

That on the *ninth* day of *January*, 1*888*, for value received, the said *Lea Owsley* sold, assigned and set over to plaintiff said account and indebtedness.

That said sum is wholly due and unpaid.

5. The plaintiff above named, further complaining of said defendant, and for a fifth cause of action alleges: That (*continuing as in first cause of action to* *) That on *January 1*, 1*888*, the defendant was indebted to *Lea Owsley* in the sum of *five hundred and eighty-one* dollars and *thirty-two* cents (*$581.32*), a balance upon an account for board furnished to the employes of defendant, at its request, from *December 1*, 1*884*, to *December 31*, 1*887*.

That. on the *9th* day of *June*, 1*888*, the said *Lea Owsley*, for value received, sold, assigned and set over unto the plaintiff the said balance of account and indebtedness.

That the same is wholly due and unpaid.

Whereupon plaintiff demands judgment against the defendant for the sum of *twenty-two thousand four hundred and twenty-four* dollars and *fifty-six* cents (*$22,424.56*), together with interest thereon at the rate of *ten* per cent. per annum from the date of filing this complaint, and for costs of suit.

Kimball & White, Attorneys for Plaintiff.

(*Verification.*)[1]

2. To Oust an Officer.[2]

ally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

1. Consult the title VERIFICATIONS.

2. **Quo Warranto.** — The proceeding to oust an officer of a private corporation is quo warranto.

Alabama. — Civ. Code (1886), § 3170.

Illinois. — Myers' Rev. Stat. (1895), p. 1117, § 1.

Indiana — Thornton's Stat. (1897), § 1154.

Iowa. — Code (1897), § 4313.

Kansas. — Gen. Stat. (1897), c. 96, § 98.

Michigan. — How. Anno. Stat. (1882), § 8635.

Minnesota. — Stat. (1894), § 5963.

Mississippi. — Anno. Code (1892), § 3520.

Montana. — Code Civ. Proc. (1895), § 1410

Nebraska. — Comp. Stat. (1891), p. 954, § 704.

Nevada. — Gen. Stat. (1885), § 3711.

New Jersey. — Gen. Stat. (1895), p. 2632, § 1.

North Carolina. — Code (1883), § 607.

North Dakota. — Rev. Codes (1895), § 5743.

Ohio. — Bates' Anno. Stat. (1897), § 6760.

Form No. 7447.[1]

(*Venue and title of court and cause as in Forms Nos. 5915, 5963.*)

The state of *Indiana*, on the relation of *John Doe*, *Daniel Webster* and *Abraham Kent*, complains of the defendant, *Richard Roe*, and gives the court to understand that the *Smith Lime Stone Company* is a corporation organized under the laws of the state of *Indiana*, and with its principal office in the county of *Decatur*. That the capital stock of said corporation is *sixty-nine thousand* dollars, divided into shares of *fifty* dollars each. That the relators own shares of said stock in the following amounts, *John Doe*, *three hundred* shares, *Daniel Webster*, *two hundred and seventy-seven* shares, and *Abraham Kent*, *two hundred* shares. That the by-laws of said corporation provide for the holding by the stockholders of an election of directors on the *third Wednesday* in *January* of each year, and that the number of directors shall be *five* and no more, and that *three* shall constitute a quorum at all meetings of the directors. That the last annual meeting of the stockholders of said company was held on the *seventeenth* day of *January*, 1*883*, that day being the *third Wednesday* in said month, at which said meeting the relators, *John Doe*, *Daniel Webster* and *Abraham Kent*, and defendant *Richard Roe* and one *James Jones* were elected as the directors of said company, to hold office until the next annual meeting of said company, to wit, the *third Wednesday* in *January*, 1*884*. Your relators further show that the by-laws of said corporation also provide that the officers of the corporation shall be a president and secretary and treasurer, and that said officers shall be elected by the board of directors.[2]

That a special meeting of said board of directors was called, but without any notice thereof being given to relator *John Doe*, for *two* o'clock *P.* M. of the *seventeenth* day of *February*, 1*883*.

That said *Richard Roe*, for the fraudulent purpose of cheating your relators out of their votes as directors of said corporation, agreed with one *James Jones* to, without notifying your relators, hold said meeting at *ten* o'clock *A.* M. of said day.

And without any notice of the change in the time of holding said meeting having been given to the relators, said *Richard Roe*, defendant herein, and one *James Jones*, directors as aforesaid, and one *Charles Mason*, fraudulently and without any right pretending to be a director, did assemble at *ten* o'clock *A.* M. of said *seventeenth* day of

Pennsylvania.—Pepp. & L. Dig. (1894), p. 3883.

South Carolina. — 2 Rev. Stat. (1893), § 428.

Tennessee. — Code (1896), § 5165, par. 1.

Texas. — Rev. Stat. (1895), § 4343.

Vermont. — Stat. (1894), § 1620.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5780.

Wyoming. — Rev. Stat. (1887), § 3092.

For forms connected with quo warranto proceedings generally, consult the title QUO WARRANTO.

1. **Founded on the facts** in the case of Armington *v.* State, 95 Ind. 421. The information in that case was held sufficient, the court deciding that it is not necessary to set forth that if the relators had been present at the meeting they would have voted against the election of the officer.

2. When the information is filed by some person other than the prosecuting attorney, it must show that the relator has an interest in the subject matter of the action. Thornton's Ind. Stat. (1897), § 1157: State *v.* Ireland,

February, 1*883*, and assume to hold a meeting of the board of directors of said corporation and to elect as the secretary and treasurer of said company defendant *Richard Roe*. Your relators show that under color of said pretended election defendant *Richard Roe* claims said offices and unlawfully continues to hold the same and to intrusively exercise the duties thereof. That on the *first* day of *March*, 1*883*, and at divers other times the relators have demanded of said *Richard Roe* that he cease to exercise the duties of said offices, and that he vacate the same, all of which he has refused to do and has continued to usurp the same. Wherefore, the said relators pray that due process of law may be awarded against the said *Richard Roe* to compel him to answer and show by what authority he claims to usurp, hold and exercise the offices aforesaid, and that he, the said *Richard Roe*, be ousted from exercising the same and all other proper relief.

Jeremiah Mason, Attorney for Plaintiffs.

(*Verification.*)[1]

3. For an Injunction.[2]

a. Generally.

AND FOR FORECLOSURE,[3] AND APPOINTMENT OF RECEIVER.[4]

Form No. 7448.

(Copied from record in Crescent Min. Co. *v.* Wasatch Min. Co., 151 U. S. 317.)[5]

In the *District* Court for the *Third* Judicial District, Utah Territory.

The Wasatch Mining Company, Plaintiff,
against
The Crescent Mining Company, Defendant.

The said plaintiff complains of said defendant and alleges:

I. That said plaintiff and said defendant are and at all times hereinafter mentioned were and still are, respectively, corporations organized under the laws of *Utah* Territory, as mining corporations, and authorized as such to own, buy and sell mining property.

II. That on or about the *first* day of *September*, 1*886*, said plaintiff sold and conveyed to said defendant, and said defendant purchased and received from said plaintiff a conveyance of the *Walker* and *Walker Extension* and the *Buckey* mining claims, situate in *Uintah* mining district, *Summit* county, *Utah* Territory. That to secure the payment of the purchase-money, *forty-two thousand five hundred* dollars, which the defendant agreed to pay for said property, said

130 Ind. 77. See also list of statutes cited *supra*, note 2, p. 698.

1. Consult the title VERIFICATIONS.

2. For forms connected with injunction proceedings, generally, consult the title INJUNCTIONS.

3. For forms connected with proceedings to foreclose, generally, see the title FORECLOSURE, etc.

4. For forms connected with proceedings relating to the appointment of receivers, generally, see the title RECEIVERS.

5. A decree for the plaintiff on the complaint was rendered, and the decree affirmed by United States supreme court.

For formal parts of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

defendant made, executed and delivered to said plaintiff a mortgage bearing date on the *first* day of *September*, 1*886*, and which appears to have been acknowledged according to law on the *fourth* day of *October*, 1*886*, which said mortgage recites the circumstances under which said sale and purchase were made, the terms thereof, and the amount of the purchase-money to be paid. It was the intention of both parties to include in said mortgage the entire property purchased, and other property. That a true copy of said mortgage with the certificates of acknowledgment and of record endorsed thereon or annexed thereto, is annexed to and made part of this complaint, and marked "*Exhibit A.*"

III. That the sole value of said mortgaged properties is in the ore deposits therein, and when they have been worked out the property will be worthless; that on the defendant's receipt of plaintiff's conveyance of said properties said defendants entered into possession of the said *Walker* and *Walker Extension* and *Buckey* mining claims, and have ever since been engaged in extracting and converting to its own use the ores found therein; that said defendant is now engaged and threatens to continue to be engaged in extracting said ores.

IV. That no part of said mortgage debt has been paid; that the action relative to the title mentioned in said mortgage is still pending and undetermined; that no direction has been made or given by all the parties to said action how payment of said mortgage debt shall be made, and therefore the condition of said mortgage requiring the mortgagor to pay the mortgage debt into this court is operative, and such payment is now due.

V. That the mortgaged property is a slender security for said mortgage debt. That as plaintiff is informed and believes the mining claims mentioned in said mortgage, other than the said property so purchased by said defendant from said plaintiff, have been worked out and exhausted of their ores, which gave them their sole value. And that the other property mentioned in said mortgage, viz: the tramway and concentrating mill, are valuable only in connection with said mortgaged premises, and will be of trifling value when said premises yield no more ore; that in such connection, and will so used, their value does not exceed, as plaintiff is informed and believes, the sum of ——— dollars. That a reasonable attorney's fee for foreclosure of said mortgage is *five* per cent. reckoned on the mortgage debt.

Therefore said plaintiff prays for relief and judgment as follows:

1. That said defendant and its agents and servants be enjoined from working or mining in the mortgaged premises or extracting and removing therefrom any ores. And that a receiver be appointed with the usual powers to take charge of said mortgaged premises during the pendency of this action.

2. That the amount of the mortgage debt be ascertained and adjudged to include principal *forty-two thousand five-hundred* dollars and interest after maturity at the rate of *ten* per cent. per annum, together with *five* per cent. for reasonable attorney's fee stipulated for in said mortgage, and that the usual decree of foreclosure may be made, and that the mortgaged premises be sold according to law,

and the proceeds of such sale be applied to pay the costs, and said mortgage, and that said plaintiff may have such other and further relief or judgment as shall be equitable.

J. G. Sutherland,
W. H. Dickson,
Plaintiff's Attorney.

(*Verification.*)[1]

b. To Abate Nuisance.[2]

Form No. 7449.

(Precedent in New Orleans Water-Works Co. *v.* Oser, 36 La. Ann. 918.)[3]

[(*Title of court and cause, address, and commencement as in Form No. 5919; allegation of plaintiff's incorporation as in Form No. 5947; and allegation of partnership of defendant as in Form No. 5957.*)] The defendants are erecting and constructing and propose to operate a nuisance, wharf at the foot of *Robin* street, in this city, and on the banks of the *Mississippi* river, a nuisance wharf to be used by them for the sole purpose of discharging therefrom into nuisance boats, and into the river adjacent thereto, night soil, fœcal and stercoraceous matter; that petitioner's pipes for drawing its supply of water for municipal distribution from the river, enter the said river within such close proximity to said nuisance wharf as to make the pollution of the supply of water for the use of the city absolutely certain, should said wharf be used as is now contemplated; that the said threatened pollution of the water is aggravated by the fact that an eddy in the river extends from the foot of said *Robin* street and from said nuisance wharf to petitioner's said supply pipes, which eddy prevents the general distribution and diffusion of impurities which might fall from said wharf into the river, and which, in the operation of said wharf and boats must necessarily so fall.

That the operation of said wharf and boats will, if permitted, by filling the atmosphere with noxious and noisome exhalations and stenches disturb petitioner's comfortable enjoyment of its works and buildings and prevent the proper use and employment thereof by its officers and employees; that such use of the said wharf would amount to a nuisance; that petitioner's rights to pure air and the comfortable enjoyment of its said property are incidents thereto and to its chartered franchise, annexed to and parts of them, and are as sacred as its right to said property and charter; and that its threatened deprivation as aforesaid by defendants would constitute a nuisance and be such a taking of petitioner's rights and property as no municipal or

1. **Verification.** — The pleading was verified by the secretary of the plaintiff company. Consult the title VERIFICATIONS.

2. For forms connected with the abatement of nuisances, generally, see the title NUISANCES.

3. The complaint in the case cited as a precedent was considered sufficient and an injunction was granted.

For formal parts of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The words to be supplied in [ ] are not found in the reported case, but should be added to make the precedent complete.

legislative action could lawfully permit without due compensation; that defendants have never been legally authorized to construct said wharf, and that the construction thereof is illegal and unauthorized and the construction itself a nuisance which petitioner is permitted to enjoin; that the construction and use aforesaid of said nuisance wharf would operate against petitioner an irreparable injury. [(*Concluding as in Form No. 5919.*)]

II. CIVIL ACTIONS AGAINST.[1]

1. Actions on Bonds of Corporation Officers. — In Durkin *v.* Exchange Bank, 2 Patt. & H. (Va.) 277, is set out the material parts of a declaration to recover from the officer and his bondsman money converted by the former. See also the title BONDS AND UNDERTAKINGS, ACTIONS ON, vol. 3, p. 812 *et seq.*

For Breach of Contract. —In Dodge *v.* Minnesota Plastic Slate Roofing Co., 14 Minn. 49, the complaint, omitting the formal parts, was as follows: "That the said defendant is a corporation, constituted and organized under the laws of the state of *Minnesota*, and empowered, among other things, to make and furnish roofs as described in the agreement hereinafter mentioned; that during the year 1866, the said defendant agreed with said plaintiff, in consideration of a certain compensation to be paid to said defendant, to construct and furnish for said plaintiff upon a certain building of said plaintiff, in the city of *St. Paul*, in said county, consisting of certain tenements or dwelling houses, commonly known as the '*Alpine Cottages*,' a first-class Plastic Slate roof, which should be durable, wind-proof, water-proof, and fire-proof, and be constructed in a skilful, workmanlike, and substantial manner, and which (after *two* weeks from its completion) should not impregnate the water which might be conducted from said roof, with any tar or other material of which said roof might be composed, nor otherwise render the said water impure. That said defendant pretending to comply with said agreement, in 1866, constructed a roof upon said building which said defendant then and there represented to the plaintiff to be of the description and quality called for by said agreement, and that the said plaintiff, relying upon said representations, on the *twenty-second* day of *November*, 1866, paid said defendant the sum of *five hundred* dollars, with the understanding between said parties that said defendant should furnish plaintiff sufficient material for another coat of the composition of which said roof was made — or slate cement, so-called — when desired by plaintiff, and which said sum was the full compensation demanded therefor by said defendant. That, thereafter, said roof appeared to require another coat aforesaid, and said defendant, in the spring of 1867, at the request of said plaintiff, put said other coat upon said roof, and that said plaintiff, still relying upon the representations of said defendant that the said roof was of the description and quality called for in said agreement first aforesaid, paid to said defendant the sum of *sixty-three* dollars and *ten* cents, being the full compensation demanded by said defendant for said work.

And the said plaintiff says that prior to the commencement of this suit, and shortly after the payment of said money last mentioned, he discovered that the said roof was not of the quality or description called for and required by said agreement; or as represented to be by said defendant as aforesaid; and said plaintiff shows that the said roof constructed by said defendant was of inferior quality and unskillfully and imperfectly constructed and insufficient for the purposes of a roof for said building. That it has never been either wind-proof or water-proof. That the same has leaked badly and been constantly shaken and loosened by the wind, and has been so defective and imperfect in its structure and composition as to be unserviceable and worthless from the time of its completion, and that a short time after its completion it became cracked, wind-shaken and leaky.

That the plastering and interior of said building has been much stained and injured by the leakage of said roof

1. For Accounting.[1]

a. Generally.

TO COMPEL DIRECTORS TO ACCOUNT FOR CAPITAL STOCK.

Form No. 7450.

(Precedent in Nott *v.* Clews, 14 Abb. N. Cas. (N. Y. Supreme Ct.) 437.)[2]

[(*Venue and title of court and cause as in Form No. 5926.*)][3] The complaint of the above named plaintiff, who sues as well for all other stockholders of the defendant, *Las Nueve Minas de Santa Maria Gold and Silver Mining Company*, who may choose to come in and avail themselves of the benefits of this action, and pay their proportion of the expenses thereof, as for himself, respectfully shows to this court. That he is a stockholder of the defendant, *Las Nueve Minas de Santa Maria Gold and Silver Mining Company*; that he purchased his stock in good faith, and for a valuable consideration.

And the plaintiff further shows and alleges on information and belief:

First. That the defendant *Las Nueve Minas de Santa Maria Gold and Silver Mining Company*, is a corporation having been duly created and organized in the month of *October*, 1*881*, under and by virtue of the laws of the state of *New York*, providing for the formation of corporations for mining and other purposes, and with a capital stock of $*25,000,000* divided into *one million* shares of $*25* each, having its principal office and place of business in the city of *New York*.

Second. That the individual defendants above named were the trustees and directors of said defendant, *Las Nueve Minas de Santa Maria Gold and Silver Mining Company*, for the *first* year after the

made by the defendant. That the water conducted from the roof of said building, (since the expiration of *two* weeks after the completion of said last mentioned roof) into cisterns has always been impure and unfit for use, by being impregnated with tar and other offensive matter derived from said roof. That ever since the roof last mentioned has been placed upon said building, the comfort, convenience, use and enjoyment of said tenements or dwelling houses have been much impaired, and that said plaintiff, by reason of the facts aforesaid, and the said defects and imperfections in the said roof last mentioned, has been greatly annoyed and put to great inconvenience.

That the said defendant has not complied with the agreement of said defendant first aforesaid in manner before stated, and plaintiff says that he has been greatly damaged thereby, and by reason of the failure of the said defendant to make and furnish a roof for his said building in accordance with the agreement of said defendant, and by the said acts of the said defendant aforesaid, in manner aforesaid, and claims damages against said defendant in the premises in the sum of *two thousand* dollars." A demurrer to this complaint was properly overruled; it being also held in this case that an allegation alleging that a party is a corporation "constituted and organized under the laws of the state of *Illinois*" sufficiently alleged the corporate existence of the party. Consult also Forms Nos. 4903, 4906.

1. For forms relating to accounting, generally, see the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 272. See also *infra*, Forms Nos. 7453, 7456.

2. *New York.* — Bliss' Anno. Code (1890), § 1781. Demurrer to this complaint was overruled.

3. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

organization of said corporation, and at the time of the issue and disposition of its stock as hereinafter mentioned.

Third. That soon after the organization of said defendant corporation as aforesaid, the said individual defendants, assuming to act for said defendant corporation, entered into an agreement, or pretended agreement, with the owner of certain mining claims and property, situated in the State of *Sonora*, in the *Republic of Mexico*, to issue to him or to a trustee for him, or him and his associates, as full-paid stock, *nine hundred and ninety-nine thousand nine hundred and ninety-three* shares of the capital stock of said defendant corporation, amounting to $*24,999,825* (being all the capital stock of said company, except *seven* shares which were issued for cash), for the consideration, or pretended consideration, of the conveyance to said defendant corporation of said mining claims and property; and that said mining claims and property were conveyed in form, and said stock issued accordingly.

Fourth. That said mining claim and property were of little or no value for mining purposes, in the condition in which the same were, when conveyed as aforesaid. That the only workings for mines or ores on said property were abandoned a century or more ago, and the shafts or openings were, in a great measure, filled with earth, debris, mud and water, and the same could only be reopened by a great amount of labor, and the expenditure of immense sums of money, and only after such expenditure of labor and money could the presumption of the unproductiveness of said mines, arising from the abandonment of such working, be overcome. That said mining claims and property were not worth the sum of $*24,999,825* paid for them as aforesaid, or any considerable proportion of that amount. That the same were purchased for $*17,000* from the *Mexican* owners a short time before the conveyance thereof to the defendant corporation by the person who, directly or mediately, conveyed the same to said corporation. That the actual value of said mining claims and property did not, at any rate, exceed $*500,000*, and that the market value of same was less than said last mentioned sum, and that $*24,999,825* was an unfair, excessive, and improvident consideration for the conveyance of said mining claims and property.

Fifth. That immediately after the issue of such stock as aforesaid, a large portion of the same was turned over by such vendor to, and received by, the individual defendants and their associates, friends, and nominees, at a nominal price, which price was less than *five* per cent. of the par value of such stock.

Sixth. That the shares of stock, mentioned and referred to in the last preceding paragraph, were transferred and delivered to the individual defendants, their friends and nominees, in pursuance of the real scheme devised, and agreement made, between said vendor and the individual defendants, for the sale of the mining claims and property, and the issue of the stock of the defendant corporation thereof, or of a further agreement made at the same time. And that thereafter said stock, or the portion thereof turned over to the individual defendants, was disposed of or might have been disposed of, in the market at a large profit.

Seventh. That the individual defendants at the time of the issue and delivery of the stock, and the conveyance of said mining claims and property, well knew or could and would, with the exercise of due and reasonable care and diligence, have known the condition and value of said property so conveyed to the defendant corporation, and that the market value thereof did not exceed $*500,000.* They also well knew, or could with reasonable care and diligence have ascertained, the cost of said property to the said vendor, and that the same was purchased by him with the design and intention of conveying the same to the defendant corporation, then organized, or intended to be organized, under the laws of the State of *New York.*

Eighth. That the individual defendants, after the issue of the whole capital stock of the defendant corporation, failed and neglected to make a record in the office of the clerk of the county of *New York*, a certificate stating the amount of capital so fixed and paid, as required by statute under which defendant corporation was organized, and that no such certificate has at any time been filed or recorded in such clerk's office.

Ninth. That after the issue and disposition of said stock of the defendant corporation, as hereinbefore stated, said corporation was entirely without means to work and improve said mining property, except the sum of $*175* derived from the sale of *seven* shares issued for cash.

That the said individual defendants with a view of giving an apparent value to and enhancing the market value of the stock, made ostensible efforts to work said mines, and to extract ores therefrom, and that the result of such operations has been to create an indebtedness on the part of said defendant corporation to the amount of $*90,000* and upwards.

Tenth. That the individual defendants, assuming to act on behalf of the defendant corporation, by the certificates of stock issued and circulated by them represented to the public, including this plaintiff, that the said stock was full paid. That such stock or a large proportion thereof, including the stock now held by the plaintiff, has been sold as full-paid stock in the open market, in pursuance of such representations, and thus passed to innocent holders and purchasers including the plaintiff.

Eleventh. That plaintiff purchased his stock in the open market, relying upon the representations aforesaid, and thereupon received from the prior holder or holders thereof certificates before that time, duly issued under the sanction of said individual defendants, declaring such stock to be full paid and accompanied by the usual power or powers of attorney for the transfer of the same. That said plaintiff caused such certificates, with such power or powers of attorney, to be presented at the office of said defendant corporation, and upon the surrender of such certificate and the proper transfer of such stock on the books of said corporation, in pursuance of the by-laws thereof, the said defendant corporation through its proper offices duly issued to the plaintiff, certificates, declaring that he was the owner and holder of *three hundred* full-paid-up shares in the capital stock of said defendant corporation, that being the number of shares represented by such surrendered certificates.

Twelfth. That the individual defendants have individually received large sums of money, gains and profits, from the sale of that portion of the stock of the defendant corporation turned over to them at a nominal price by the vendor of the property, as herein before stated. That plaintiff is unable to state definitely the amount received by said individual defendants, and each of them, from the sale of such stock.

Thirteenth. That the individual defendants have not, nor have any or either of them, accounted concerning or paid over to the defendant corporation the difference between the *$24,999,825* represented by the capital stock of the defendant corporation, issued for property as aforesaid, and the real value or market value of the property conveyed to the said corporation in exchange therefor, nor any part of such amount, nor have the individual defendants or either of them accounted for or paid over to said defendant corporation the sums of money, gains and profits received by them, or either of them, from the sale of the stock of the defendant corporation as herein before stated.

Fourteenth. That *four* of the individual defendants are still directors of the defendant, *Las Nueve Minas de Santa Maria Gold and Silver Mining Company*, and are a majority of the board of directors, and control the same, for which reason said defendant, *Las Nueve Minas de Santa Maria Gold and Silver Mining Company*, is in no condition to bring and prosecute an action, for the relief sought by this action and neglects to do so, and is for that reason made a defendant in this action, but no personal claim is made against the defendant, *Las Nueve Minas de Santa Maria Gold and Silver Mining Company.*

The plaintiff therefore prays: that the individual defendants may be adjudged and declared to be trustees as to the *$25,000,000* represented by the *one million* shares of the capital stock of the defendant corporation, and that they may collectively and severally be adjudged and decreed to account of and concerning such sum. That they may also be severally adjudged and decreed to account of and concerning the sums of money, gains and profits received by each from the sale of the stock of the defendant corporation as aforesaid.

That the value of the property conveyed to said defendant corporation, to be determined by this court, be credited on such accounting as may be just.

That the amount found due on such accounting may be brought into court and paid to a special receiver to be appointed by this court, and disposed of, as the court may direct. That the plaintiff, and other stockholders of such corporation, who may choose to come in and share the benefits and expenses of this action, may be paid their proportion of the amount found due on such accounting, after satisfying all prior just claims thereon, and that the plaintiff and such other stockholders and the defendant, *Las Nueve Minas de Santa Maria Gold and Silver Mining Company* may have such other and further relief as may be just and equitable with costs of this action to be paid by said individual defendants. [(*Concluding as in Form No. 5926.*)]

b. By Bondholders.

ALSO SEEKING FORECLOSURE[1] AND APPOINTMENT OF RECEIVER.[2]

Form No. 7451.

(Copied from record in Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459.)[3]

Circuit Court *of the United States*, *Eastern* district of *Texas.*

N. A. Cowdrey and others against *The Galveston, Houston and Henderson Railroad Company and others.* } In Chancery.

To the judges of the *Circuit* Court *of the United States* for the *eastern* district of *Texas.*

Your orators, *N. A. Cowdrey*, *Edwin* and *George Parsons*, *Frederic P. James*, and *Isaac Sherman*, citizens of the city and State of *New York*, bring this their bill against the *Galveston, Houston and Henderson Railroad Company*, successors of the first named company, the *Galveston and Houston Junction Railroad Company*, *George B. Nichols*, *J. L. Briggs*, *L. M. Hitchcock*, *Thomas W. Pierce*, *E. B. Nichols*, *J. H. Hutchings*, *Wm. R. Smith*, *Robert Mills*, *E. S. Wood*, *John Sealy*, *T. H. McMahan*, *S. Southwick*, *Wm. H. Nichols*, *George Ball*, and *J. W. Jockusch.*

The individuals defendants above named are all, except *Tho's W. Pierce*, who is a citizen of *Boston* and of the State of *Massachusetts*, citizens of *Galveston* and of the State of *Texas*, in said *eastern* district of *Texas*; and the above named companies or corporations are located in and have their principal places of business in the State of *Texas*, and *eastern* district thereof, and profess and claim to be organized under the laws of said State.

Your orators respectfully say that they bring this bill not only for their own benefit, but for that of all other holders or owners of bonds or coupons issued under, and purporting to be secured by, the various mortgages or deeds of trust herein sought to be foreclosed according to their respective priorities, who may come in and contribute to the costs and expenses necessary for the prosecution of this suit. And thereupon your orators complain and say that the *Galveston, Houston and Henderson Railroad Company*, being a body corporate, created under the laws of the State of *Texas*, did, on the *first* day of *December*, 1853, by virtue of the powers conferred upon it by the State of *Texas*, make, execute, and deliver to *William Kent*, a citizen of the city and State of *New York*, *Ambrose Moore* and *John Masterman, jr.*, both of the city of *London*, *England*, a mortgage or deed of trust,

1. For forms relating to foreclosure, generally, see the title FORECLOSURE OF MORTGAGES.

2. For forms relating to appointment of receivers, generally, see the title RECEIVERS.

3. A decision in this case in favor of N. A. Cowdrey was affirmed by the supreme court of the United States.

For formal parts of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

according to the provisions of its charter in such case made and provided, a copy of which mortgage or deed of trust is hereto attached marked Schedule "*A*," to which your orators crave leave to refer with the same effect as if here set out, and to which they hereinafter refer as the *first* or *six* per cent. mortgage, which mortgage or trust deed was duly and legally recorded as authorized by the laws of *Texas*, wherein the premises are located.

That afterwards, on or about the *first* day of *June*, A. D. 1855, the said *Galveston, Houston and Henderson Railroad Company*, by virtue of like powers conferred upon it by the State of *Texas*, and according to the provisions of its charter in such case made and provided, did make, execute, and deliver to *William Kent*, a citizen of the city, and State of *New York*, and *Charles B. Haddock*, a citizen of the town of *Lebanon*, in the State of *New Hampshire*, a mortgage or deed of trust, a copy of which is hereto attached, marked Schedule "*B*," to which your orators crave leave to refer with the same effect as if here set out, and to which they hereinafter refer as the *second* or *ten* per cent. mortgage, which mortgage or trust was duly and legally recorded as authorized by the laws of *Texas*, wherein the premises are located.

That afterwards, on or about the *eighth* day of *October*, A. D. 1857, the said *Galveston, Houston and Henderson Railroad Company*, by virtue of like powers conferred upon it by the State of *Texas*, and according to the provisions of its charter in such case made and provided, did make and execute and deliver to *William Kent*, a citizen of the city and State of *New York*, and *Charles B. Haddock*, a citizen of the town of *Lebanon*, State of *New Hampshire*, a mortgage or deed of trust, a copy of which is hereto attached, marked Schedule "*C*," to which your orators crave leave to refer with the same effect as if here set out, to which they hereinafter refer as the *third* or *eight* per cent. mortgage, which mortgage was duly and legally recorded as authorized by the laws of *Texas*, wherein the premises are located.

That the object and purpose of making said mortgages or deeds of trust was to enable said *Galveston, Houston and Henderson Railroad Company* to raise money with which to construct, equip, and supply their railroad; that, in pursuance of said object and purposes, the said company did obtain the money by the sale of the bonds issued under said mortgages or deeds of trust, and that their entire railroad from *Galveston* to *Houston*, about *fifty-two* miles, was built, equipped, and supplied by the money furnished by your orators and others, *cestuis que trust*, under said mortgages or deeds of trust, and the repayment of which was secured thereby as therein set forth.

That the *first* or *six* per cent. mortgage or trust deed was given to secure the payment of *one hundred and fifty thousand* pounds sterling, currency of the *Empire* of *Great Britain*, and the evidences, bonds, or obligations given therefor were in sums of *one hundred* pounds sterling each, and were made payable in the city of *London*, *England*, interest semi-annually, *three* pounds sterling on the *first* day of *June* and *December* of each year, until the principal thereof matured and became due, viz., on the *1st* of *Dec.*, 1873, as more fully appears by reference to the description of said bonds contained in Schedule "*A*," hereto attached.

That afterwards, the defendants, the makers thereof, paid, cancelled, and took up a portion of said bonds secured by said mortgage, the exact amount is to your orators unknown, but they believe about *one hundred thousand* pounds sterling, so that there is now in the hands of holders, for value received and due and unpaid, *fifty thousand* sterling, with interest on said semi-annual coupons from the time of their maturity to the time of the final decree of this court made herein, amounting now in the aggregate, as your orators charge and believe, to *one hundred thousand* pounds sterling, and in the currency of the country to near *seven hundred and fifty thousand* dollars. That the premises embraced in said mortgage or trust deed given to secure the indebtedness above named are correctly described in the copy hereto attached as Schedule "*A*."

That the *second* or *ten* per cent. mortgage or trust deed was given to secure the payment of *seven hundred and fifty thousand* dollars in *ten* years from date, with interest, coupons due and payable semi-annually, on the *first* day of each *January* and *July*, until said principal become due and payable, which debt was evidenced by bonds and coupons as more fully appears by reference to the description thereof contained in Schedule "*B*" hereto attached, all of which were issued for value received.

That afterwards the defendants, the makers thereof, paid and cancelled about *fifty thousand* dollars, the exact amount is to your orators unknown; but your orators believe, and therefore charge, that there is now outstanding and due and unpaid of said *second* mortgage or *ten* per cent. bonds, *seven hundred thousand* dollars with unpaid interest or coupons due thereon and interest upon said past due coupons from the *first* day of *July*, 1*855*, to the time of the final decree of this court made hereon, in the aggregate amounting now, as your orators charge and believe, to *one million five hundred thousand* dollars.

That the premises embraced in said mortgage or trust deed given to secure the indebtedness above named, are correctly described in the copy hereto attached as Schedule "*B*."

That the *third* or *eight* per cent. mortgage or trust-deed was given to secure the payment of *two million six hundred and twenty-five thousand* dollars in ——— years from date, with interest coupons due thereon — semi-annually on the *first* day of *January* and *July* in each year until said principal becomes due, which indebtedness was evidenced by bonds and coupons, as more fully appears by reference to the description thereof contained in the copy of said mortgage in Schedule "*C*" hereto attached.

That a portion of the same were never issued by said company. The exact amount issued and outstanding is to your orators unknown, but they are informed and believe, and therefore charge, that of this mortgage there is now outstanding for value received, due, and unpaid, about *two million* dollars with semi-annual coupons due thereon from *July first*, 1*858*, and also interest on said semi-annual coupons to the time of the first decree of this court hereon. in the aggregate now amounting, as your orators charge and believe, to *three million five hundred thousand* dollars (*$3,500,000*). Your orators can not state with exactness how many of said bonds, issued

under the three mortgages above named, are now outstanding and valid claims against the company, but they are informed and believe the amount now outstanding under the several mortgages is as above set forth, so that your orators charge and believe that there is now outstanding for value received and due and unpaid, and purporting to be secured by said mortgage or trust-deeds or said promises, as follows, viz: (*setting out statement*).[1]

Your orators further say that by virtue of the laws of the State of *Texas*, the said defendants, the *Galveston, Houston and Henderson Railroad Company*, became entitled to *ten thousand two hundred and forty* acres of land per mile of finished railroad, to be received in sections for each *twenty-five* miles of finished road, making the aggregate now due them for constructing said railroad from *Galveston* to *Houston*, *five hundred and twelve thousand* acres. Your orators are informed and believe that said defendants have received the title to a portion thereof, and are now entitled to receive the balance, that the said lands and the claim thereof are embraced in and covered by the said *second* and *third* mortgages or deeds of trust, copies of which are hereto attached, marked Schedules "*B*" and "*C*."

Your orators further say that they are the holders and owners of *thirty-two thousand* pounds sterling of the said *first* or *six* per cent. mortgage bonds with the unpaid interest due thereon as above set forth.

And are also owners and holders of about *two hundred and fifty thousand* dollars of said *second* mortgage or *10* per cent. bonds with the unpaid interest due thereon as above set forth.

And are also owners of a large amount of said *third* mortgage or *8* per cent. bonds with unpaid coupons attached.

Your orators further say that the said *William Kent*, the trustee named in each of said mortgages, and the said *Charles B. Haddock*, the trustee named in the *second* and *third* of said mortgages, are dead, and that no successors have been appointed to take their places as trustees under said mortgages or trust-deeds; that the said *Ambrose Moore* and said *John Masterman, jr.*, each neglected and refused to accept or to execute the trust devolved upon them by the said deed of trust, and that no successors have been appointed in their place. Your orators further say that the said defendant, the maker of said bonds or obligations and of said mortgages or trust-deeds, is hopelessly and irretrievably insolvent; that it is indebted to other parties than the holders of the securities above named to large amounts, the exact sums are to your orators unknown, and that it has now no agents or officers or employees to prosecute and carry on its business and to operate its railroad; that it has in the manner and form as hereafter alleged, been dispossessed of the possession of its railroad, and of the premises described in said mortgages or trust-

1. Statement referred to in the text is as follows:

On the *1st* or *6* per cent. mortgage	$750,000
On the *2nd* or *10* per cent. mortgage	1,500,000
On the *3rd* or *8* per cent. mortgage	3,500,000
Total	$5,750,000

deeds, and is not now in the possession thereof; that the last officers of said company elected by the company were *Wm. R. Smith*, esq., president, *Tipton Walker*, esq., secretary, and that they hold their respective offices until successors are appointed.

And your orators further say, on information and belief, that on or about the *twelfth* day of *March*, 1*860*, various creditors of said *Galveston, Houston and Henderson Railroad Company*, having previously obtained judgment against said company on claims arising subsequent to the claims of your orators, caused executions to be issued, whereon a real or pretended sale was had of the premises known as the *Galveston, Houston and Henderson Railroad Company*, it being a railroad in active operation from the city of *Galveston* to the city of *Houston*, a distance of about *fifty-two* miles, together with all its right, title and interest to its franchise, road bed, track, chartered rights and privileges, and its rolling-stock, it also being the same premises described in the mortgages or trust-deeds, copies of which are hereto attached as Schedules "*A*," "*B*" and "*C*," and it also being the same premises that were built, purchased and constructed with the proceeds of, and derived from the sale of, the bonds issued under and secured by said mortgages, which bonds are now held and owned by your orators. Your orators further show that the parties professing to call themselves the *Galveston, Houston and Henderson Railroad Company*, successor to the first company of that name, after getting possession of the railroad and rolling-stock, to wit, *two* locomotives and tenders, *one* second-class passenger car, *one* hand car, and *fourteen* freight cars, with a full knowledge of the lawful claims of the bond creditors of the said road and in utter disregard thereof; and for the purpose of delaying and defrauding said creditors of their rights in the premises, conspired together to divert the earnings of the said *Galveston, Houston and Henderson* railroad from their proper use and application to their own personal use and benefit, and to this end formed themselves into a company called the *Real and Personal Estate Association*, under which association, as your orators are informed and believe, they purchased property and paid for the same out of the earnings of the said *Galveston, Houston and Henderson* railroad, which property they allowed said road to use, receiving a large compensation in return, and further to carry out the conspiracy they sought and obtained from the legislature of the State of *Texas* a charter for a railroad company, called the *Galveston and Houston Junction Railroad Company*, which company, under color of said charter, constructed a railroad *one* mile and *three-fourths* of a mile in length, connecting the said *Galveston, Houston and Henderson* railroad, from its terminus, with the *Houston and Texas Central* railroad, which commences at *Houston*. That, as your orators are informed and believe, the funds employed in the building of the *Galveston and Houston Junction* railroad were derived from the earnings of the said *Galveston, Houston and Henderson* railroad, and used in fraud of the rights of the bond creditors of said road.

Your orators further say that the association called the *Real and Personal Estate Association*, the stockholders of the *Galveston, Houston and Henderson Railroad Company*, successors of the first named com-

pany, and the stockholders of the *Galveston and Houston Junction Railroad Company*, represent one and the same interest.

And your orators further say that the individuals defendants above named, comprising the said *Real and Personal Estate Association*, the board of directors of the *Galveston, Houston and Henderson Railroad Company*, and the stockholders of the *Galveston and Houston Junction Railroad Company*, proceeded to purchase rolling-stock in the name of the said *Galveston and Houston Junction Railroad Company*, but which was paid for from the earnings of the said *Galveston, Houston and Henderson Railroad Company*, in fraud of the rights of your orators, creditors of said company.

And your orators further show that the said individuals composing said association and said stockholders of the two companies as aforesaid, claim and assert that there is no property belonging to the *Galveston, Houston and Henderson Railroad Company*, except its road-bed and charter; all the other property for working the road and carrying on its ordinary business belonging, as they claim, either to the said *Real and Personal Estate Association* or to the said *Galveston and Houston Junction Railroad Company*, as aforesaid; all of which statements your orators insist to be untrue, and in fraud of the rights of your orators, creditors of said *Galveston, Houston and Henderson Railroad Company*.

That by reason of said real or pretended sale on said judgments, the premises, or the possession thereof, were conveyed to purchasers who, either by themselves or their assigns, subsequently transferred their rights and claims to the above-named defendants, or some of them.

Your orators charge and believe that said *Galveston and Houston Junction Railroad Company* has less than *two* miles of railroad, that its capital stock is nominally *five hundred thousand* dollars (*$500,000.00*), but that little or none of its capital has been actually paid in; that all or nearly all of its entire assets and property, real and personal, were acquired or purchased with the income, rents, and profits derived from the *Galveston, Houston and Henderson Railroad Company*, mortgaged to your orators as herein set forth; that said company, called the *Galveston and Houston Junction Railroad Company*, operates the entire *Galveston, Houston and Henderson* railroad, and takes all its profits, receipts, and income; and with a portion of said receipts and income purchases and acquires additional equipment, supplies, and property, real and personal, in its own name, entirely disregarding the rights of your orators and other *cestuis que trust*, under said mortgages or trust-deeds, and diverting and depreciating the security given to your orators by said mortgages or deeds of trust.

And your orators charge that in equity and law the entire assets and property of the *Galveston and Houston Junction Railroad Company* belong to and are covered by said mortgages or trust-deeds herein sought to be foreclosed.

That since the *twelfth* day of *March*, 1*860*, the defendants, the *Galveston, Houston and Henderson Railroad Company*, the successor of the first-named company of the same name, which successor company is a company composed of the same individuals, representing

the same pro rata interest as the said *Galveston and Houston Junction Railroad Company*, and the said *George B. Nichols*, *J. L. Briggs*, *L. M. Hitchcock*, *Wm. H. Nichols*, *Thomas W. Pierce*, *E. B. Nichols*, *J. H. Hutchings*, *Wm. R. Smith*, *Robert Mills*, *E. S. Wood*, *John Sealy*, *T. H. McMahan*, *S. Southwick*, *George Ball* and *J. W. Jockusch*, the individuals composing both of said above-named companies, under the name of the *Galveston, Houston and Henderson Railroad Company*, (successor to the former company of the same name,) and the *Galveston and Houston Junction Railroad Company*, with full knowledge of the claims of your orators, and other *cestuis que trust*, under said mortgages or trust-deeds, to the tolls, rents, and income of said *Galveston, Houston and Henderson Railroad Company* have been and now are in receipt, use, and occupation, and have appropriated for their own uses and purposes, all the rents, tolls, and income to be derived from the use and occupation of said mortgaged premises, so mortgaged and pledged to your orators as aforesaid, amounting, as your orators charge and believe, to about the sum of *three millions five hundred thousand* dollars (*$3,500,000*) from the said *12th* day of *March*, 1*860*, to the *first* day of *February*, 1*867*. That notwithstanding the large income and tolls derived from the use and operation of said mortgaged premises, the defendants hitherto have and still do refuse and neglect to keep the mortgaged premises in proper repair, and to purchase in behalf of said premises necessary equipment, rolling stock, and supplies to do the business of the country naturally and properly belonging to said road.

Your orators are informed by the president of the companies now in possession and defendants herein, that with suitable and proper additional rolling stock, equipment, and supplies, the road — that is, the mortgaged premises — would earn double its present earnings; that the road bed, superstructure, and equipment are in poor repair, and generally needs new iron, ties, rolling-stock, and additional equipment and supplies. And that the premises as now managed and controlled are inadequate security for the indebtedness due your orators, and that the security derived by virtue of said mortgages or trust-deeds is being daily and surely diminished in value by the management of the defendants who are now in possession thereof, and your orators charge and believe that it is the design of said defendants to depreciate and exhaust their security so undertaken to be given by said mortgages or trust-deeds, and the defendants now threaten and seek to make your orators' security utterly valueless. And your orators charge and believe that, unless prevented by the interposition of a court of equity, the said defendants will sell and dispose of all the property acquired by them, with the rents, tolls, income, and earnings of said *Galveston, Houston and Henderson Railroad Company*; that they have within a short time permitted their treasurer, *Wm. H. Nichols*, one of the defendants herein named, to pervert and appropriate to his own use about *thirty-seven thousand* dollars (*$37,000*); that, under color of commission and services, they allow the defendant, *Thos. W. Pierce*, or his firm, *Pierce & Bacon*, to sell them supplies and equipments at exorbitant prices, much larger than the same articles can be purchased of other disinterested

parties; that in *April*, 1*863*, they procured and allowed the premises to be sold for taxes, and purchased it themselves, under the name of *J. L. Briggs*, *George Ball*, and *J. W. Jockusch*, defendants herein; that their object is to vex, harass, and delay your orators from collecting their just claims, and to squander the income, and depreciate the mortgaged premises and the income thereof.

Your orators further say that, by reason of said proceedings under said judgments, and some subsequent proceedings, of which your orators are ignorant, the individual defendants herein named claim that their respective companies, viz., the *Galveston, Houston and Henderson Railroad Company*, successor of the first-named company of the same name, and the *Galveston and Houston Junction Railroad Company* are corporations organized under the laws of *Texas*, and that said companies have some claim upon the whole or some part of said mortgaged premises, of the exact nature of which your orators are uninformed; that whether either or both of them are corporations or not, or whether either or both have any just and valid claims against or in said mortgaged premises or not, your orators are entirely ignorant; but your orators here charge and allege that neither the one or the other of said companies are corporations, but that they are and were mere associations or copartnerships, organized for the purpose of defrauding your orators out of their mortgage security on the premises aforesaid, and that whether corporations or not, they have no just or valid claims to any part of said mortgaged premises, or to the incomes or earnings thereof, superior to the claims of your orators; and that they have not rightfully acquired either the title to or the possession of the mortgaged premises. And your orators leave said defendants to their proof to show what their character, claims, and rights are by virtue of said proceedings under and subsequent to said judgments.

For consideration of all which premises, your orators pray process of subpœna against the defendants, the *Galveston, Houston and Henderson Railroad Company*, the *Galveston, Houston and Henderson Railroad Company*, successor to the former company of the same name' the *Galveston and Houston Junction Railroad Company*, *Geo. B. Nichols*' *J. L. Briggs*, *L. M. Hitchcock*, *Wm. H. Nichols*, *Thomas W. Pierce*' *E. B. Nichols*, *J. H. Hutchings*, *Wm. R. Smith*, *Robert Mills*, *E. S. Wood*, *John Sealy*, *T. H. McMahan*, *S. Southwick*, *George Ball*, and *J. N. Jockusch.*

And that the said defendants may jointly and severally be required to account to your orators for the tolls, income, and use and occupation of the mortgaged premises, and upon being found indebted for said receipts, tolls, and income they may be jointly and severally ordered to pay over the same to your orators, to be applied in reduction of said mortgage claims, according to their respective rights and priorities.

And that the defendants may be compelled and required to answer all and singular the matters and things herein set forth as fully and completely as if they were severally interrogated thereto.

And until the final hearing of this cause may be had, and the said property, rights, credits, franchises, and effects so conveyed as afore-

said to the said trustees under said mortgage or trust-deeds, may be sold and disposed of, and to the end that the same may in the meantime be preserved and taken care of, and the railroad of said company operated, and the business of the said company prosecuted to the greatest advantage for the benefit of all parties interested therein, your orators pray your honors to appoint a suitable receiver or receivers of all the property embraced in the said mortgages or trust-deeds, and of all the property purchased, with the rents, income, and earnings of the mortgaged premises, and of all the rolling-stock, equipments, and supplies claimed to be owned by the defendants the *Galveston and Houston Junction Railroad Company*, now as heretofore being used by them to operate and work said railroad embraced in said mortgaged premises, with such powers as shall be adequate for the purpose aforesaid; and on a further hearing herein, your orators pray your honors to make such interlocutory and final orders and decrees as may be necessary to keep and maintain said railroad and its appurtenances in proper repair and condition for use, and have the same used, operated, and carried on until it can be sold and disposed of; and in the meantime the income, tolls, and product thereof accumulated, or paid, appropriated, and applied as may be lawful, and to ascertain, fix, and determine what amount is due and owing by said company, the makers of said mortgages or trust-deeds, for principal and interest on its bonds and coupons and on each class thereof, made, issued, and negotiated by said company, and secured by its various mortgages or deeds of trust, and to declare and determine the priorities of lien between them and all the creditors of said company; and to the end that the same may be applied accordingly, to order, adjudge, and decree that said railroad and its appurtenances, rolling-stock, and property of every description necessary to operate and to the use of said railroad, with the franchise and privileges of said company, lands, rights, credits, and effects, and all and whatsoever was and is by the said mortgages or deeds of trust conveyed to or vested in the said trustees named in said mortgages or deeds of trust, for the security of the bonds and coupons held and owned by your orators as aforesaid, to be sold and converted into money, and the same be distributed to and among the holders of the various classes of bonds and coupons, issued as aforesaid, as shall be found to be proper in a due and faithful execution of the trust in said mortgages or deeds of trust, and for these purposes to cause to be made, taken, and stated all necessary accounts, and to grant to your orators further or such other relief as may be equitable in the premises. And your orators, as in duty bound, will ever pray.

William G. Hale, Counsel for Complainants.

(*Verification.*)[1]

2. For Injunction.[2]

a. Restraining Directors from Disposing of Corporate Property.

1. Consult the title VERIFICATIONS.
2. For forms connected with injunction proceedings, generally, consult the title INJUNCTIONS.

SEEKING ALSO DISSOLUTION OF CORPORATION,[1] APPOINTMENT OF RECEIVER[2] AND AN ORDER RESTRAINING FURTHER WRONGFUL MISMANAGEMENT.

Form No. 7452.[3]

[(*Venue and title of court and cause as in Form No. 5911.*)][4]

The plaintiff complaining of the defendants says that the *Smith Mining Company* is a corporation organized under the laws of the state of *Colorado*:

That the plaintiff is, and since *December*, 1*887*, has been, the duly appointed and acting administrator of the estate of *Daniel Webster*, deceased, and as such a stockholder in the said defendant company. The exact amount of said stock he is unable to state, but upon information and belief alleges it to be about *seventy-five thousand* shares.[5]

That the *Smith Mining Company* was duly organized under the laws of the state of *Colorado* in the month of *February*, 1*882*, and the stock of said company was fixed at *five million* dollars, divided into *five hundred thousand* shares, and the entire capital stock of said company was issued. The principal object of said company's incorporation was the purchase from *Daniel Webster*, since deceased, of certain valuable mining lands, located in *Pitkin* and *Gunnison* counties, and the operation and development of the said mining lands. The articles of incorporation of said company provided that the company's principal office should be in *Aspen*, *Colorado*, and the principal business carried on in *Pitkin* and *Gunnison* counties, and the directors were authorized to make by-laws not inconsistent with the laws of the state of *Colorado*.

After the organization of said company it acquired title to a large number of acres of mining lands principally secured from *Daniel Webster*, one of the incorporators, and said *Daniel Webster* took stock in the defendant company to the extent of *seventy-five thousand* shares in payment for said lands by him conveyed to the defendant company. The mining lands belonging to said company are located in a rich silver mining district, and present unusual inducements for exploration and development and are of great prospective value, and, if the same had been properly managed and developed, would long since have been rendered productive and profitable to the stockholders of said company. But said company, in violation of its plain duty to its stockholders, has since the death of *Daniel Webster*, which occurred on the *first* day of *December*, 1*887*, failed wholly to work or develop any of its mines and has misused its corporate powers by holding a pretended meeting of the stockholders in 1*890* in the city of *Philadelphia*, *Pennsylvania*, and without any notice of said meeting

1. Consult also the title CORPORATIONS.

2. Consult also the title RECEIVERS.

3. **Based on the facts** in Jones *v.* Pearl Min. Co., 20 Colo. 417.

4. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

5. This manner of alleging plaintiff's appointment, etc., held sufficient in Jones *v.* Pearl Min. Co., 20 Colo. 417.

being published in any newspaper printed and in circulation in the state of *Colorado*,[1] although, as hereinbefore stated, the articles of incorporation provided that the principal office of said company should be kept at *Aspen*, *Colorado*. At said pretended meeting of the stockholders of the *Smith Mining Company*, defendants *Richard Roe*, *James Smith*, *William Brown*, *Thomas Jones* and *William Short* were declared to be the directors of said company, which said persons pretending to be the directors of said company proceeded to adopt by-laws for the said corporation, among other things providing for the calling of an annual meeting of the stockholders of said company in *Philadelphia*, *Pennsylvania*, on the *fourth Tuesday* of *January* in each year, on *two* days' notice published in the newspapers of *Philadelphia*, *Pennsylvania*, and *Aspen*, *Colorado*,[1] and said persons wrongfully pretending to be the directors of said company have held many other meetings without the state of *Colorado* at which business was sought to be transacted in contravention of plaintiff's and other stockholders' rights and prejudicial to the welfare of said company.

Said the *Smith Mining Company* has further violated its duty to its stockholders and misused its corporate powers in that it has kept no principal office in the town of *Aspen*, or any other place in *Colorado*; in that it has failed to make annual reports,[2] and has kept no books of account at its principal office nor any stockholders' book in the state of *Colorado*,[3] and whatever books it has kept have been kept outside of the state of *Colorado* and beyond the reach or inspection of this plaintiff and the other stockholders of said company.

The defendants *Richard Roe*, *James Smith*, *William Brown*, *Thomas Jones* and *William Short* own and control a majority of the stock of the defendant company and have conspired to prevent the development of said mining property and to prevent the plaintiff from receiving dividends upon his said stock, and pursuing said conspiracy, the defendants at said pretended meeting of the stockholders of said company, had themselves declared the directors of said company in the manner hereinbefore set forth, and these defendants have combined together for the purpose of cheating the plaintiff and defrauding him out of his profits and have depreciated the value of the stock of defendant company for the purpose of making this plaintiff and other stockholders sell their stock at less than its real value. Also said defendants, in furtherance of said conspiracy for said purposes, have appropriated to their own use *one hundred thousand* shares of said company's stock, which said stock was set aside as working capital to raise funds to develop the property of said company, and they refuse to account for the same to this plaintiff or to the company or to any stockholder. And said persons, defendants herein, pursuing said conspiracy, threaten to dispose of said mining property to various persons to this plaintiff unknown for the sole use and in the interests solely of said defendants, rendering plaintiff's stock of no value and working great and irreparable injury to him.

1. As to necessity of notice, see Mills' Anno. Stat. Colo. (1891), § 481; Colo. Laws (1895), p. 150.

2. The making of annual reports is governed by Mills' Anno. Stat. Colo. (1891), § 491.

3. The keeping of books is regulated by Mills' Anno. Stat. Colo. (1891), § 488.

Wherefore plaintiff asks that the charter and corporate powers of the defendant company be set aside, the incorporation be dissolved and that a receiver be appointed to take charge of its property and to close up its business. That an order be issued restraining the defendants *Richard Roe*, *James Smith*, *William Brown*, *Thomas Jones* and *William Short* from perpetrating further wrongful acts in the management of said company and restraining them from disposing of any of the corporate property or assets, and that such other relief be granted as this plaintiff may be entitled to. (*Concluding as in Form No. 5911.*)

ALSO SEEKING FOR AN ACCOUNTING[1] AND AN ORDER RESTRAINING DISPOSITION OF PROPERTY AT AUCTION, OR AT A LOSS OR SACRIFICE.

Form No. 7453[2]

(*Commencement as in Form No. 5912.*)[3]

I. That the defendant, the *Smith Manufacturing Company*, is a corporation created under the statute laws of *Connecticut* and engaged in the manufacture of malleable iron castings and having its principa office at *Sharon* in said state. That the capital stock of said company consists of *twenty-one thousand* dollars, divided into shares of *twenty-five* dollars each.

That the plaintiff *John Doe* is the owner of *eighty* of said shares and the other plaintiffs herein are the owners of *forty* shares each.

That the defendants are owners of shares in the following amounts, to wit, *Daniel Webster*, *one thousand* shares, *Abraham Kent*, *one thousand*; *John Jones*, *one thousand*; *Jeremiah Mason*, *five hundred*; *Abram Smith*, *five hundred*; *Samuel Short*, *eight hundred*; and *John Long*, *two hundred and ninety* shares of said company's stock.

II. The said the *Smith Manufacturing Company* has been engaged for a year and more in the manufacture of malleable iron castings, which said business is by its nature a profitable one and one that could have been managed to the great advantage of the stockholders of said company, and would have proved so but for the wrongful practices of the defendants as hereinafter set forth. The directors of said company are *John Doe*, *Richard Roe* and *James Smith*, plaintiffs herein, and *Daniel Webster*; *Abraham Kent*, *John Jones* and *Jeremiah Mason*, defendants herein, and said defendant *Daniel Webster* is president and defendant *Abraham Kent* the treasurer of said company.

III. That the said directors, *Daniel Webster*, *Abraham Kent*, *John Jones* and *Jeremiah Mason* have combined together and conspired to misapply the funds of said company and take and exercise entire control of said company without heed or regard to the wishes or

1. See the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 272; also *supra*, Forms Nos. 7450 *et seq*, 7456.

2. **Founded on facts** in Sears *v.* Hotchkiss, 25 Conn. 171, in which case it was held that the directors of a trading corporation might be restrained from mismanaging the business of the corporation or wasting its funds.

3. **For formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

votes of the plaintiffs, also directors of said company, and said defendants are unjustly and fraudulently acting in regard to and handling the affairs of said company so that they are depreciating the value of said company's stock and ruining its business in this, that before the organization of said *Smith Manufacturing Company* the defendants *Daniel Webster*, *Abraham Kent*, *John Jones*, *Jeremiah Mason*, *Abram Smith*, *Samuel Short* and *John Long*, as partners, under the firm name of *Jones and Company*, owned all the real estate and a large portion of the personal estate now belonging to said *Smith Manufacturing Company*, which said firm, and the aforesaid persons as members of said firm, had for a long time before the organization of said *Smith Manufacturing Company* been engaged in the manufacture of malleable iron castings in the same location as is now the said corporation, and said firm of *Jones and Company* thereby became largely indebted to divers persons in divers sums unknown to these plaintiffs. That upon the organization of said *Smith Manufacturing Company* the said firm of *Jones and Company*, and the members thereof, sold to said *Smith Manufacturing Company* all its said real estate and personal estate. That the defendants, *Daniel Webster*, *Abraham Kent*, *John Jones*, *Jeremiah Mason*, *Abram Smith*, *Samuel Short* and *John Long* have at all times owned a majority of the stock of said corporation and at all times controlled the votes and elections of officers and the affairs of said corporation, without regard to the wishes, votes and interest of the plaintiffs, and as partners of the firm of *Jones and Company* being liable for the debts of said firm, unjustly and fraudulently, at divers times between the *first* day of *November*, 1*888*, and the date of the filing of this bill, by themselves and by the said *Daniel Webster*, *Abraham Kent*, *John Jones* and *Jeremiah Mason*, a majority of the directors of said corporation, and by the presidents, treasurers, clerks and agents of said corporation, used and appropriated wrongfully and fraudulently *three thousand* dollars and more of the money and means of said corporation in the payment and discharge of divers debts of said firm of *Jones and Company*, due from said *Jones and Company* and said members of said firm to divers persons, whose names are unknown to the plaintiffs herein, and misapplied the money and means of said corporation, and wrongfully appropriated the same for their own benefit as members of said firm of *Jones and Company*. By means thereof said firm of *Jones and Company* and the members thereof became indebted to and justly liable to pay and refund to said *Smith Manufacturing Company* said sum of *three thousand* dollars and more, and the interest thereon, and that said firm of *Jones and Company* is indebted to said corporaation in other sums to a large amount unknown to the plaintiffs for moneys advanced and paid for said *Jones and Company*, and for their use and benefit by the defendants, and by divers of the defendants, acting as agents, clerks, treasurers, directors and presidents of said corporation, no part of which the defendants would permit to be charged on the books of said corporation to said *Jones and Company*, and all of which sums they concealed from said corporation, and of the amounts of which sums, and the time of their advancement, the plaintiffs are entirely ignorant.

IV. That the said *Jones and Company* and said members of said firm wholly refuse to refund or pay said debt and moneys to said corporation, and said members of said firm, defendants herein, own a large majority of the stock of said corporation and have for more than *twelve* months last past controlled the votes and acts of the meetings of the members of said corporation and wholly refuse to refund or permit the said firm of *Jones and Company* to refund said moneys to said corporation, or to pay said debt, and refuse to permit said corporation to collect, or sue for, said moneys, by means of which said corporation has become embarrassed in its business and the plaintiffs greatly injured.

V. That said defendants *Daniel Webster*, *Abraham Kent*, *John Jones* and *Jeremiah Mason*, being a majority of the directors of said *Smith Manufacturing Company*, refuse to permit said moneys and debts to be charged to said *Jones and Company* and refuse to collect the same, or permit any suit to be commenced therefor by said corporation or otherwise, by means of which the stock owned by the plaintiffs has been greatly reduced in value and they injured. That said directors threaten to dispose of all the property of said corporation at auction or otherwise, at any and all hazards and at any price it will bring, and intend to buy it in themselves, or procure others to buy it in for them, at prices much less than its real value, and to waste and destroy said property.

VI. The plaintiffs have no means of providing the amount of moneys so misappropriated by the defendants, and said directors, clerks, agents and other officers of said corporation, or the amount so due and owing to said corporation from said *Jones and Company*, without the oath disclosure and exhibits of said directors, defendants herein, and of the members of said firm of *Jones and Company* and all of the defendants.

The plaintiffs are without any adequate remedy at law, and therefore the plaintiffs ask that the court, on finding the facts alleged herein to be true, order the members of the firm of *Jones and Company* and all the defendants to disclose on oath their knowledge respecting the funds of said corporation, advanced to or received by said *Jones and Company*, and that an exhibit be made of all their books and accounts respecting said moneys. Also that said *Jones and Company*, and the persons composing said firm, and all the defendants be ordered to settle their accounts with the *Smith Manufacturing Company*, and that said *Jones and Company* pay over to said *Smith Manufacturing Company* the balances due to the said *Smith Manufacturing Company*, from said *Jones and Company*, or from the members of said firm, and that the members of said firm of *Jones and Company* give a faithful account of all the moneys belonging to said corporation which have come into their hands as directors of said corporation or otherwise.

And plaintiffs ask that the defendants be enjoined by an order of court from disposing of the property of said *Smith Manufacturing Company* at auction, and at a loss and sacrifice, and for such other and further relief as plaintiffs may in equity be entitled to. (*Concluding as in Form No. 5912.*)

b. Restraining Directors from Violating By-laws.

Form No. 7454.

(Precedent in Fisher *v.* Patton, 134 Mo. 37.)[1]

[(*Venue and title of court and cause as in Form No. 5921.*)][2]

Plaintiff, for his amended statement of cause of action, states: That the *Richmond Building and Loan Association*, one of the defendants herein, was incorporated under the laws of the state of *Missouri*, article *nine*, entitled "*Mutual Fund, Loan and Building Associations*," Revised Statutes, 1879, in the month of *October*, A. D. 1886, and has ever since its organization been transacting business in *Ray* county, *Missouri*; that *W. C. Patton*, *Jas. A. Davis*, *William Bernard*, *Jas. E. Ball*, *John W. Shotwell*, *Jr.*, *W. W. Brown*, *J. A. Anderson*, *T. N. Lavelock*, *W. M. Allison*, and *John T. Patton* were the duly elected and legally constituted board of directors of said *Richmond Building and Loan Association* at the institution of this suit on *August 21*, 1894, and as such were intrusted by law with the management of the affairs of the association; and that said directors, since the filing of the original petition in this case, were re-elected as directors of said *Richmond Building and Loan Association*, and as such are by law intrusted with the management of the affairs of the association; that *W. C. Patton* was the president thereof, and that *Geo. W. Schweich* is secretary of said *Richmond Building and Loan Association.*

Plaintiff further states that at the date of its incorporation as aforesaid, the capital stock of said association, defendant, was *one hundred thousand* dollars, which said capital stock was divided into shares of the par value of *two hundred* dollars each, making *five hundred* shares in all; that prior to the incorporation of the defendant association as aforesaid, those wishing to take stock or shares, including the plaintiff, pursuant to the laws in such cases made and provided, filed articles of agreement and association of the *Richmond Building aud Loan Association* with the recorder of deeds within and for the county of *Ray*, and state of *Missouri*; that by the terms of article *three* of said agreement, the capital stock and shares were fixed as follows, as will more fully appear by a recital thereof, which is as follows: "Article III. The capital stock of this corporation shall be *one hundred thousand* dollars, divided into *five hundred* shares of the par value of *two hundred* dollars each, of which number *three hundred* shares have been subscribed and the entrance fees thereon have been paid in;" that by the terms of article *seven*, the object and purpose of the corporation was expressed to be as follows: "Article VII. The object and purpose of this corporation shall be the accumulation of a fund to be loaned to its stockholders or others, with which to purchase or improve real estate, or for other purposes, the loans to be secured by real estate;" that said association, by virtue of the authority given by law, before the issuance of any certificates or

1. This bill in equity was held on demurrer to be sufficient.

2. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

shares of stock, adopted certain by-laws for its government, and for the proper and just protection of the property rights of others connected with said association as shareholders; that the funds for said *Richmond Building and Loan Association*, under the laws of its creation, as well as under section *seven* of the by-laws aforesaid, was to be formed by "payments of entrance fees, monthly dues, premiums on loans, interest on loans, fines, and from other sources;" that by section *46* of the by-laws aforesaid, under the title of dissolution, provided among other things that when the assets of the association, exclusive of immatured monthly dues, shall be sufficient to make each and every share of stock worth in cash the sum of *two hundred* dollars, etc., the directors shall then proceed to pay, satisfy, and discharge first the debts and liabilities of the association, and then to pay over to the owner of each share not having obtained a loan the sum of *two hundred* dollars for each and every share of stock held by him or her; all of which will more fully appear from a recital of said section *46*, which is as follows, to wit: (*setting out section*).[1]

Plaintiff further states that the amount of entrance fee was fixed by the by-laws at *fifty* cents on each share, and that the monthly dues aforesaid required to be paid in to the association by each shareholder upon every share of stock held by him was by the by-laws aforesaid fixed at *one* dollar, as will fully appear from section *five* of said by-laws, which is in words and figures as follows, to wit: (*setting out section*),[2] which said certificates were duly filled out and delivered to

1. **Section forty-six referred to** in the text is as follows:

"Dissolution.

Section *46*. When the assets of the association, exclusive of unmatured monthly dues, shall be sufficient to make each and every share of stock worth in cash the sum of *two hundred* dollars, and there shall be funds enough in the treasurer's hands, with loans and with advances made to shareholders, to pay that amount to the shareholders after paying all debts of the association, the directors shall then proceed to pay, satisfy, and discharge, first the debts and liabilities of the association, and then they shall pay over to the owner of each share not having obtained a loan from the association for the purpose hereinbefore specified, the sum of *two hundred* dollars for each and every share of stock held by him or her upon which no loan has been made by the association; and thereafter no further monthly dues or interest shall be payable by the stockholders, except that all arrears shall be fully paid up, and the association shall deliver to each shareholder, mortgagor, who has in other respects fully complied with the conditions of his mortgage or deed of trust, a discharge thereof, and any balance remaining in the treasury shall be distributed to the shareholders of this corporation, in proportion to the number of shares held by each. After the performance of the foregoing duties, this association shall cease to exist, and it shall not sooner be dissolved."

2. **Section five of the by-laws** referred to in the text is as follows:

"Monthly Dues.

Section *V*. Each and every stockholder, for each and every share of stock that he or she holds in the association, shall pay the sum of *one* dollar on the *second Tuesday* in *October*, 1886, and on the *second Tuesday* in every month thereafter to the secretary of the association. Plaintiff further states that he was a subscriber to said articles of agreement, and became the purchaser of *fifteen* shares of said capital stock issued soon after the incorporation of defendant association, and now designated and known as series *A*, and that said association caused to be delivered to plaintiff herein, pursuant to the articles of agreement and incorporation aforesaid, and pursuant to the by-laws of said association, *three* certificates, representing in all *fifteen* shares, as aforesaid, of the par value of *two hundred* dollars each, and duly signed

plaintiff as aforesaid, and are not filed as an exhibit herein, because they are temporarily hypothecated as collateral security with other persons; that plaintiff has kept the dues paid thereon, as by the terms of the by-laws of said association he was required to do, from and after the *second Tuesday* in *October*, A. D. 1*886*, up to the time when the directors aforesaid refused to permit any further payments on said shares of stock, as will hereafter appear, and has, since the date of such action complained of, promptly tendered to the secretary of said association all dues accruing to said association up to the present time, and is still willing and anxious to continue the payments thereon, until the assets of the association, exclusive of unmatured monthly dues, shall be sufficient to make each and every share of said capital stock worth in cash the sum of *two hundred* dollars, and until there shall be funds enough in the treasurer's hands, with loans and with advances made to shareholders, to pay that amount to the shareholders after paying all debts of the association. Plaintiff further complains and states that the directors aforesaid have the management and control of the business of said association defendant as aforesaid, have illegally and wrongfully directed that no further interest and dues be collected on stock of shareholders in said series "*A*," and unlawfully refused to collect from such holders any sum or sums whatever upon any such shares, as by law they are required to do; that the said shares are not now worth the par value, as declared by the by-laws of said association they should be before dissolution of said corporation or first series of shares; that although the said association has not cash on hands sufficient to pay off and discharge the debts of said association, and to pay the holders of free and unborrowed shares the par value of said stock, the said directors have unlawfully and illegally directed that all mortgages and deeds of trust given by the borrowers in said series "*A*" to the *Richmond Building and Loan Association* be duly satisfied of record; that said officers as aforesaid are about to unlawfully and illegally cancel, satisfy, and release said mortgages and deeds of trust and other obligations and evidence of indebtedness due said association on the part of the shareholders thereof, when the same has not been paid, satisfied, or in any manner liquidated; that said board of directors aforesaid, defendants herein, undertook by improper and unlawful action, on or about the *tenth* day of *August*, A. D. 189*4*, to declare that the assets, funds, and property belonging to series "*A*," as then denominated, and intended to refer to the shares issued to

by its president and secretary, said certificates, omitting numbers, name, date and signature, were in the following form to wit:

'No. ——. *Richmond Building and Loan Association.* Shares ——.

Capital stock $*100,000*. *Richmond, Mo.* Shares each $*200*.

This certifies that —— is the owner of —— shares of capital stock of the *Richmond Building and Loan Association*, organized under, and according to the laws of *Missouri*, and is entitled to all the privileges and subject to all obligations set forth in the constitution and by-laws of said association.

Transferable only on the books of the association in the presence of the secretary, either in person or by attorney duly authorized according to the by-laws.

Richmond, Mo., ——, 18—.

——, President.

——, Secretary.'"

plaintiff upon the organization of said association in the first instance, was sufficient to pay the face value of the free shares, or shares on which no loans had been made by the association, by a method repugnant to the laws governing said association at the date of the organization of said association defendant and not provided for in the articles of agreement, and in violation of the provisions of section *46*, aforesaid, of the by-laws and constitution of said association, as aforesaid, to wit: by charging the holder of each free share in the series aforesaid denominated "series *A*" with the sum of *forty-two* dollars on each share of the association defendant's stock, and by promising to give the holder thereof, including plaintiff, only *one hundred and fifty-eight* dollars when the money may be collected on other shares belonging to other and different series of the defendant's creation — all of which wrongful and illegal threatened acts will more fully appear from the order or resolution passed by the board of directors aforesaid, at the date aforesaid, as follows, to wit: (*setting out resolution*).[1]

Plaintiff further states that the directors aforesaid are still threatening to carry said order as aforesaid into execution, and to release all mortgages due the association aforesaid whereon all dues and fines have been paid up to the date of the passage of said resolution, and to deprive the plaintiff of his just rights under the articles of agreement as aforesaid and the by-laws governing said association, fixing the rights, duties, and obligations of both defendant association and plaintiff, and to deprive plaintiff of the benefits of his full contract rights.

Plaintiff further states that he, as the owner of the shares aforesaid, is entitled to the sum of *two hundred* dollars in cash upon each share so held by him in said series before dissolution of said association, or of said series now denominated as series "*A*," as aforesaid, and before the deeds of trust taken by the association to secure the loans made to shareholders can or ought to be released under the laws authorizing its issue and under the corporate by-laws aforesaid in relation to dissolution, etc.; that such threatened acts on the part of the directors are illegal, and that the resolution passed as aforesaid was without warrant or authority in law, as he believes; that

1. **Resolution referred to** in the text is as follows:

"Whereas, it appears from the *July* statement of the secretary of this association that the value of the shares of stock of series '*A*' then was *one hundred and fifty-eight* dollars and *one* cent per share, and that the average premium paid by borrowers of this association up to date of statement was *forty-two* dollars per share; and,

Whereas, it appears to the satisfaction of the board of directors of said association that the assets, funds, and property belonging to series '*A*' of said association are sufficient after payment of debts, to pay the face value of the free shares in said series, less the average premium paid by borrowers of the association; therefore be it

Resolved, that we declare the stock in series '*A*' has reached the maturity value thereof as provided by section 2617, Revised Statutes of Missouri (1889), and that the deeds of trust of borrowers upon which all interest, dues, and fines are paid be released at cost of borrower, upon surrender of certificates of stock, and that free shares be settled according to the provisions of the act of the legislature of Missouri, approved March 31, 1893, relating to the payment of free or unpledged shares of stock in such association."

many of the borrowers in series "*A*," as aforesaid, are wholly insolvent, and should such wrongful and illegal action be taken by the board of directors as aforesaid, great and irreparable loss would be sustained by plaintiff as shareholder.

Plaintiff further states that, if the directors as aforesaid are permitted to carry out such threatened acts, they would violate the contract between plaintiff and defendant association, and put plaintiff's right in great jeopardy, and that such unlawful action would affect the value of plaintiff's shares to a very great extent, so much so that accurate computation cannot be made, and at least to the extent of about *forty-two* dollars on each share of the *fifteen* so held by plaintiff as aforesaid — the difference between the face value of said shares and the alleged value thereof at the time of passing said resolution or order.

Plaintiff further states that many of the shares in series "*A*" were borrowed on at a bonus of *ten* dollars by some of the members of the board of directors, while the said board of directors wrongfully, unjustly, and inequitably are threatening and are about to unlawfully charge the plaintiff up with the sum of *forty-two* dollars, on the theory of average bonus; that if the threatened acts of said board of directors are to be consummated, such persons who borrowed on shares in series "*A*" would thereby obtain an advantage of this plaintiff to the extent of *thirty-two* dollars on each share; that at the time said loans were made, the association paid them the sum of *one hundred and ninety* dollars in cash on their said shares, giving to them an excess from the corporate funds over that of the non-borrower or holder of free shares of *thirty-two* dollars as aforesaid.

Plaintiff further states that said order or resolution, passed or attempted to be passed as aforesaid, was the result of the illegal participation in the vote on said proposition by *W. C. Patton*, *T. N. Lavelock*, *J. A. Anderson*, and *W. M. Allison*, who were borrowers in series '*A*' aforesaid, and owners of shares in said series, on account of which they were precluded by the by-laws of the association, as well as the general laws of the state of *Missouri*, and particularly section *968*, Revised Statutes, 1879, from taking part in the vote, which said by-law is as follows: (*setting out by-law*).[1]

Plaintiff further states that *Jas. E. Ball*, and *Jno. W. Shotwell*, *Jr.*, defendants herein, voted against said proposition aforesaid, and the proposition was not legally carried by said vote, but the chairman declared the resolution carried, and pursuant thereto the board of directors are threatening and are about to carry out and intend to execute the said illegal order or resolution so voted and adopted as aforesaid by releasing the deeds of trust and by ceasing to collect any further dues, fines, forfeitures, and interest from the holder or holders of shares or certificates of stock in said association in said series "*A*" aforesaid; that although plaintiff has tendered his dues on shares held by him as aforesaid to the secretary of said association,

1. **By-law referred to** in the text is as follows:

"Sec. 15. No member who has borrowed money from the association shall be allowed to vote on any question affecting the claims of the association against himself."

the legally constituted and properly appointed person to collect and receive the same, yet such secretary, acting under the illegal order or resolution as aforesaid, refused, and still refuses to receive the same thereon as aforesaid.

Wherefore, inasmuch as plaintiff has no adequate remedy at law, he prays for an order of injunction to issue out of this court, directed to said defendants, enjoining and restraning them, and each of them, their agents, servants, and officers from releasing the deeds of trust so executed by borrowers on shares in said series "*A*" or other securities by said association, and especially enjoining and restraining said directors, as well as the defendant's other officers, from releasing the deeds of trust executed by *W. M. Allison*, *J. A. Anderson*, *W. C. Patton*, and *Thomas Lavelock*, and sufficient others to preserve and protect the rights of plaintiff, and also enjoining said defendants, and each of them, from taking any illegal action as threatened by them, or discontinuing the collection of fines, penalties, dues, and interest, until the funds be sufficient to pay plaintiff's shares according to the face value, as expressed in the certificates issued and given to plaintiff, and as required by the by-laws of said association aforesaid; and that said defendants, directors, and association be required to accept all dues, fines, and penalties to accrue on said shares, until the assets of the association, exclusive of unmatured monthly dues, shall be sufficient to make each and every share of stock worth in cash the sum of *two hundred* dollars, as by the laws governing said association, and as by the contract of plaintiff as shareholder with said association, the plaintiff is legally entitled to receive; and for such other and further orders, judgments and decrees, and for such other and further relief, as the court shall deem meet and just in the premises.

W. D. Fisher.

(*Verification.*)[1]

c. Restraining Officers from Issuing Stock.

ALSO SEEKING A DETERMINATION OF THE RIGHTS AND INTERESTS OF SAID PLAINTIFF.

Form No. 7455.

(Precedent in Wright *v.* Ascheim, 5 Utah 482.)[2]

[(*Title of court and cause as in Form No. 5935.*)][3]

The plaintiffs complain of the defendants, and allege and show to the court that they, the plaintiffs, are citizens of the United States of America. That, as the plaintiffs are informed and believe, the defendant the *Rebellion Mining Company* is a corporation organized under

1. Consult the title VERIFICATIONS.

2. **An injunctional order** was issued in this case restraining the company from issuing the shares, and the individual defendants Wright, Avery and Mattson from receiving the shares.

3. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the complaint.

the laws of the territory of *Utah*, and the defendant *William W. Woods* is the president, and the defendant *John Sholdebrand* is the secretary, of said corporation.

And the plaintiffs further allege, the plaintiff *James M. Mocks*, on his knowledge, and the plaintiff *Mayer S. Ascheim*, on his information and belief, as follows: That on or about the *5th* day of *August*, A. D. 1*880*, the defendant *Frank Wright* posted a notice of the location of a mining claim on a claim called by him in said notice the "*Rebellion*," situated in the *Uintah* mining district, county of *Summit*, territory of *Utah*. That no ledge or lode of rock in place, bearing silver or any metal was discovered by said *Wright* before or at the time of posting said notice, but said *Wright* posted said notice at a place where, according to the conformation of the country, and the course of the ledges known to exist in said district, it was thought probable there was a blind lode beneath the surface, which might be discovered by development work. That said notice, when posted, bore the name of defendant *Frank Wright* as the sole locator thereof. That soon after posting said notice of location, and prior to the *13th* day of *August*, 1*880*, the defendant *Charles A. Mattson*, at the request of the defendant *Frank Wright*, commenced work on said *Rebellion* claim. That on or about the *13th* day of *August*, 1*880*, the plaintiff *James M. Mocks* and the defendants *David Avery* and *Frank Wright* entered into a contract by which they became partners and jointly interested in filling a contract for supplying lagging to the plaintiff *Mayer S. Ascheim*, for the *Ontario* mine, said contract having been made between said *Avery* and said *Ascheim*; and by said partnership agreement it was stipulated by and between said defendants *Avery* and *Wright*, and the plaintiff *Mocks*, that each should contribute his time and labor, and his share of all expenses, in filling said contract for supplying lagging, including all expenses incurred for supplies, or otherwise, on and after the *6th* day of *August*, 1*880*; and that each should share equally in the proceeds and profits derived from said business. And at the same time it was further mutually agreed by and between said defendants *Wright* and *Avery* and the plaintiff *James M. Mocks* that the defendants *Avery* and *Wright* and the plaintiff *James M. Mocks* should jointly, and as such partners, work and develop the said *Rebellion* mining claim, and each have an equal interest therein, and in any lodes and mineral veins discovered therein. That neither the plaintiff *James M. Mocks* nor the defendants *Avery* and *Wright* had any money or means to use in the development of said claim, other than his personal services and earnings, and the proceeds of their labor in filling said contract for the supply of lagging, and it was agreed between them that they should continue said lagging contract, and devote the proceeds derived therefrom, and from any earnings they might otherwise make, to work and develop the *Rebellion* claim. That the defendant *Charles A. Mattson* had full notice and knowledge of said partnership agreement, and of the relation of the plaintiff *James M. Mocks* and the defendants *Wright* and *Avery* towards each other in respect to said mining claim. That, in pursuance of said agreement of partnership, the plaintiff *James M. Mocks* and the defendants *Avery* and *Wright* contributed the

proceeds received from the plaintiff *Ascheim* under said contract to furnish lagging, and the plaintiff *James M. Mocks* contributed all his labor and the proceeds of such labor to development of said mining claim, and furnished materials and supplies for working the same, and board and pay for other men who were hired to work, and worked thereon. That by the joint contribution of the plaintiff *Mocks* and the defendants *Avery* and *Wright* the said *Charles A. Mattson* was continually kept at work on said mining claim, and one *Oscar Rydvall* and one *Frank Molen* were employed to work and worked thereon for several months, and were boarded while at work on said claim, the said *Mocks* working part of the time on the lagging contract and part of the time on said mining claim. That after said *15th* day of *August*, 1*880*, the plaintiff *James M. Mocks* and the defendants *Avery* and *Wright* and *Mattson*, and the men employed to work said mine, all camped and messed together, part being at work on said mining claim, and others working in filling said lagging contract as aforesaid; and in doing other work; and said camp was furnished and supplied by said *Mocks*, *Wright* and *Avery* under their said agreement. That the plaintiff *James M. Mocks*, in addition to his contributions as aforesaid, personally worked on said mining claim not less than *25* days. That the plaintiff *Mocks*, with said *Avery* and *Wright*, by their joint labor and expense, earned in filling said lagging contract a large amount of money, all the net proceeds of which was applied to subsist the parties at work on said contract and on said mine, and to pay for labor hired on said mine, and in development of said mining claim; and the plaintiff *Mocks* contributed under said agreement at least his equal share of the labor and expense with said *Wright* and *Avery*; and that the labor of said *Charles A. Mattson*, if by reason thereof he became entitled to any interest in said mining claim, would not entitle him to over *one-fourth*, and the value of his labor did not exceed *one-fourth* of the expenses in developing said claim. That by joint contributions of the plaintiff *James M. Mocks* and said defendants *Avery* and *Wright*, under the aforesaid partnership agreement between them, a tunnel was run into said *Rebellion* mining claim, beneath the surface, and, at a distance of about *60* feet from the mouth of said tunnel, a lode of rock bearing silver and lead was disclosed in said claim in the fore part of *September*, 1*880*, being the first discovery of a lode therein. That after said lode was reached, and about the middle of *September*, 1*880*, the said mining claim was for the first time staked, and the boundaries thereof marked on the ground. That by said joint contributions the said tunnel was further extended on said lode a distance of about *220* feet, making in all a distance of about *280* feet. That the value of the work in running said tunnel is about the sum of $*1,700*. That by said joint contributions a shaft in the tunnel was sunk on the vein a depth of *16* feet, of the worth of $*4* per foot. That by said development work bodies of ore are disclosed showing the mining claim is of considerable, and probably of great value. That on or about the *first* day of *October*, 1*880*, the defendant *Charles A. Mattson*, without the consent of the plaintiff *James M. Mocks*, caused his name to be put on the location notice of said mining claim, under that of

the defendant *Frank Wright*, and afterwards, on or about the *eleventh* day of *October*, 1*880*, the defendant *Frank Wright* caused a location notice to be recorded in the office of the recorder of said *Uintah* mining district, and by said notice, as recorded, the said *Wright* and *Charles A. Mattson* appear as the locators of said mining claim; and said recorded notice states the claim was located *October 4*, 1*880*. That after large bodies of ore were disclosed in said mining claim, and after all or nearly all the development work hereinbefore named had been done, the defendants *Wright* and *Mattson* denied that the plaintiff *James M. Mocks* had any interest in said claim, and proposed to pay him wages at *five* dollars per day, which he declined to receive. That afterwards, and on or about the last day of *December*, 1*880*, the defendants *Mattson* and *Wright* conveyed to said defendant *Avery 400* feet, undivided, of said mining claim, and since said time these defendants have declined to recognize the interest of the plaintiff *James M. Mocks* or to convey to him his or any interest. That on or about the *27th* day of *January*, 1*881*, a corporation was formed, called the "*Rebellion Mining Company*," with a capital stock of $*20,000,000* divided into *200,000* shares of the denomination of $*100* per share. That in full payment of said capital stock various mining claims were conveyed to said corporation by the corporators. That among the corporators and subscribers to said stock were the defendants *Frank Wright*, *David Avery*, and *Charles A. Mattson*, who conveyed to said corporation the said *Rebellion* mining claim, and they, or some of them, also conveyed to said corporation the *Hecla* mining claim, and the *Ætna* mining claim, and subscribed for and agreed to receive, and it was agreed in the agreement of the incorporation that they should receive *109,400* shares of said capital stock, in full payment for said claims conveyed by them. That said *Hecla* and *Ætna* mining claims were of no value except as surface ground, and the said *Rebellion* mining claim constituted the whole substantial consideration for said *109,400* shares of stock to be issued to them. That the amount of stock subscribed for and to be issued to said *three* defendants is as follows: To the said *Frank Wright*, *40,123 1-3* shares; to the said *David Avery*, *29,-153 1-3* shares; and to the said *Charles A. Mattson*, *40,123 1-3* shares. And on information and belief the plaintiffs allege that certificates of said stock have not been issued by said company, and that most of the corporators, at and before the time of the incorporation of said company, and said conveyance of said *Rebellion* mining claim, had knowledge of the facts herein stated in regard to the development and discovery of said lode, and the contributions of plaintiff *James M. Mocks* thereto and his interest therein, and of all the material facts hereinbefore stated relating to his rights and interests in said mining claim. And the plaintiffs allege that the plaintiff *James M. Mocks* has conveyed to the plaintiff *Mayer S. Ascheim* an undivided half of his interest in said *Rebellion* mining claim, and assigned to said *Ascheim* an undivided half of all his rights therein, and of any and all causes of action for the recovery of his interest and the avails of said interest in stock, damages, or otherwise. That the *Rebellion* mining claim consists of surface ground, *1,500* feet long,

and *200* feet wide, and the *Rebellion* lode therein contained. And the plaintiffs further allege that the defendants *Frank Wright*, *David Avery*, and *Charles A. Mattson* are insolvent, and have no property out of which a judgment for damages could be collected. The plaintiffs therefore pray judgment as follows: That the rights and interests of plaintiffs in said *Rebellion* mining claim may be adjudged, and that it may be determined they are entitled to an undivided *one-fourth* of said claim; and that a conveyance thereof from the *Rebellion Mining Company* to the plaintiffs be adjudged. That if in the judgment of the court such conveyance cannot be decreed, or would be inequitable, that the plaintiffs be adjudged entitled to *one-fourth* of *109,400* shares of the capital stock of said *Rebellion Mining Company*, subscribed for by said *Wright*, *Avery* and *Mattson*, and said company be decreed to issue the same to plaintiffs. That the defendants the *Rebellion Mining Company*, and the said *William W. Woods*, its president, and *John Sholdebrand*, its secretary, and all officers and agents thereof, be restrained by the order of this court from issuing, and the defendants *Frank Wright*, *David Avery* and *Charles A. Mattson* be in like manner restrained from receiving, pending the action, *one-fourth* part of *109,400* shares of the said capital stock of the *Rebellion Mining Company*, being *27,350* shares of said stock; and that upon trial, said injunction be made perpetual. [(*Concluding as in Form No. 5935.*)]

d. Restraining Officers from Interfering in or Managing Corporate Affairs.

ALSO SEEKING A DISCOVERY[1] AND ACCOUNTING.[2]

Form No. 7456.

(Copied from the record in Tyler *v.* Savage, 143 U. S. 79.)[3]

[(*Address as in Form No. 4284.*)]

To the hon. judges of said court:

Sarah Chauncey Savage, a resident of the city of *Philadelphia* and a citizen of the State of *Pennsylvania*, suing for herself and all others, creditors of the *Virginia Oil Company*, who will make themselves parties to this suit on the usual terms, brings this her bill against the *Virginia Oil Company*, incorporated under the laws of *Virginia* and having its principal office in the city of *Richmond*, in the said state; *John Tyler*, president of the said company, and in his own right; *John W. Otley*, *C. W. Tanner*, *Isaac Davenport*, *Jr.*, *J. H. Montague*, *C. E. Belvin*, late directors in the said company, and residents of the said city of *Richmond* and citizens of the State of *Virginia*, and *Joseph D. Evans* and *J. F. Crane*, residents of the city of *New York*

1. See also the title DISCOVERY AND INSPECTION.

2. See also the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 272, and *supra*, Forms Nos. 7450 *et seq*, 7453.

3. A decree for the plaintiff was affirmed by the supreme court.

For the formal parts of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

and citizens of the State of *New York*; and thereupon your oratrix complains and says that, being anxious to secure a business position for her son, *H. C. Savage*, she was referred by *Col. Wm. E. Tanner*, of the city of *Richmond*, *Va.*, with whom she had business transactions, to *John Tyler*, president of the *Virginia Oil Company*, of which company *C. W. Tanner*, a son of *Col. Wm. E. Tanner*, was a member.

Through *Col. Wm. E. Tanner* she opened negotiations with the said *Tyler*, and was informed that she could secure a position equivalent to that of assistant secretary in the company for her son by the investment of *ten thousand* dollars. This investment she was willing to make in the shape of a loan well secured, but the said *Tyler* declined to take the sum as a loan, and required that she must purchase of the company that amount of its capital stock at its par value. In order to induce her to purchase the said stock the said *John Tyler*, as president of the said company, wrote and sent her the letter herewith filed, dated *April 10th*, 1*884*, which is marked (*A*) and prayed to be taken as a part of this bill. This letter entered into the reason why the sale of stock was preferred to a loan, and made statements as to the condition of the company, its past business and future prospects, upon which your oratrix relied, and had a right to rely, as a basis for the investment of her money. The important statements therein made may be recounted as follows:

1. The then capital stock was *eighteen thousand and three hundred* dollars (*$18,300.00*), with authority from the stockholders to increase it to *thirty thousand* dollars (*$30,000.00*).

2. The last dividend declared was *seven* per cent. semi-annual, and the current fiscal year would end on the *first* of *June*.

3. The manufactures of the company were paying a large profit, and were favorably known throughout a wide territory — North, South, and West.

4. There had been a late decrease of expenses, and the outlook for business was better than ever before.

5. By adding moderately to their capital they could without much risk double their business.

6. A gentleman of *New York* had bought *thirty* shares of the stock at par within the last *ten* days.

With these statements from the president of the company, to whom your oratrix had been referred as an honorable man, she concluded that the stock of the company was a safe investment, and she consented to take the stock instead of loaning the money, which was her preference, but which the said latter assured her would not suit the company.

She thereupon paid into the treasury of the company *ten thousand* dollars, to wit, on the *19th* day of *May*, 1*884*, and received a certificate for *one hundred* shares of stock, which she still holds, and which will be produced at the proper time.

In accordance with her understanding with *Mr. Tyler*, her son was given a position at a salary of *eight hundred* dollars per annum, and he performed the duties assigned to him until the suspension of the office work.

When the *first* of *December*, 1884, arrived your oratrix was not informed of the declaration of the semi-annual dividend she had been led to expect, and on the *fifth* of that month wrote to *Mr. Tyler* a letter of enquiry concerning it. In reply she received a letter from him as president, dated *8th Dec.*, 1884, and herewith filed, marked (*B*), as a part of this bill. By this letter he stated that the depression of business which had caused payments to come in very slowly had induced the company to omit a semi-annual declaration of dividend, and he added that "the business of the last *six* months shows a profit over and above all expenses."

When the *first* of *June*, 1885, arrived, your oratrix received no notice of dividend, and some weeks later she received a statement of the business of the company for the fiscal year, which is herewith filed, marked (*C*), as a part of this bill, showing a loss of *three thousand six hundred and two* dollars and *forty-seven* cents ($*3,602.47*), and a circular signed by the said *Tyler* as president, which is herewith filed, marked (*D*), as a part of this bill.

This circular states that a profit was made during the first *six or seven* months of the year, and the loss is charged to the last *five or six* months. It further states that it had become a matter of vital importance to reduce the expenses of the company, and it suggests that only *three* persons be retained on salaries: *one* for the office, *one* for factory and city work, and *one* for travelling. This, it states, would save *one thousand two hundred and eighty* dollars ($*1280.00*) of salaries per annum. This suggestion involved the striking from the pay-roll of *Allan Tyler*, the son of the said *John Tyler*, whose salary as assistant in the office was *four hundred and eighty* dollars ($*480.00*) per annum, and of the son of your oratrix, whose salary was *eight hundred* dollars ($*800.00*). In reply to a message conveyed through her son with regard to this circular, your oratrix received from the said *John Tyler* a letter dated *Aug. 4th*, 1885, which is herewith filed, marked (*E*), as a part of this bill. In this letter *Mr. Tyler* states that the company owed him between *five and six thousand* dollars, borrowed money, and proposes that if your oratrix will assume this debt to him he will resign his position as president and allow her son to remain in the employment of the company. This proposition, which was remarkable to say the least of it, was not acted on, and your oratrix made a trip to *Richmond* to try and get something more satisfactory concerning the affairs of the company. She was told by *Mr. Tyler* that he believed that the company had assets enough to pay its liabilities and it had been determined, as she was informed, to wind up its affairs, and in doing so to stop all of the salaries of the officers on *1st* of *September* ensuing. The son of *Mr. Tyler*, and *Mr. C. W. Tanner*, as a new firm, were to occupy the store-house and had purchased or were about to purchase part of the stock on hand at cash-price. With this information, your oratrix, fearing that her investment was in danger of being lost, deemed it best to employ counsel to represent her in winding up the affairs of the company. Upon the investigation of her counsel she finds that she has been deceived by the misrepresentations of *Mr. Tyler*, and is in danger of suffering great loss thereby, and has determined to file her bill for relief.

Your oratrix now finds and charges that for some time previous to 1*881* the said *John Tyler* and *John W. Otley*, under the firm name of *John Tyler and Co.*, conducted in the city of *Richmond* a business in oils, railroad grease, etc.; that in the spring of that year they determined to get up a chartered company for the conduct of their business, and together with *C. W. Tanner*, *J. H. Montague*, *Isaac Davenport, Jr.*, and *C. E. Belvin* applied to the judge of the *Circuit* Court of *Richmond*, *Va.*, for a charter, to wit, on the *21st* day of *May*, 1*881*, which was granted on that day and was lodged for record on the *23rd* of *May*, 1*881*, in the office of the secretary of the Commonwealth. A duly certified copy of the said charter is herewith filed marked (*E*), and prayed to be taken as a part of this bill. By section 60 of chapter 57 of the Code of Virginia, authorizing the judges of the circuit courts to grant such charters, the lodging of the charter with the secretary of the Commonwealth made the applicants a corporation, and the officers and directors named in the application were to continue as such for *one* year thereafter.

The object for which the said company, styled the *Virginia Oil Company*, was chartered was stated to be "the refining and wholesale and retail dealing in petroleum oils; the manufacture and sale of illuminating and lubricating oils and compounds, including animal, mineral, and vegetable oils; the right of prospecting and boring for oils, and the privilege of buying and selling, on commission or otherwise, crude petroleum and other materials, and either separately or in combination for illuminating and lubricating purposes." The minimum capital was put at *fifteen thousand* dollars ($*15,000.00*) and the maximum at *three hundred thousand* dollars ($*300,000.00*), and *John Tyler* was named president, and the other five corporators directors, the law requiring that number.

The parties at once issued certificates of paid-up stock in the "*Virginia Oil Company*" to themselves, dated *21st May*, 1*881*, as follows: (*setting out certificate*).[1] And on the *12th Nov.* 1*881*, they sold and issued to *Joseph D. Evans*, of *New York*, *thirty* shares, of the par value of *one hundred* dollars ($*100.00*), making in all *183* shares of the par value of *eighteen thousand three hundred* dollars ($*18,300.00*). How these shares were paid for your oratrix is not informed, except as to the shares of *John Tyler* and *John W. Otley*. The books kept by the concern show that no money was paid by them for their stock, but their stock account is balanced by the following entry as of *May 21st*, 1*881*, between the *Virginia Oil Company* and themselves: (*setting out entry*).[2]

It will be seen that the tangible property turned over by them to

1. Certificate referred to in the text is as follows:

To *John Tyler*, *50* shares...	$*5,000 00*
" *John W. Otley*, *50* shares,	*5,000 00*
" *C. W. Tanner*, *50* shares,	*5,000 00*
" *T. Davenport, Jr.*, *1* share	*100 00*
" *J. H. Montague*, *1* share,	*100 00*
" *C. E. Belvin*, *1* share ...	*100 00*
Aggregating *153* shares ..	$*15,300 00*

2. Entry referred to in the text is as follows:

Dr.	
Amount of inventory turned over	$*2,450 51*
Mdse., balances, $*267.55*, & cash $*46.50*	*314 05*
Machinery and fixtures.....	*395 75*
Amount of stock allowed *J. Tyler* and *J. W. Otley* in	

the company, after deducting the charge of *one thousand six hundred and forty-seven* dollars and *fifteen* cents (*$1647.15*), amounted to only *one thousand five hundred and thirteen* dollars and *sixteen* cents (*$1513.16*).

The corporation was evidently obtained in the interest of *John Tyler*, *John W. Otley*, and *C. W. Tanner*, and the other members were induced to come in that the requisite number of directors might be obtained.

John Tyler as president, *John W. Otley* as superintendent, and *C. W. Tanner* as secretary and treasurer were each paid a salary, believed to be as much as *fifteen hundred* dollars (*$1500*) per annum apiece, and on the *1st June*, 1882, at the end of the *first* year, dividends of *twenty* per cent. upon the original capital stock, and *seven* per cent. upon the shares of *Joseph D. Evans*, which had been held about *six* months, were declared and paid, amounting to *three thousand two hundred and seventy* dollars (*$3,270.00*).

It is hardly possible, in view of the subsequent history of the company, that these dividends were earned, as since that date no dividend whatever has been paid, and now the said company is admitted to be insolvent.

Your oratrix would further show that on the *third April*, 1884, the stock of the said *John W. Otley* was surrendered to the company, and he was paid *two thousand five hundred* dollars (*$2500.00*) therefor, which is at the rate of *fifty* cents upon the dollar, and his duties and salary as superintendent ceased. The stopping of his salary is evidently the reduction of expenses alluded to by the said *Tyler* in his letter of *April* the *tenth*, 1884.

If this purchase and the original payments of *Tyler* and *Otley* for their stock be permitted to stand, it is demonstrable from the statements furnished by the said *Tyler* that the company was insolvent on the *tenth* of *April*, 1884, when the said *Tyler* represented it to be in a flourishing condition.

By a statement of its condition, lately furnished by the said *Tyler*, which is herewith filed, marked (*G*), as a part of this bill, it appears that he estimates its assets as follows: (*setting out estimate*),[1] showing the utter insolvency of the company. As *Mr. Tyler's* statement for the year ending *June first*, 1885, shows only a loss during that year

consideration of good will, formulas, etc., of *John Tyler and Co*		$8,486 84
Cr.		
John Tyler's stock,	$5,000 00	
John W. Otley's stock	5,000 00	
To *John Tyler* for amount due him by the business of *John Tyler & Co*	1,647 15	
	$11,647 15	$11,647 15

1. **Estimate referred to** in the text was as follows:

Open account	$1088 76
Machinery account	5811 46
Stock on hand	1013 00
M'd'se, sales in Nov. to date	226 30
	$8139 56
And its liabilities as follows:	
Amount due for M'd'se, etc.	$1858 16
Bills payable	2909 88
	$4768 04
Amount due *John Tyler* (loan)	5160 32
	$9928 36

of *three thousand six hundred and two* dollars and *forty-seven* cents (*$3602.47*), and the company ceased active business on *1st September* following and has been closing out since at not less than cash, and it now appears that the entire capital is gone and the liabilities are near *two thousand* dollars (*$2000.00*) in excess of the estimated assets, and as it is hardly possible that the loss during the *three* months between *1st June* and *1st September*, 1*885*, could have exceeded *two thousand* dollars (*$2000.00*), it must be concluded that the company was in very strai[gh]tened circumstances, if not insolvent, on the *tenth April*, 1*884*. This is also shown by the statement of the business during the year ending *1st June*, 1*885*. In that statement the sum of *seven hundred and fifty-six* dollars and *twenty-seven* cents (*$756.27*) is charged for "interest and discount."

This represents loans of at least *ten thousand* dollars (*$10,000.00*) at ordinary bank rates, and these loans were not used in purchase of materials, as these are accounted for in the separate item of "gross profits" credited on the statement. The *ten thousand* dollars (*$10,000.00*) gotten from your oratrix just before the beginning of that fiscal year had been applied to the indebtedness of the company, and still this large debt was left unpaid, showing that when your oratrix was induced to take stock there was a debt hanging over the company beyond what was due for materials used in the current business of at least *twenty thousand* dollars (*$20,000.00*). This was greatly in excess of their capital, which was then nominally only *thirteen thousand three hundred* dollars (*$13,300.00*), as *Otley* had drawn out, but which was in fact only the property on hand, less what was due for materials, which it now appears was much less than the nominal capital.

It thus appears that the letter of *John Tyler*, president, to your oratrix of the *10th April*, 1*884*, which induced her to subscribe for stock in said company, both by its statements and omissions was false and deceitful and operated as a fraud upon her and will cause her to lose the money so obtained from her unless the proper relief be granted her.

Your oratrix is informed and charges that the mode of settlement for their stock adopted by the said *John Tyler* and *John W. Otley* is illegal and fraudulent and should be set aside and they be made to pay for the amount of said stock subscribed for by them in money, with interest from *21st May*, 1*881*. The pretended sale of "good will, formulas, etc.," of the firm of *John Tyler & Co.* was in fact a purchase by *Tyler* of himself, and this cannot be allowed when he was using the assets of the corporation in the transaction. The price at which this intangible property was placed was fictitious and fraudulent. It could not be possible that a firm in such a business, having only net assets of *one thousand five hundred and thirteen* dollars and *twenty-two* cents (*$1513.22*) to turn over, could be possessed of good will and formulas in their business worth *eight thousand four hundred and eighty-six* dollars and *eighty-four* cents (*$8486.84*); and that the valuation was merely fictitious is demonstrated by the fact that now, when the corporation is admitted to be insolvent and its assets are inventoried by the said *Tyler*, not one dollar is estimated as the value

of this good will and these formulas. It is apparent that if they ever had any appreciable value their owners, *Tyler & Otley*, were more than repaid such value by the large salaries they appropriated to themselves in the chartered company.

Your oratrix further charges that it is well suited that the capital stock of a chartered corporation is a trust fund for the payment of all the debts of the corporation; she therefore charges that the taking out of the assets of the corporation of *two thousand five hundred* dollars (*$2500.00*) by *John W. Otley* on account of his stock was illegal and he is a debtor for the said sum, with interest. In fact, the transaction, if valid otherwise, was forbidden by the terms of the charter, as the capital stock was thereby reduced to *thirteen thousand three hundred* dollars (*$13,300.00*), which is less than the minimum capital allowed.

Your oratrix further charges that, by section 33 of chapter 57 of the Code of Virginia, it is provided that the directors and stockholders shall be liable to the creditors of a chartered company for any dividend of any part of the capital stock. She therefore claims that any dividend which in whole or in part has been paid out of the capital stock of said company should be returned by the said persons.

Your oratrix further charges that the sum of *ten thousand* dollars having been unlawfully obtained from her by the misrepresentations of the affairs of the said company by *John Tyler*, its president and duly authorized agent, and the same having gone into the treasury of and been expended by the said company, the said sum, with interest thereon from the *first* day of *June*, 1884, is justly due her by the said *Tyler* and *Virginia Oil Company*, and she has a right to require all the proper assets of the company to be gotten in and to have them applied to the liquidation of the debts due her and others.

Your oratrix further charges that, by section 26 of chapter 57 of the Code of Virginia, the assignee, as well as the assignor, is made liable for the unpaid subscription for the stock which he holds by assignment, and if there is any part of the subscription due for the stock issued to *Joseph D. Evans* as aforesaid, both the said *Evans* and *J. F. Crane* are debtors to the company therefor.

Your oratrix further charges that the said *Virginia Oil Company* is insolvent, and that its president, who has been its active manager, is seeking or has secured some other business, and it is necessary that a receiver be appointed for the said company to prevent irreparable loss to those entitled to its assets.

In consideration of the premises, therefore, and as she is without remedy at law, your oratrix prays that the *Virginia Oil Company*, *John Tyler*, *John W. Otley*, *C. W. Tanner*, *Isaac Davenport, Jr.*, *J. H. Montague*, *C. E. Belvin*, *Joseph D. Evans*, and *J. F. Crane* be made parties defendant to this bill and be required to answer its allegations and to make full, true, direct, and perfect answer to the several interrogatories hereinafter numbered and set forth — that is to say:

1. What amount of stock has been issued by the *Virginia Oil Company*, to whom, and when issued?

2. What was the consideration paid for said stock by the several stockholders and when and how has it been paid?

3. What sums have been paid to the said stockholders as dividends and when were they so paid and by what authority?

4. What sums have been paid to the several defendants who claim to have been officers of the company and by what authority?

5. Whether any stockholder has surrendered his stock to the company; and, if so, when and what was paid for the same?

6. What was the statement made to the stockholders at the end of each fiscal year of the condition of the company and its business by the president and directors or any of them?

7. What meetings of the stockholders have been held and what were their proceedings at such meetings?

8. How was the money paid in by your oratrix for her stock expended by the company?

9. How and when was the capital lost?

Your oratrix further prays that an account of the assets and of the debts of the said company be taken and the said assets be realized as quickly as possible and the funds arising therefrom be paid to the creditors of the company as they may be lawfully entitled, and that the claim of your oratrix to be repaid the money she was induced to pay for the stock issued to her, with interest thereon, be established and be made a debt of the company and payment of the same be decreed to her.

Than an injunction be granted restraining the company, and its officers and agents, from managing or interfering in its affairs; that a receiver be appointed to take charge of the property and effects, and administer them under the direction of the court; and that general relief be granted, and all orders made that the nature of the case might require, and to the court might seem meet. [(*Concluding as in Form No. 4284.*)]

3. For Mandamus.[1]

1. For forms connected with mandamus proceedings, generally, see the title MANDAMUS.

To Compel President of Bank to Pay Taxes to State. — In State *v.* Mayhew, 2 Gill (Md.) 487, the application for a writ of mandamus upon petition of the state, omitting the formal parts, was as follows: "That the General Assembly of *Maryland*, by the Act of 1841, ch. 23, entitled 'An Act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State'; among other things enacted, that all stocks or shares, in any bank or company, incorporated by the said State, together with all other property thereby subjected to assessment and taxation, should be valued agreeably to the directions of said Act, and chargeable according to such valuation, with the public assessment; which said assessment or tax, by the State of *Maryland*, was, by the said Act of Assembly, fixed at *twenty* cents, or *one-fifth* of *one* per cent. in every *hundred* dollars worth of assessable property, for each and every year thereafter to be collected as therein prescribed; and, that afterwards, by another Act of the General Assembly of *Maryland*, made and passed at December Session 1841, ch. 328, a further additional annual tax, of *five* cents in the *hundred* dollars, to be levied and collected in the same manner as the first mentioned tax, was imposed upon all the property assessed by the first mentioned Act of Assembly, the said taxes collectively amounting to *twenty-five* cents, or *one-fourth* of *one* per cent. annually, in every *hundred* dollars worth of such property.

Your petitioner further states, that by the *second* section of the said first mentioned Act, the City of *Baltimore*,

in said State, was divided into assessment districts, as therein specified; that by the *ninth* section thereof, it was declared to be the duty of the assessors, appointed by said Act, to value all such assessable property at its full, cash value, in the names of the owners thereof respectively; that by the *sixteenth* section thereof, it was enacted, that for the purpose of valuing the stock of banking, and other private corporations, held by non-resident stock-holders, it was thereby declared and understood, that the stock of a banking, insurance, or other corporation, usually termed a moneyed institution, should be situated at the place in which the principal office for transacting the business of such corporation should be situated, and for the effectual collection of the taxes assessed on the stock of private corporations, held by non-residents, it was enacted, by the *seventeenth* section thereof, among other things, that the stock of corporations, liable to assessment under said Act, held by persons, non-residents of said State, should be valued at its actual cash value, to, and in the name of such stockholders respectively; but, that the tax assessed on said stock should be levied and collected from said corporation, unless paid by such stockholders, and should be charged to such stockholders respectively, and be a lien on their respective stocks; that by another Act of the General Assembly of *Maryland*, made and passed at December Session 1841, ch. 281, it was made the duty of the president, or other proper officer of every bank, or other private corporation in the said State, to set apart and withhold, out of the dividend of the stock of such corporations, the amount of the tax levied by the *first* mentioned Act semi-annually, and pay the same to the collector of the county, city, or district, in which such bank or corporation might be situated; that the General Assembly of *Maryland*, in substitution for the former enactments on the subject, at its December Session, 1843, made and passed an act, entitled 'An Act entitled a supplement to the Act entitled an Act to facilitate the collection of a portion of the tax levied in pursuance of the act passed at March Session, 1841, ch. 23,' wherein it is enacted that it should be the duty of the president, or other proper officer of the banks, and of all other of the incorporated institutions of this State, semi-annually, after the passage of the said Act, (which passed on the 8th of March, 1844) to set apart, and withhold, out of the dividends or profits, when dividends are not declared on the stock of said banks, or other incorporated institutions, the amount of the tax levied on the stocks of said banks, and other incorporated institutions, under the Act of March Session, 1841, ch. 23, and its supplements, without reference to the place of residence of the stockholders therein, and to pay the said tax to the treasurer of the said State, who should give proper receipts therefor; that at the time of the passage of the first mentioned Act of Assembly, there was, and from thence hitherto has been, a certain bank of the said State, duly incorporated by the laws of the said State, under the name and style of the *Farmers and Planters Bank* of *Baltimore*, and that its principal office for the transaction of its business then was and is situated in the said City of *Baltimore*, in the State aforesaid, in the *fourth* assessment district of said city; and that by the force and exigency of said first mentioned Act, the stock of said bank then was and is situated in said city and district, and that *William E. Mayhew, Esq.*, of the city of *Baltimore*, from thence hitherto has been, and yet is, the president of the said bank. Your petitioner further states, that shortly after the passage of the said first mentioned Act of Assembly, the stock of the said bank was duly valued by the proper, then assessors, under said Act, at the city, and assessment district aforesaid, and that *twenty-three thousand, four hundred and twenty-five* shares of the stock of said bank, being the number of assessable shares, were then, by them, valued at $*19.50* a share, being the cash value thereof, amounting, altogether, to the sum of $*456,787.50*, and that the same valuation, under the said Act, has ever since subsisted, and is now in force; that at the time of the passage of the last mentioned Act of Assembly, of December Session, 1843, and ever since the said shares of stock, so valued as aforesaid, were and are liable to pay the said taxes, under the two first above mentioned Acts of Assembly, to the said State, amounting, annually, to $*1,141.96*; and that since the passage of the said last mentioned Act of Assembly, the said bank has made great profits, and has declared *three* several

a. To Compel Inspection of Books.[1]

dividends, that is to say, a dividend on the *1st* of *July*, 1844; and dividends on the *1st* day of *January* and *July* respectively, in the year 1845, each of which said dividends far exceeded the amount of such taxes due on the said shares of stock at the time such dividend was declared; that by force of the last mentioned Act of Assembly, it has been, and is, the duty of the said *Wm. E. Mayhew*, as such president of the said bank and its proper officer in that behalf, ever since the passage of such Act, semi-annually to set apart and withhold, out of such dividends or profits, the sum of $570.98, being the moiety of the taxes, annually since accruing and levied on the said stock at such valuation as aforesaid, and pay the same to the treasurer of the said State, upon his proper receipts therefor, for the benefit of your petitioner; but although the said treasurer has always been, and is, ready and willing to give such receipts therefor, the said *William E. Mayhew*, so being such president of the said bank, as aforesaid, has utterly refused, and still refuses, to comply with the exigencies of the said last mentioned Act, and semi-annually to set apart and withhold such last mentioned sum out of such dividends or profits for such taxes as aforesaid, and pay the same over to the said treasurer of the said State, for the benefit of your petitioner, and the sum of $1,712.94. for such taxes, as aforesaid, accruing since the said passage of the said last mentioned Act, remains in arrear, and wholly unpaid to the said treasurer of the said state.

[Wherefore your petitioner prays that a writ of mandamus be issued,] directed to said *Wm. E. Mayhew* of the City of *Baltimore*, in the State of *Maryland*, President of the *Farmers and Planters Bank* of *Baltimore*, commanding and enjoining him, according to the exigency of such last mentioned Act of Assembly, semi-annually to set apart and withhold out of the dividends, or profits, when dividends are not declared upon said shares of stock so valued as aforesaid, the sum of $570.98, being the amount of the taxes levied on the said shares of stock of the said bank, under the Act of March Session, 1841, ch. 23, and its supplements, and pay over the same to the treasurer of the State of *Maryland*, upon his proper receipt therefor, and, also, to pay over to the said treasurer of the State of *Maryland* the said sum of $1,712.94, for such taxes on the said shares of stock so remaining in arrear and unpaid, as aforesaid, upon his proper receipt therefor, according to the exigency of such Act of Assembly."

The rule for the mandamus was discharged by the county court. On appeal, this judgment was reversed and a procedendo awarded.

1. See also the title DISCOVERY and INSPECTION.

To Compel Giving Up of Books. — *The writ of mandamus* which issued in State *v.* Goll, 32 N. J. L. 285, on application by the relators commanding defendant to immediately deliver certain books, records and papers in his possession, was in words and figures as follows, to wit:

"*New Jersey*, ss.

The State of *New Jersey* to *James E. Goll*, greeting:

Whereas, it has lately been represented to our justices of our *Supreme* Court *of Judicature*, on the part and behalf of the *Newark and New York Railroad Company*, that you, the said *James E. Goll*, were by the corporators of the said the *Newark and New York Railroad Company*, soon after the passage of the act entitled 'An act to incorporate the *Newark and New York Railroad Company*,' approved March 1st, 1866, appointed secretary of said corporators, and that you, the said *James E. Goll*, continued to act as such secretary until a board of directors of said company was duly elected by the stockholders thereof, and duly organized, to wit, on the *first* day of *June last*, and that you, the said *James E. Goll*, before and at the said time of the organization of the said board of directors of the same company, held in your hands certain books, records, and papers belonging to the said company, consisting, amongst others, of the books of minutes of the proceedings of the said corporation and stockholders and directors, and the subscription book, containing the signatures of the subscribers to the capital stock of said company, and their subscriptions to said stock, and the receipt books of the said company; that you, the said *James E. Goll*, after the organization of said board of directors of said company, refused to deliver up the said books,

records, and papers to the said company, and that from that time to the present time, you have kept the said books, records and papers, and have refused to deliver them up, and still keep them, and refuse to deliver them to the said company, or their board of directors, although the same have been demanded of you by the said company; and that you, the said *James E. Goll*, also refuse to disclose or inform the said company where you have placed the said books, records and papers, and where you keep the same, although the said company have frequently, by their officers, requested you, the said *James E. Goll*, to inform them where the same are kept by you; whereupon, we being willing that due and speedy justice should be done in the premises, do command you, that immediately after receiving this our writ, you, the said *James E. Goll*, do deliver up to the said the *Newark and New York Railroad Company* the said books, records, and papers of the said company, or that you show cause in our *Supreme* Court *of Judicature*, before our said justices thereof, on the *fourth Tuesday* of *February* next, why you have not done the same.

Witness, *Mercer Beasley*, Esq., our *chief justice*, at *Trenton*, the *twenty-sixth* day of *November*, in the year of our Lord one thousand eight hundred and sixty-six.

Chas. P. Smith, Clerk.

T. P. Ranney, Attorney."

The return to the writ of mandamus in State *v.* Goll, 32 N. J. L. 287, was as follows:

"To the honorable the justices of the *Supreme* Court *of Judicature* of the state of *New Jersey*:

James E. Goll, of the city of *Newark*, for return to the writ of alternative mandamus, heretofore issued by this court against him, on application made by 'the *Newark and New York Railroad Company*,' says:

That it is true that he was duly appointed secretary of said company, to wit, on the *sixth* day of *March*, one thousand eight hundred and *sixty-six*, and that he acted as such secretary from that time until the *fifteenth* day of *May*, in the same year, but he denies that he hath or ever held in his hands any books, records or papers belonging to said company, containing the minutes of the proceedings of the meetings of said corporators of said company, or of its stockholders or directors, or any book belonging to said company, containing the signatures of the subscribers to the capital stock of said company, and the receipt book of said company. He admits that he has in his possession books, one in which he hath himself written the minutes of the proceedings of the meetings of the said corporators, and of the same stockholders and directors, and another in which are contained the signatures of the subscribers to the capital stock of said company, and their subscription to said stock, and the receipt books of said company; but the respondent says, that each of these books is his own property — was purchased by him, with his own money, and that he has expended in said purchase the sum of *one hundred and fifty* dollars; and further, the respondent says, that even if the said company had a right to said books, or any of them, which he denies, he hath a right to the custody and possession thereof, as security to himself for certain moneys due him from said company, to wit, for the cost of said books, *one hundred and fifty* dollars; for this deponent's services, as secretary, the sum of *seven hundred and fifty* dollars; for use and occupation of respondent's premises, by said corporators, directors, and stockholders, the sum of *one hundred* dollars. And the respondent insists that until he is paid what is due him, as aforesaid, he cannot legally be required to deliver up said books.

And this respondent further says, that the said company have no right to a writ of mandamus in this matter, because there is a sufficient remedy against this respondent for any wrong he has done said company otherwise, either by writ of replevin, action in trover, or bill of discovery in equity, to answer all or any of which respondent is fully capable, pecuniarily.

And this respondent prays that such order may be made in the premises as is lawful and right, and that the respondent may be hence dismissed, with his reasonable costs, most wrongfully sustained.

James E. Goll.

February 26, 1867."

Motion to quash writ overruled. The return quashed and a peremptory mandamus issued.

(1) Generally.

Form No. 7457.[1]

To the *Circuit* Court of the County of *Cook*, in the State of *Illinois*:

Your petitioner, the People of the State of *Illinois*, on the relation of *John Doe*, respectfully shows unto your honor that relator is a resident of the city of *Chicago*, county of *Cook* and state of *Illinois*, and is a citizen of said state of lawful age.

Relator further shows that the *Smith Telephone Company* is a corporation organized under the laws of the state of *Illinois*. That defendants *Richard Roe* and *Daniel Webster* are president and secretary respectively of said company. That relator was on the *twenty-second* day of *May*, 1894, and during all the time the acts herein complained of occurred, and for some years prior thereto had been, a stockholder and director in said company, and on said day relator was the owner in his own right of *seven hundred and fifty* shares of the capital stock of said company, and said shares on said day stood in his name upon the books of said company.

Relator further shows that the by-laws of said company provide that the affairs and business of the said company shall be under the control and management of an executive committee of *five* persons, chosen annually by the board of directors, and that of said committee the president of the said company is chairman *ex-officio*. That on said *twenty-second* day of *May*, 1894, the business of said company was so managed and controlled.

Upon said day your petitioner, having heard that the officers and agents of said company were not managing the business of said company in the interest of the stockholders, applied to the defendant *Daniel Webster*, secretary as aforesaid, at the principal office of said company, which then was in the county of *Cook*, during the business hours of said day, for permission to see the minute book of the board of directors and the minute book of the executive committee, the purpose and sole motive of your petitioner being to discover whether the affairs of said company are being honestly managed and also to discover and read a certain instrument in writing hereinafter mentioned.

The request to inspect said books was by said *Daniel Webster* refused. On said day, at the principal office of said company and during the business hours of the day, your petitioner asked of *Richard Roe*, president as aforesaid, permission to inspect said minute books. This permission was refused by said *Richard Roe* because, as said *Richard Roe* pretended and said, your petitioner had filed a request with the department of justice of the United States that the government should institute a suit to repeal the *Kent* patent, a certain patent in which the *Smith Telephone Company* was interested, as a licensee of the *Jones Telephone Company*.

On the *eighteenth* day of *June*, 1894, the petitioner made a formal

1. **Founded on facts** in Stone *v.* Kellogg, 165 Ill. 192, in which case a writ of mandamus was issued.

Illinois. — Myers' Rev. Stat. (1895), p. 331, § 13.

See also list of statutes cited *infra*, note 1, p. 830, relating to right of a stockholder to inspect books of the corporation.

demand[1] in writing on said *Richard Roe*, president as aforesaid, to be permitted to examine the records and books of said company, collectively and separately, a copy of which letter is hereto attached and marked Exhibit "*C.*"

On the *twentieth* day of *June*, 1894, said *Richard Roe* wrote acknowledging the receipt of your petitioner's letter and refused your petitioner permission to inspect said books, a copy of which letter is hereto attached and marked Exhibit "*D.*"

On the *twenty-first* day of *June*, 1894, a letter was addressed and mailed by the petitioner to *Daniel Webster*, secretary as aforesaid, informing him that the petitioner would present himself at the principal office of the *Smith Telephone Company* on the *twenty-fifth* day of *June*, 1894, during the business hours of said day, to inspect the books of the company, a copy of which letter is hereto attached and marked Exhibit "*E.*" On said day and during the business hours thereof the petitioner did apply to *Daniel Webster*, at the principal office of the said company, for permission to examine said books, which permission was by said *Daniel Webster* refused.

Your petitioner has been informed and believes that when, nearly *twelve* years ago, the *Jones Telephone Company* obtained the control of the majority of the stock of the *Smith Telephone Company*, or its predecessors, there was a writing entered into or an agreement made and reduced to writing and assented to by the *Jones Telephone Company*, which regulated the relations between the said companies and was intended to conserve and protect the interests of the minority stockholders of the *Smith Telephone Company*, in view of the fact that the *Jones Telephone Company* was to have the ownership of the majority of the stock of said *Smith Telephone Company*, and would have interests in the management of the *Smith Telephone Company* adverse to the interests of the other stockholders, and your petitioner believes that the present management of the *Smith Telephone Company* is in important particulars contrary to the express terms of said writing or agreement, and your petitioner believes that said writing or agreement is among the records and the papers of the *Smith Telephone Company* controlled by said *Richard Roe* and *Daniel Webster*. Your petitioner desires to obtain access to this writing or agreement relating to the working arrangement of the said companies, as well as all other books and records contemplated in his said letter of the *eighteenth* day of *June*, marked Exhibit "*C.*"

The complainant further gives the court to understand and be informed, that he has reason to fear and believe, and does fear and believe, that by reason of the relations of the *Jones Telephone Company* and its control thereof, by reason of its ownership of a majority of the stock thereof, and the further facts as to the large salary paid to defendant *Richard Roe*, and also that said *Richard Roe* is related by marriage to the *Joneses*, who are among the largest owners of the stock of the *Jones Telephone Company*, the affairs of the *Smith Tele-*

1. Where the duty sought to be enforced is of a private nature, a demand is necessary in order to lay the foundation for the relief sought by mandamus. People *v.* Board of Education, 127 Ill. 613. The petition should set forth the demand and refusal. People *v.* Mount Morris, 137 Ill. 576.

phone Company have not been and are not now carefully and economically administered, but that contracts and business arrangements have been made and are now in force with the *Jones Telephone Company* which have been entered into with a reckless disregard of the interests and rights of such minority holders, and with a desire rather to serve the interests of the *Jones Telephone Company* than of the *Smith Telephone Company*; that while complainant does not and has not contemplated any litigation against the *Smith Telephone Company*, if he could have these evils corrected, or if he could first induce the stockholders and board of directors of said company to correct the same, he has intended, by all lawful means within his power, to induce the said company to so conduct its affairs as shall best subserve the interests of the stockholders, and not dispose of large portions of its revenues to the *Jones Telephone Company* in payment of royalties on articles no longer covered by patents, or as rentals for articles which could be purchased outright at much less than the amount paid as rent per annum, or conduct the business in other ways contrary to the interests of the *Smith Telephone Company*; that it has been, is now and will be his course of conduct to pursue his course with a view to secure the honest and economical administration of the affairs of this company, and that he has no other purpose in view, and has no desire to publish the result of his investigations to the courts or to the public in any way, and is willing to submit to any reasonable restrictions, consistent with the due and adequate protection of his own interests, which the court may think it has power to impose, and to give any reasonable security to abide by such restriction, reserving to himself only the right, in the event that it becomes necessary in his judgment so to do, to seek such relief as he may be advised the law affords to protect his interest in said company, which embraces a large portion of his fortune.

By means whereof the petitioner is prevented from examining the books of account and records of said *Smith Telephone Company*, as he is by law entitled to do, and of which the said defendants have the sole custody and control, wherefore the petitioner prays a writ of mandamus, directed to said *Richard Roe* and *Daniel Webster*, president and secretary respectively of the *Smith Telephone Company*, commanding them, and each of them, forthwith to admit the complainant to the office of said *Smith Telephone Company*, and to give to him full access to all books of account and records of the said company, including herein the records of the executive committee of the board of directors thereof, and of all the contracts entered into by said company with the *Jones Telephone Company* or by either of said companies, through any agent, officer or servant thereof with the other, and that such admittance and access be permitted from day to day during business hours, and in such a manner as not to interrupt the order of business of the corporation, to the complainant, until the same shall have been completed, and that such further order may be made in the premises as justice may require, etc.

John Doe.[1]

(*Verification.*)[1]

1. **Signature and Verification.** — See State Board *v.* People, 123 Ill. 227; People *v.* Chicago, 25 Ill. 483; also the title VERIFICATIONS.

(2) Of Foreign Corporation.

Form No. 7458.

(Copied from the record in State *v.* Farmer, 7 Ohio Cir. Ct. Rep. 429.)[1]

State of *Ohio*, *Cuyahoga* County, ss. } In the Court *of Common Pleas.*

The State of Ohio on the relation of Lewis Templin, R. S. Templin, M. B. Templin, S. C. Templin, Alfred H. McCline, August Lamprecht, Jacob S. Haudt, Amzi Mentzer, S. C. Fowler and E. P. Crowe, plaintiffs, against *E. J. Farmer, James E. Farmer and John N. Stockwell*, defendants. } Petition in Mandamus.

Plaintiffs say that *The Magna Charta Silver Mining and Tunnel Company* is a corporation incorporated and organized in the year *1883*, under the laws of the state of *Colorado* with an authorized capital stock of *two million five hundred thousand* (*$2,500,000*) dollars, divided into *two hundred and fifty thousand* (*250,000*) shares of *ten* (*$10.00*) dollars each with a Board of Directors consisting of *five* (*5*) members, all of whom are residents of said county of *Cuyahoga*, *Ohio*, with its principal office and place of business at *Tomichi*, in the county of *Gunnison*, in the said state of *Colorado*, and also an office called the "*Eastern Office*" for the transaction of its financial business in the city of *Cleveland*, in the said county of *Cuyahoga*, and which last named office is now located at number *fifty Euclid Avenue* in said city, and the officers of said company consist of the President, Vice-President, Treasurer, Secretary and General Manager. Plaintiffs further say that said company has a town-site property called *Tomichi*, a tunnel and the engines and machinery and apparatus for boring and driving said tunnel in which is known as the "*Granite Mountain*" in the *Tomichi* mining district in said *Gunnison* county, state of *Colorado*, and was and has been engaged in boring and driving said tunnel about *six* (*6*) years until about *six* (*6*) months ago, when all work on the same ceased.

Plaintiffs further say that said *E. J. Farmer* is the president and general manager of said company, that said *James E. Farmer* is its secretary, and that said *John N. Stockwell* is the treasurer, and have been such officers since about the *tenth* day of *February* last, and the said *E. J. Farmer* has been its general manager for the last *six* (*6*) years and longer. Plaintiffs say that from the organization of said company hitherto all the annual meetings of the stockholders and the regular and special meetings of the Board of Directors of said company have been held in the said city of *Cleveland*, *Ohio*, and all its financial business, its sales of stock, the receiving of money for

1. The circuit court in this case held that where a private corporation, organized under the laws of a foreign state, is permitted by the charter to have an office in Ohio, the officers of such corporation residing in Ohio and having possession of the books of the corporation, the right of the shareholders therein, granted by statute of the foreign state, to inspect the books of the corporation will be enforced by appropriate remedies in the courts of Ohio.

the same, paying out money for machinery and labor, and other purposes, and its general financial business have been carried on in and through its said office in said city of *Cleveland*, and all the said officers are located and residents in said city of *Cleveland*.

Plaintiffs further say that under the laws of said state of *Colorado*, under which said company is incorporated and organized, said company has the right to have an office for the transaction of its financial and other business in any other state than *Colorado* where it is required to have its principal office and place of business.

Plaintiffs further say that by the laws of said state of *Colorado*, under which said company is incorporated and organized, it is provided that every corporation shall keep correct books of account of all its business, that any stockholder of said company shall have the right at all reasonable times to inspect and examine all the books, accounts and papers of the corporation, and shall have the right as aforesaid to demand of any officer, clerk, cashier or other agent of any such corporation having in his control and custody such books, accounts or papers as said stockholders may desire to examine or inspect, and upon such demand being made in writing, every such officer, clerk, cashier or agent shall be bound to produce such books, accounts and papers to such stockholders and afford due opportunity to examine and inspect the same, and such stockholder shall have the right to take copies or make extracts therefrom, but shall not remove from the office of the corporation any such books, accounts or papers.

Plaintiffs further say that they are each holders and owners of shares of the capital stock of said *Magna Charta Silver Mining and Tunnel Company* together aggregating more than *two thousand* (*2,000*) shares, and have been such owners and holders for more than *two* (*2*) years last past, and as such are interested in said company, its business and transactions, prosperity and welfare, and each and all feel a deep interest in its success and are each and all interested to know its true financial standing and condition. That said company has been driving its said tunnel in said *Granite Mountain* since *May*, 1*885*, until as aforesaid stated about *six* (*6*) months ago, and has expended thereon and the machinery therefor, as the defendant the said *E. J. Farmer* has informed the plaintiffs and the other stockholders of said company, more than *two hundred thousand* ($*200,000*) dollars, but as yet no income whatever has been received from said tunnel or other property of said company, and all the money used and paid out by said company ever since its organization has been received almost, if not entirely, from the sale of the stock of said company, which money so received, as said *E. J. Farmer* has informed plaintiffs and the other stockholders of said company, is over *two hundred thousand* ($*200,000*) dollars, and the said defendant *E. J. Farmer* and the said *John N. Stockwell* have informed and now inform these plaintiffs and the other stockholders of said company that said company is indebted to the said *E. J. Farmer* more than *eighteen thousand* ($*18,000*) dollars besides more than *ten thousand* ($*10,000*) dollars now owing to the former superintendent of said company, its laborers and certain merchants in said *Tomichi*, making a total indebtedness of more than *twenty-eight thousand* ($*28,000*) dollars.

Plaintiffs further say they have no knowledge in relation to these aforesaid matters, except such information as is communicated to them by the said *E. J. Farmer* and said *Stockwell*, the former of whom has had almost the exclusive control and management of all of said company's business for the past *six* (*6*) years and more, and during all of that time the said *E. J. Farmer* has owned and still owns a majority of the issued stock of said company and practically controls said company, its management and business.

Plaintiffs further say that they have no knowledge or information as to the property or resources of said company except as aforesaid, that at no time during the past *six* (*6*) years has there ever been a detailed or itemized statement or showing made by any officer of said company to its stockholders at any annual or special meeting or at any other time of the moneys received and paid out by said company and of the property or the resources of said company, nor has any such statement or showing ever been made by any officer of said company to the Board of Directors of said company, that the books and accounts and papers of said company have heretofore been in the custody and control of said *E. J. Farmer*, and the same are still under his control and in his custody in connection with the said *James E. Farmer*, who is his son, and the said *John N. Stockwell.*

Plaintiffs further say that said company has books as said plaintiff has been informed by said *E. J. Farmer* which purport to show the business transactions of said company, has a stock certificate book, stock ledger, and journal showing the business transactions of said company, and a ledger into which said transactions are posted, and a ledger or book which purports to show the moneys received and paid out by said company and said *E. J. Farmer*, its general manager, and vouchers for the same, also bank pass books issued to said company or said *E. J. Farmer*, who is general manager, by the banks of said city of *Cleveland* and has also deeds and contracts relating to said property of said company in said *Tomichi* mining district, and also the book kept by the late superintendent of said company at *Tomichi*, purporting to show the moneys received and paid out by him as such superintendent in the business of the company, also recorded and unrecorded tunnel claims in writing and recorded and unrecorded mining claims in writing and also the record book of the meetings of the Board of Directors of said company, and which said books, deeds, contracts, claims, vouchers and papers these plaintiffs cannot describe more definitely, and all the foregoing books, papers, deeds, contracts and claims are now in the office of said company at *fifty Euclid Avenue* in said city of *Cleveland* in this county and are under the control and custody of the defendants and each of them.

Plaintiffs further say that on the *eleventh* day of *April*, 1*892*, they did demand in writing of and from each of the above named defendants the privilege and opportunity to inspect and examine each and all the aforesaid books, papers, deeds, contracts, tunnel claims and mining claims and vouchers, with the privilege of taking copies and making extracts therefrom if they should so wish at the office of said company in the said *Cleveland*, at such reasonable time

or times as the said defendants should fix upon, but the said defendants utterly refused the demand of the plaintiffs and refused to allow the said plaintiffs, or any of them, to see, inspect or examine said books, deeds, papers, contracts and claims or any of them whatever. Plaintiffs say that they are interested and anxious to ascertain the true financial condition of said company as are very many others of the stockholders of said company of whom there are more than *three hundred* (*300*) scattered principally throughout the state of *Ohio*; that their purpose in inspecting and examining the said books, records, deeds, contracts, claims and papers of said company is honest and in good faith to find out the true financial condition of said company, and is for this proper and legitimate purpose only, and not for any speculative, unworthy or improper purpose whatever, and that the only way to ascertain the said financial condition of said company is to make such inspection and examination.

Plaintiffs further say that they are not competent themselves nor is any one of them competent to make such examination alone, but to do so effectually must be aided by some one expert in the business of book-keeping.

Plaintiffs further say that they are entirely without remedy in the premises unless it be afforded them by the proper writ to issue from this court and its interposition in their behalf.

Wherefore the plaintiffs pray that a writ of mandamus may issue against each of said defendants *E. J. Farmer*, *James E. Farmer* and *John N. Stockwell*, that each of said defendants may be ordered and commanded to produce to said plaintiffs at the office of said company at number *fifty Euclid Avenue* in said city of *Cleveland* in said county all the aforesaid books, papers, deeds, contracts, tunnel and mining claims and vouchers at such time as the court shall fix upon for inspection and examination, with the right to take copies and make extracts therefrom if found necessary by said plaintiffs, and further ordering and commanding that such inspection and examination may be made by said plaintiffs with the aid of a competent, impartial and expert book-keeper to be appointed by the court, and that such further command and order be made in the premises as justice may require.

Chas. E. Pennewell, Plaintiff's Attorney.

(*Verification.*)[1]

b. To Compel Performance of Legal Duty.

Form No. 7459.

(Precedent in State *v.* Grand Island, etc., R. Co., 27 Neb. 696.)[2]

[(*Title of court and cause as in Form No. 5923.*)][3]

1. Consult the title VERIFICATIONS.

2. A demurrer to the petition in this case was overruled. This case was cited with approval in Chicago, etc., R. Co. *v.* State, 47 Neb. 549.

3. **For formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The words to be supplied in [ ] are not found in the reported case, but should be added to make the precedent complete.

Your relator, *George W. Farmer*, makes known that he is a resident and citizen of the state of *Nebraska*, and has been such for the last *four* years. That your relator is and has continuously for the last *four* years past been in the possession of the *south* half of the *southeast* quarter of the *soutwest* quarter and lot *seven*, all of and in section *six*, in township *twenty-two* north, range *twenty-five* west, *6th* principal meridian. That on the *9th* day of *March*, 1*885*, your relator filed upon said lands under and by virtue of the laws of the United States of America for a timber culture claim and has ever since remained in possession of the same, in all respects complying with the federal laws in respect to such claims, and fully intends to perfect the title in the relator by a full compliance with the laws of the United States prescribed for that purpose.

Your relator further makes known that while this relator was in possession of said premises as aforesaid, to-wit, on or about the *15th* day of *July*, 1*886*, the *Grand Island & Wyoming Central Railroad Company*, a corporation organized and existing under and by virtue of the laws of the state of *Nebraska*, of its own wrong and without any right whatever entered upon said premises for the purpose of constructing its line of railroad and for general railroad purposes, and constructed its line of railroad and has ever since and now operates its line of railroad across and over said premises; and for the purpose of operating its said line of railroad said defendant for its use for depot grounds has appropriated through said premises a strip of land of a width not uniform, but of an area of about *six* acres.

Your relator says the whole of said appropriation, use, and occupation by said railroad company of a strip through above premises was without any compensation to your relator, and without any *ad quod damnum* proceedings whatever on the part of said railroad company, the said railroad company doing said acts under the claim that it had the right to, and could justifiably by law deprive this relator of the occupation, use, and possession of said strip without making compensation for the same and without resort to any *ad quod damnum* proceedings whatever.

Your relator says that your relator demanded compensation for the above appropriation, use, and occupation of said strip through said premises, which said railroad company utterly refused to make or recognize, whereupon your relator filed his petition for the appointment of *six* qualified commissioners with the county judge of *Blaine* county, *Nebraska*, (said land being situated in said *Blaine* county); that said commissioners were thereupon duly selected, appointed, and qualified, and after notice of the contemplated assessment of damages by said appraisers to the defendant, said appraisers assessed the damages sustained by your relator by reason of the premises at *four hundred* dollars, no part of which has been paid.

Your relator says said appraisement was made by disinterested freeholders in the manner prescribed by law and has never been appealed from, reversed, or modified in any manner, notwithstanding which the defendant still persists in and still occupies, uses, and holds said strip of land for railroad purposes.

Your relator herewith submits and hereto attaches a copy of the

pleadings filed and proceedings had in *ad quod damnum* proceedings had at the instance of your relator, duly certified by the county judge of *Blaine* county, *Nebraska*, as Exhibit "*A*", and makes the same a part of this information and petition with the same effect as though fully set out herein.

Your relator says that the duty to make said compensation results as a duty on the part of the defendant by reason of its assuming to act under the laws of the state of *Nebraska* governing railroad corporations, as the defendant does, and availing itself of the delegated right of eminent domain. Wherefore your relator prays that this honorable court by mandamus require the defendant to pay the above award, with interest and incidental costs of the same, as a duty resulting from its exercise as a railroad corporation of the franchise of taking, using, and occupying real property for railroad purposes across your relator's premises, and for such other relief as the plaintiff may be entitled to, and for costs. [(*Concluding as in Form No. 5923.*)]

c. To Compel Reinstatement of Expelled Member.

Form No. 7460.

(Precedent in Lysaght *v.* St. Louis Operative Stonemasons' Assoc., 55 Mo. App. 540.)[1]

[(*Title of court and cause as in Form No. 5921.*)][2] The petitioners herein, *John Lysaght*, *Patrick Touhey*, *Phillip Emmerich*, *John Emmerich*, *Paul Kostich*, *George W. Bickel*, *Denis O'Leary*, *William J. Campbell*, *John J. Schneider*, *R. H. Eddy* and *Joseph Weisemeyer*, respectfully represent to the court that the General Assembly of the state of *Missouri* by an act entitled "An act to incorporate the *St. Louis Operative Stonemasons' Association*," approved February 23, 1853, duly incorporated the *St. Louis Operative Stonemasons' Association*, a body politic, to have perpetual succession, and provided that it may be sued.

The objects of said association, as appears in section 2 of said act, was for the encouragement of the stonemasons' trade, to furnish deserving members employment when they need the same, to afford relief, comfort and protection to sick [or] unfortunate, needy, and also to promote industry, benevolence and temperance among the members of said association. For the purpose of carrying out these objects of said association it is empowered by said act to make rules

1. A motion to quash the petition was sustained by the circuit court. In so doing, the St. Louis court of appeals held the circuit court erred. In so deciding, the judge held that mandamus is the most appropriate remedy to restore or induct one into the enjoyment of the privileges of an incorporated association, of which he is unlawfully and unreasonably deprived; that the application of the remedy is restricted to cases where the relator is deprived of some pecuniary right, but that, subject to this limitation, it is applicable to corporations formed for the purpose of gain or to incorporations for religious, benevolent or social ends.

2. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

and by-laws: Provided, however, that the same be not repugnant to, or against, good morals, the laws of the United States or the state of *Missouri*. By the terms of said act it is further provided that the business and management of said association is to be under the control of a president, vice-president, secretary, treasurer and standing committee, to be elected and chosen by the members of said association from time to time, as they may deem necessary for their interest.

That by the terms of a by-law of said association all persons who are by occupation operative stonemasons and residents of the city of *St. Louis* are eligible to membership in said association, and an initiation fee of $*5* is required to be paid to said association by the person initiated, and, in addition to said fee, a monthly contribution of *fifty* cents from the *first* of *April* to the *first* of *December*, and for the other *four* months of the year *twenty-five* cents each, to commence from the date of his election.

It is further provided by a by-law of said association that, when a member has paid *twelve* months prior to his death all dues and arrears, the sum of $*75* will be paid by the association towards defraying of the dead member's funeral expenses. It is also further provided by its by-laws that, at the death of a member's wife, who has complied with the above rule, he shall be entitled to draw from the treasury the sum of $*40* to assist in defraying her funeral expenses. Plaintiffs further state that they are all stonemasons by trade, and have worked for many years at said trade, and are residents of the city of *St. Louis*, and duly and properly qualified to be members of said association. That all of them were duly elected and qualified for more than *one* year next before the ——— day of *December*, 18*92*, and paid all of the dues and initiation fees required of them as such members, and enjoyed all the privileges of membership of said association, and were all members in good standing up to said ——— day of *November*, 18*92*.

Plaintiffs further state that on some day after the said day of *November*, A. D. 18*92*, the date of which is unknown to them, without any notice to your petitioners, the said defendants, the officers and committee or high court of said association, namely, *Patrick T. Walsh*, its president; *Christian Bauer*, vice-president; *Patrick J. Costello*, secretary; *Gustav Schneider*, treasurer, and *Martin Widmer*, *Philip Kustner*, *Gustav Wiegert*, *Robert Smithanna*, *Charles La Walles*, *Edward Harvey*, *John J. Byrnes*, *William Evans*, *Francis Noonan* and *Richard Lyons*, notwithstanding that they, the plaintiffs, were all members in good standing, the said officers and committee, actuated by malice and by a determination to deprive these plaintiffs by a corrupt, arbitrary and illegal use and construction of the powers vested in them by the charter and special act hereinbefore referred to, presented to the members of said association, without notice to these petitioners, unjust, illegal and damaging charges against your petitioners, and undertook without notice to said plaintiffs to charge upon the books of said association unjust, illegal and oppressive fines against your petitioners, and afterwards dropped the petitioners' names from the rolls of the said association and expelled them there-

from, and have frequently refused to permit your petitioners to participate at the meetings of said association, and at the election of officers and a committee for said association, as provided by said act, and have failed and refused to reinstate your petitioners to all the privileges of membership in said association, and to remit the fines thus illegally and corruptly assessed against them.

Plaintiffs further state that the action of said officers and committee was not the exercise of a discretion lawfully pertaining to the objects of said association, as set forth in the act creating it, or the carrying out the purposes for which it was created, but a usurpation of power by them only to oppress and unjustly and illegally deprive the plaintiffs of the benefits of said association, and of the use of all the fees and initiation fees paid by them to said association. Plaintiffs further state that, to carry out their malicious oppression and illegal designs and determinations, the said officers notified all the other members of said association, not thus expelled, that it would be a cause of expulsion should they, or either of them, work at mason work at any building where your petitioners were working, and illegally and maliciously reported the work of one *McCully* as blackened where your petitioners were working, and prohibited all members from working thereon.

Plaintiffs further state that they are remediless in the premises by or through ordinary process of law, and they therefore pray this honorable court to award against said corporation, officers and committee, a mandamus, commanding them and each of them, to expunge from the books of said association all illegal and oppressive fines charged against your petitioners thereon, and that their names be again placed on the rolls of said association as members thereof, and that they be reinstated to all of the privileges of said association, and for such other and proper relief as the plaintiffs may be entitled to, and for their costs in this proceeding expended. [(*Concluding as in Form No. 5921.*)]

d. To Compel Transfer of Stock.[1]

Form No. 7461.

(Precedent in State *v.* McIver, 2 S. Car. 26.)[2]

[(*Venue and title of court and cause as in Form No. 5932.*)][3]

To the *Chief Justice* and the *Associate Justices* of the *Supreme* Court of the State of *South Carolina.*

The humble petition of *Benjamin D. Townsend*, a citizen of the State of *South Carolina*, and resident of *Darlington* county, in the said State, and, also, of *William T. Walters* and *Benjamin F. Newcomer*, of the State of *Maryland*, respectfully sheweth unto your Honors that, on the ——— day of *May*, A. D. 1866, at a meeting of the stock-

1. See also the title STOCK AND STOCKHOLDERS.

2. Writ of mandamus was issued in this case.

3. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

holders of the *Cheraw and Coalfields Railroad Company*, held in the city of *Charleston, S. C., B. D. Townsend* was unanimously chosen President of the said company, which had been duly chartered by the Legislatures of the States of *North* and *South Carolina*, and continued in the discharge of the duties of said office until the next annual meeting of the said stockholders, in the month of *May*, A. D. 1*867*, held at the same place, when he was again elected unanimously to the same office, at the regular annual meeting in 1*868*, a majority of the stock of said company not being represented, and there, hence, being no quorum, there was no election for officers, consequently your petitioner, *B. D. Townsend*, and his Board of Directors, in default of an election, held over and continued in the discharge of their duties until the next regular annual meeting of the said stockholders, held on the *12th* day of *May*, A. D. 1*869*, in the town of *Cheraw, S. C.* By effort and zeal, on the part of some of the stockholders, a full attendance upon this meeting was secured, and there was almost if not an entirely full representation of the stock of said company, either in person or by proxy. The meeting was a large and enthusiastic one, and your petitioner, *B. D. Townsend*, was again almost unanimously elected President, and the following persons Directors, viz: *A. F. Ravenel, L. D. Mowry, A. J. White, S. J. Townsend, W. H. Robbins, L. Green, D. Ingraham, R. J. Donaldson*, and *D. Malloy*.

At this meeting the stockholders adopted sundry resolutions, and among them one authorizing and empowering your petitioner, *B. D. Townsend*, and the Board of Directors elect, to use all the funds and assets of the said company, as they, the said President and Directors, might deem best for the interest of the said road, the name of which was then changed from that of the *Cheraw and Coalfields Railroad* to the *Cheraw and Salisbury Railroad*, the northern terminus changed from *Coalfields*, in the State of *North Carolina*, to *Salisbury*, in the said State, and all the provisions of the last Acts of the Legislature of the said States amendatory of previous ones were then and there fully accepted by the said meeting. Since that time, your petitioner, *B. D. Townsend*, as President, has worked and labored as zealously in the discharge of his duty, and in the interest of the said company, as his ability would enable him to do, enjoying the co-operation of the Directors aforesaid, but has experienced great embarrassment in forwarding this enterprise of public importance, from want of funds sufficient to carry on the work. The company was the owner of *four thousand and thirteen* shares of the stock of the *Cheraw and Darlington Railroad*, which your petitioner, *B. D. Townsend*, regarded as proper to be sold, as otherwise it could prove of poor service to the company. Accordingly, at an adjourned meeting of the said Board of Directors, held on the *11th* day of *August last*, (1*869*,) *B. D. Townsend* submitted a report in full concerning the affairs of the said road, its present condition and future prospects, and, among other things, recommended the sale of said stock, and gave his reason for so doing. All the directors were present except *three*. The report was fully considered, and adopted by the unanimous voice of those present, who also passed a resolution authorizing, empowering

and instructing your petitioner, *B. D. Townsend*, as their President, to sell the said stock as soon as he could secure therefor *ten* dollars per share, less brokerage, or *twenty* per cent. of its par value. Your petitioner, *B. D. Townsend*, under this resolution of the said Board, and the aforesaid resolution of the stockholders, on *May twelfth*, 1*869*, deeming his authority to make the sale unquestionable, and knowing the *Cheraw and Darlington Railroad* to be greatly embarrassed, and deeming the aforesaid price exceedingly fortunate for his company, if the same could be secured, succeeded in effecting the said sale of this stock to your petitioners, *Messrs. Walters and Newcomer*, of *Baltimore*, with whom he had been previously negotiating, who paid your petitioner, *B. D. Townsend*, *two thousand* dollars in cash, and gave their written obligation to pay him the balance, about *thirty-eight thousand* dollars, as soon as the proper and lawful transfer thereof could be made upon the books of the *Cheraw and Darlington Railroad Company*, at their office in *Cheraw*. This sale occurred on the *13th* day of *August*, and, to consummate the same, the purchasers thereof dispatched one *Mr. R. R. Bridges*, as their agent, to proceed in company with your petitioner, *B. D. Townsend*, to the office of the *Cheraw and Darlington Railroad Company*, in *Cheraw*, *S. C.*, for the purpose of having the said certificates of stock properly transferred upon the books of the said company, as the rules and by-laws, and the certificates themselves, required, a complete transfer requiring not only the receipt and transfer of your petitioner, *B. D. Townsend*, but the signatures of the President and Secretary of the said *Cheraw and Darlington Railroad Company*. The aforesaid *R. R. Bridges*, as agent of the said purchasers, *Messrs. Walters and Newcomer*, being prepared, upon the delivery of the certificates of stocks signed, as aforesaid, to pay your petitioner, *B. D. Townsend*, the balance of the said purchase money, as per terms of sale. But your petitioner, *B. D. Townsend*, and the said *Bridges*, having made a demand upon *Henry McIver*, *Esq.*, President, and *John McIver*, *Esq.*, Secretary and Treasurer of the said *Cheraw and Darlington Railroad Company*, to make the proper entries in the books of said company, and permit your petitioner, *B. D. Townsend*, to enter the proper receipts and transfers, as their rules and by-laws and the terms of the said certificates require, in order to a lawful sale and transfer, to your petitioner's (*B. D. Townsend's*) great surprise, they positively refused to do and permit the same to be done, and still persist in so refusing, alleging, as an excuse therefor, that the attorney of certain stockholders of the said *Cheraw and Salisbury Railroad* have notified them that legal proceedings are about to be instituted to prevent the said transfer of stock from being consummated, and alleging sundry other frivolous and unfounded excuses and pretexts for their declining and refusing to do this plain act of duty. Your petitioners respectfully show unto your Honors that this refusal of their just and reasonable demands is unjust, unlawful, directly and immediately damaging to the interests of themselves and the said company, and may work irreparable injury to them and the public, who are interested and concerned in the completion of the said road. The right and authority of your petitioner, *B. D. Townsend*, to make

the sale cannot soundly be questioned; the title of the said purchasers is good in law, the immense advantage of the sale to the said company is too manifest to be gainsaid, and this conduct of the said officers in refusing to allow the transfer to be properly recorded, and to issue new certificates to the purchasers, may, and probably will, by its delay, cause and necessitate the recession of the sale or contract. Without this money, your petitioner, *B. D. Townsend*, cannot proceed with the work on the said road; the engineers and other employees will not labor without pay, and there being no money in the treasury, all such employees and subordinates will be compelled to quit and seek employment elsewhere. The public along the line who are now much encouraged and becoming willing to subscribe, will again become lukewarm and discouraged, and will withhold the proffered and promised aid. The Legislatures of the *two* States will probably be loth to aid a company thus blocked in its progress; and, in fine, the abors and efforts of years be lost by a forfeiture of charter, and the State damaged by the loss of a splendid sale of bad stock. Your petitioners further shew that, if the parties thus offending were the representatives of a perfectly solvent corporation, they would still be without any adequate and complete remedy by ordinary suit for damages at law, specific performance in equity, or similar proceedings, because of the slow and tedious progress ordinarily of such suits, during the pending of which the work on the said road must, from necessity, be at a stand still for want of funds, as it now is and has been.

But your petitioners further shew that the said *Cheraw and Darlington Railroad Company* is, from the best of their knowledge and belief, totally insolvent, and could not respond in damages at all adequate to the loss inflicted, should your petitioners elect an action with a view of recovering damages. The said *Henry McIver*, *Esq.*, and *John McIver*, *Esq.*, are, therefore, the representatives of a road under heavy existing liens and incumbrances, unable to answer in damages, while the said *Cheraw and Salisbury Railroad* is, in its infancy, greatly and absolutely in need of this fund immediately, and in danger of forfeiting its charter, unless the work is soon begun, which cannot be conveniently done without this fund.

Therefore, your petitioners respectfully submit that this refusal is not only an injury to themselves, personally, and the stockholders of both of said roads, but it is an injury to the public, by checking the construction of an important highway and violating and infringing the chartered rights and privileges conferred by the Legislature upon the stockholders of the said *Cheraw and Salisbury Railroad Company*, and *Cheraw and Darlington Railroad Company*, and entitles your petitioners to invoke the most speedy, adequate and complete remedy and relief within the power of this Honorable Court.

In view of these facts, the necessitous condition of the *Cheraw and Salisbury Railroad Company*, its present indebtedness, the insolvency of the *Cheraw and Darlington Railroad Company*, in consideration of the premises, and entire absence of any adequate remedy, at law or in equity, your petitioners humbly and respectfully pray your honors to grant unto them a rule issuing from this Honorable Court, directed

to *Henry McIver*, *Esq.*, President of the *Cheraw and Darlington Railroad Company*, and *John McIver*, *Esq.*, Secretary and Treasurer, commanding them, and each of them, to show cause before your Honors, at a time and place therein to be specified, why a writ of mandamus should not issue enjoining, directing and commanding them, and each of them, to sign the necessary certificates of stock upon the books of the said company at their office in *Cheraw*, and to suffer and permit your petitioners to have access to the books, and to sign thereon all necessary receipts and transfers of stock to the said *Messrs. Walters and Newcomer*, of *Baltimore*, or their assigns, and commanding them to issue new certificates of stock to the said purchasers, and to do and perform all and every act necessary upon the books of said company to complete and perfect the sale of stock made by your petitioner, *B. D. Townsend*, to the purchasers aforesaid, according to the terms thereof. And your petitioners, in confirmation and verification of the statements, allegations and charges upon which the prayer of the petitioner is based, respectfully submit for reference, as exhibits to this petition and part thereof, the books of this said *Cheraw and Coalfields*, and *Cheraw and Salisbury Railroad Company*, containing the journal or minutes of the meetings of the stockholders and directors thereof. Also, the Acts of the Legislatures of *North* and *South Carolina*, incorporating the said company, and those subsequently amending the same. The copy of the written contract of sale to *Messrs. Walters and Newcomer*. All of which they pray may be taken as part of the petition for all necessary reference. And upon this array of facts, your petitioners humbly pray the rule above craved. And they will ever pray, etc. [(*Concluding as in Form No. 5932.*)]

4. For Misconduct and Negligence.[1]

1. For other forms of proceedings based upon negligence or misconduct of corporation officers consult Form No. 6430 *et seq.*

For Gross Negligence Amounting to Fraud. — In Swentzel *v.* Penn Bank, 147 Pa. St. 141, a bill filed by the creditors of the bank to compel them to pay moneys lost by reason of their carelessness, negligence, and fraudulent management, substantially averred as follows: "That the *Penn Bank* incorporated to do a banking and insurance business, began a general business in the city of *Pittsburgh* in 1873, and continued said business until *May 21*, 1884, when it suspended payment; that for more than one year prior to *May 21*, 1884, the bank had been insolvent, which fact was known to, or ought to have been known to its officers and directors; that the officers and directors of the bank for several years before the suspension published statements showing that the bank was solvent and prosperous, but that such statements were false; that the directors of the bank carelessly and negligently permitted the president, cashier and some of the directors to use the funds of the bank in the illegitimate and hazardous business of gambling in oil; that within two years before the suspension of the bank its officers and directors permitted a large portion of the funds and moneys thereof to be checked out and withdrawn in the names of fictitious persons and firms; that, after the suspension of the bank on *May 21*, 1884, the defendants caused false statements to be published concerning its condition, which statements the complainants relied upon, and increased their deposits, but that the bank was then utterly insolvent, and that it finally suspended payment on *May 26*, 1884; that after it was ascertained that the bank must finally suspend payment, the defendants per-

a. By Creditors and Stockholders of Insolvent Bank.

Form No. 7462.

(Copied from the record in Meisse *v.* Loren, Wkly. L. Bul. (Ohio, 1898), 307; 5 N. P. (Ohio) 307, 6 Ohio Dec. (C. Pl.) 258.)[1]

mitted some of the directors to take and apply to their own use large sums of money then in the bank." The bill prayed that the officers and directors be decreed to pay to the complainants all moneys lost by reason of the defendants' carelessness, negligence, and fraudulent management; and that it be decreed that certain directors (naming them) pay to the complainants and other creditors all moneys which they drew out of the said bank between May 21, 1884, and the date of assignment to Henry Warner. In this case it was held that bank directors, being gratuitous mandatories, are only liable for fraud, or for such gross negligence as amounts to fraud. If they use ordinary care which bank directors usually exercise they will not be liable for misappropriations by the officers of the bank. But where a director, acting upon information obtained in his confidential relations with the bank, withdraws, on the day of the suspension of the bank, the deposit of partnership of which he is a member, he will be ordered to repay it.

Also, in Minton *v.* Stahlman, 96 Tenn. 98, is set out the substance of several counts of a declaration in an action by a depositor against the officers and directors of a defunct bank for loss of a general deposit, by reason of the bank's insolvency. The declaration was held to be insufficient in that it did not allege that the loss had resulted from the "intentional fraud and willful mismanagement" of the affairs of the bank on the part of the directors and officers, the declaration merely averring that the loss resulted from their negligence and inattention. It seems but for that defect the declaration would be sufficient. The liability of directors and officers of corporations for intentional fraud or willful mismanagement is imposed by the following statutes:

Kansas. — Gen. Stat. (1897), c. 18, § 74.

Missouri. — Rev. Stat. (1889), § 2760.

Tennessee. — Code (1896), § 3242.

1. Amendments to amended petition set out in Form No. 7462 were filed, which, omitting the formal parts, were as follows:

First Amendment. — "Plaintiffs say, by way of an amendment to the amended petition, that the said *Mary A. Thomas*, on or about the *1st* day of *February*, 1894, became and now is the owner of *ten* shares of the capital stock of said *The Fifth Avenue Savings Bank Company*, of the value of *One Thousand* Dollars. Plaintiffs in compliance with the order of Court allege that the said illegal commissions were paid out by said *John A. Kight* under the following circumstances:

That said directors and other customers of said bank constituted the said Cashier, *John A. Kight*, as their agent to secure for them certain loans, that the said *John A. Kight* in pursuance of said appointment, between the *1st* day of *February*, 1894, and the time when said bank went into the hands of a receiver, procured for them said loans, and disposed of their securities so placed in their hands for said purpose, for sums far less than the amounts for which he the said *Kight*, gave them credit on the books of the bank. That in each loan so procured *two* per cent. commission was retained by the person making the loan, but that *Kight* credited the whole amount including the *two* per cent. commission to the accounts of such customers, and thereby diverted from the funds of the bank to the accounts of said person for whom he secured said loans large sums of money, the amounts of which and the date of which plaintiff cannot definitely state.

That said cashier, *John A. Kight*, has wrongfully withdrawn from the funds of said bank and converted the same to his own use, the sum of about *$10,000.00*, which the defendants by reason of the negligence as set forth in the amended petition herein, failed to discover.

The books of said bank containing said information concerning said wrongful withdrawal and appropriation of said sum are inaccessible to plaintiff. Plaintiffs have made diligent effort to get said information but have been unable to do so, that it appears in the books of said bank to which plaintiffs have not access, and even if plaintiffs did have access there-

In the Court of *Common Pleas*, *Franklin* County, *Ohio*.

Charles E. Miesse, who sues on his own behalf as well as on behalf of each and all of the creditors and depositors of *The Fifth Avenue Savings Bank*, and *Mary E. Thomas*, who sues on her own behalf as well as on behalf of each and all the stockholders of said *The Fifth Avenue Savings Bank*, Plaintiffs,

vs. No. 34,390. } Amended Petition.

James M. Loren, *Ephraim Sells*, *George J. Atkinson*, *William G. Hess*, *George McDonald*, *Joseph R. Lane*, *Levi R. Smith*, *Bernard N. Payne*, *William H. Fish* and *Irvin T. Coe*, Directors of *The Fifth Avenue Savings Bank*; *The Fifth Avenue Savings Bank* and *John Field*, Receiver of said Bank, Defendants.

Plaintiffs sue as well on behalf of all the creditors and stockholders of the defendant (excepting the defendants herein who are stockholders), *The Fifth Avenue Savings Bank*, as on their own behalf, the said *Charles E. Miesse* as a creditor, and said *Mary E. Thomas* as a

to, they would be unable to state the facts more in detail without having first made a careful and accurate accounting thereof, and they, therefore, are unable to allege the date or dates when said sums were so wrongfully withdrawn from said bank, or whether they were withdrawn in one sum or different sums.

Kinkead and Merwine,
Vorhees and Vorhees,
R. M. Vorhees and
Geo. K. Nash,
Attys. for Plffs."

Second Amendment. — "Plaintiffs say, by way of amendment to the amended petition that the said *Mary E. Thomas*, on or about the *first* day of *Feb.* 1894, became and now is the owner of *ten* shares of the capital stock of said *The Fifth Avenue Savings Bank Company*, of the value of *One Thousand* Dollars.

That said Cashier, *John A. Kight*, on the *17th* day of *September*, 1895, wrongfully withdrew from the funds of said bank and converted the same to his own use, the sum of about $*10,000.00* which said defendants by reason of the negligence as set forth in the amended petition herein failed to discover.

Kinkead and Merwine,
Vorhees and Vorhees, and
Geo. K. Nash, Attys. for Plffs."

Third Amendment. — "Plaintiffs say, by way of an amendment to the *first* and *second* (amendments) to the amended petition, and in compliance with the order of the court.

That said directors and other customers of said bank constituted the said cashier *John A. Kight* as their agent to secure for them certain loans, and that the said *John A. Kight* in pursuance of said appointment between the *1st* day of *February*, 1894, and the time when said bank went into the hands of a receiver, procured for them certain loans, and disposed of their securities so placed in their hands for said purpose, for sums far less than the amounts for which the said *Kight* gave them credit on the books of the bank. That in each loan so procured *two* per cent. commission was retained by *D. E. Williams* who made the loans, but that *Kight* credited the whole amount including the *two* per cent. commission to the accounts of such customers, and thereby diverted from the funds of the bank to the accounts of said persons for whom he procured said loans large sums of money, the amounts of which and the dates of which plaintiff cannot definitely state.

Kinkead and Merwine,
Vorhees and Vorhees,
and *Geo. K. Nash*,
for Plaintiffs."

To the petition demurrers were filed, which were by Judge Evans, of the court of common pleas of Franklin county, Ohio, overruled April 18, 1898.

stockholder, and they say; that they have in their own respective rights a common interest with others as creditors and stockholders of the said *The Fifth Avenue Savings Bank*, arising out of the same transactions hereinafter set forth. The parties interested are so numerous that it would be impracticable to bring them all before the Court; the nature of their common interest will fully appear by the statements of the amended petition hereinafter set forth.

The said, *The Fifth Avenue Savings Bank*, is, and was a corporation organized, on or about the *15th* day of *January*, 1894, under the laws of the State of *Ohio*, for the purpose of carrying on business at the City of *Columbus*, *Ohio*, by receiving deposits, loaning money, and conducting all business authorized by law to be conducted by *Savings and Loan Associations*, under the provisions of Chapter *16*, Title *Two*, Part *2nd* of the Revised Statutes of *Ohio*, and other corporation laws of said State applicable to said corporation.

On or about the *18th* day of *January*, 1894, the defendants, *James M. Loren*, *Ephraim Sells*, *George J. Atkinson*, *William G. Hess*, *George McDonald*, *Joseph R. Lane*, *Bernard W. Payne*, *Levi R. Smith*, *William H. Fish*, and *Irvin T. Coe*, were each and all of them duly elected directors of said defendant corporation; and ever since that time they have been, and now are directors of said corporation, excepting *George J. Atkinson*, who ceased to be a director on or about the ——— day of *March*, 1895. On the *20th* day of *January*, 1894, the defendant, *James M. Loren*, was duly elected president of said corporation, and of the Board of Directors thereof. The defendant *Bernard W. Payne* was elected Vice-president, *Irvin T. Coe*, Secretary, and *Joseph R. Lane*, Treasurer, of said corporation. Said officers so elected, as aforesaid, each accepted the office to which he was so elected, and entered upon and assumed the discharge of the duties pertaining thereto. Said *James M. Loren* was to and did receive for his services, as such President, a salary of *Fifty* Dollars per month, to be paid by said corporation. On said *20th* day of *January*, 1894, said Board of Directors so elected, as aforesaid, elected and chose one *John A. Kight*, as Cashier of said corporation or Bank at a salary of $*100.00* per month. Said *John A. Kight* was not a fit person for said position, he being incompetent, careless, and dishonest, which utterly disqualified him, for the position of Cashier of the Bank; all of which the said Board of Directors well knew at the time they so elected him Cashier.

The said *Fifth Avenue Savings Bank* commenced business as such corporation, as aforesaid, the *1st* day of *February*, 1894, with a capital stock of $*50,000.00*, consisting of *500* shares of $*100.00* per share, which on the *1st* day of *February*, 1894, were of the value of $*100.00* per share, and the said plaintiff *Mary E. Thomas*, became and now is the owner of *ten* shares of said stock, of the value at the time of becoming such owner, of the sum of $*1000.00*.

On and prior to the *1st* day of *February*, 1894, *Daniel E. Sullivan*, *Ephraim Sells*, *James M. Loren*, *George J. Atkinson* and *Eli M. Tuller*, were partners in the banking business at the City of *Columbus*, under the name and style of the *Farmers and Mechanics Bank*, and after, said *The Fifth Avenue Savings Bank*, became incorporated and organized,

as aforesaid, the said *James M. Loren*, *George J. Atkinson* and *Ephraim Sells*, while they were still members of said partnership, became stockholders in said corporation, and the said *Loren* and *Atkinson* were elected directors and officers in said corporation, as hereinbefore averred; and while sustaining such relation to said corporation, as aforesaid, said *James H. Loren*, *George J. Atkinson* and *Ephraim Sells* were members of said partnership, as aforesaid.

The directors of said corporation, elected and chosen on the *18th* day of *January*, 1*894*, as aforesaid, to-wit: on or about the *18th* day of *January*, 1*894*, the exact date plaintiffs cannot state, made and entered into an agreement on behalf of said corporation, as one party, and the said partnership, the said *Farmers and Mechanics Bank* as second part, whereby it was amongst other things agreed and stipulated that the said, *The Fifth Avenue Savings Bank*, should buy all the fixtures belonging to said *Farmers and Mechanics Bank*, and the said *Fifth Avenue Savings Bank* should succeed to the good will of the said *Farmers and Mechanics Bank*; and the said *Farmers and Mechanics Bank* was to turn over to the said *Fifth Avenue Savings Bank*, all its accounts of depositors which it had upon its books at that time, and turn over, deliver and assign to said *The Fifth Avenue Savings Bank*, all the cash on hand arising from deposits, accounts or otherwise, and all rights, credits and bills receivable, which it, the said *Farmers and Mechanics Bank*, then held.

It was further understood and agreed between said Banks, upon the representations of said *Farmers and Mechanics Bank*, that its said cash deposits, accounts, and other accounts, rights, credits and bills receivable, which it was to turn over and assign to said, *The Fifth Avenue Savings Bank*, under said agreement, were and would be sufficient to pay all of the accounts due from it, said old Bank, to its depositors. Said, *The Fifth Avenue Savings Bank* was not to, nor did it assume to pay the obligations due from said *Farmers and Mechanics Bank* to their depositors, it being understood and agreed that said depositors' accounts, so to be turned over to said Savings Bank, as aforesaid, were to be paid from assets then on hands in said old Bank, and which said *Farmers and Mechanics Bank* represented were ample and sufficient to pay the amount due from it, the said *Farmers and Mechanics Bank*, to its depositors.

Plaintiffs are unadvised whether said agreement was written or verbal, and after the exercise of reasonable care have been unable to ascertain what is the fact in this regard.

Said agreement was not carried out or performed on the part of said *Farmers and Mechanics Bank*, according to its terms and conditions, in this, to-wit: — Said *Farmers and Mechanics Bank* failed to transfer its good will and business to said *The Fifth Avenue Savings Bank*, and failed to turn over and transfer to said Savings Bank all, or any of its cash on hand arising from its deposits, the accounts, rights, credits and bills receivable, which it had and held at the time said agreement was made; but did transfer and carry over into the books and into the accounts of said *The Fifth Avenue Savings Bank*, the obligations due from it, the said *Farmers and Mechanics Bank*, to its depositors, without providing any means

to pay the same from any of the sources or methods contemplated or to be provided for by said contract.

The debts and liabilities of said *Farmers and Mechanics Bank* to its depositors and others, were greatly in excess of all the cash on hand from deposits, deposit accounts, and other accounts, rights, credits and bills receivable, held by it at the time its said agreement was made, and its liabilities were carried into the books and into the accounts of the said *The Fifth Avenue Savings Bank*, as aforesaid.

Said *Farmers and Mechanics Bank* failed to adjust, balance, close up and merge its business and transfer its good will and said accounts, to said *The Fifth Avenue Savings Bank*, as by the terms of said agreement it would and was bound to do.

Said *Farmers and Mechanics Bank* did not furnish means, or provide funds in any way to meet its obligation to its depositors, incurred prior to the making of said agreement, aforesaid, as it was bound to do according to the terms and conditions of said agreement.

By reason of gross mismanagement, negligence and imbecile inattention, of the said defendants, *James M. Loren*, *Ephraim Sells*, *George J. Atkinson*, *William G. Hess*, *George McDonald*, *Joseph R. Lane*, *Levi R. Smith*, *Bernard W. Payne*, *William H. Fish* and *Irvin T. Coe*, to their duties of their said offices respectively, as hereinafter set forth, the plaintiffs and others on whose behalf this action is brought, have been damaged as hereinafter stated.

Said gross mismanagement, negligence and inattention of said defendants, are the following, to-wit: — In electing and choosing *John A. Kight*, as Cashier of said Bank or corporation, at the salary hereinbefore stated or at any salary; he, the said *John A. Kight* being at the time wholly incompetent and unfit for such position, for the reasons hereinbefore set forth. Said directors had knowledge, or could have had knowledge, of the said reasons for his unfitness for such position by the exercise of reasonable care and diligence on their part; In not giving attention to the business of said Bank, and in leaving its affairs to the management and in the care of said incompetent Cashier: To make or cause to be made a transfer from said *Farmers and Mechanics Bank*, to said *The Fifth Avenue Savings Bank*, of the business of the former Bank to the said latter Bank, or corporation, and have all accounts and transactions of the old Bank, said *Farmers and Mechanics Bank*, adjusted and transferred to said new Bank (said Savings Bank) and the affairs and business of said old Bank, properly adjusted, balanced and merged into said new Bank, according to the terms and conditions of said agreement:

To make or cause to be made an examination of the books of the said old Bank at the time of the pretended or attempted transfer of its good will, business and accounts, to said new Bank as aforesaid, but relied upon false and fraudulent representations of the agent, *John A. Kight*, Cashier, and other officers and members of said old Bank, to-wit: *Daniel E. Sullivan*, President: *Ephraim Sells*, Vice-president: and said *James M. Loren* and *George J. Atkinson*, Directors of said Bank, as to its condition and business, as hereinafter specifically alleged: In not discovering the true situation and condition of the affairs and financial condition of said old Bank, at the time said

agreement was made, and said pretended transfer of its business, as hereinbefore set forth. Said old Bank's condition and affairs were not good, but on the contrary said old Bank was embarrassed financially and utterly insolvent, its debts and liabilities were much greater than its assets, that its cash on hand arising from deposits, with all other accounts, credits, and bills receivable at that time or at any other time after said contract or agreement was made with said new Bank, were insufficient to pay the accounts due its depositors, all of which were known to said directors, or could have been ascertained by them by the exercise of reasonable care and diligence or by a slight examination of its accounts and books:

In not ascertaining that the debts and liabilities of said old Bank to its depositors, were largely in excess of its assets: In not ascertaining that for a year or more, the moneys of said new Bank were wrongfully being paid out upon the debts and liabilities, and to make up a shortage and defalcation in said old Bank: In not ascertaining what amount of liability said old Bank was subject to, and owed its depositors before said attempted transfer of its business and assets under said agreement was made, and its business merged into said new Bank, and that the cash and bills receivable were also properly transferred: In not procuring and opening a new set of books for said new Bank at the commencement of its business, *February 1st*, 1894, or within a reasonable time thereafter, and in permitting the accounts of said new Bank to commence and be continued by said Cashier thereof, in the same books used by the old Bank commencing *February 1st*, 1894, immediately after the last date of the last business transactions of said old Bank, to-wit:—*January 31st*, 1894, and without striking any balance in any of the accounts of the old Bank, with its depositors on said Books, and without any indication of a change in said accounts, or any of them, other than stamped letters between the said dates, *January 31st*, 1894, and *February 1st*, 1894, the commencement of the business of said new Bank, and the close of the business of said old Bank, as aforesaid. The business of the new Bank in the several accounts of the depositors of the old Bank, were in this way carried over to and continued with the new Bank, and these obligations of said old Bank, so carried over and continued by said new Bank, had been represented by the said defendants, members of said old Bank, not to be more than the amount of the bills receivable, so held by the said old Bank, and which were to be transferred to said new Bank, as aforesaid, all of which were untrue and the falsity thereof could and would have been ascertained by the said defendants at the time said business of said new Bank was commenced, as aforesaid, by the exercise of reasonable care and diligence, and a slight examination of the books, as aforesaid.

The defendants hereinbefore named, who constituted the Directors and officers of said, *The Fifth Avenue Savings Bank*, as aforesaid, were each and all guilty of gross negligence, mismanagement and inattention to their duties of their said offices, respectively, in not discovering the several violations of said agreement on the part of the said *Farmers and Mechanics Bank*, as hereinbefore set forth. All of which they knew or could have known at the time of the commit-

ting of the same, by the exercise of reasonable care and diligence. Said directors knew, or could have ascertained the financial condition and insolvency of said *Farmers and Mechanics Bank* at the time said agreement, and the transfer of its business and accounts, as aforesaid, were made, and that its liabilities to its depositors were greatly in excess of its cash, credits, bills receivable, by the exercise of reasonable care and attention to the business of said Bank, and in the discharge of their duties as such directors.

All of the said defendants, directors of the said *The Fifth Avenue Savings Bank*, have been and were guilty of gross carelessness, negligence, mismanagement and inattention to their duties as directors, and to the duties of their said officers, respectively, in this, to-wit: — On the *20th* of *January*, 1894, the Directors of the said *The Fifth Avenue Savings Bank* appointed a finance committee for said Bank, composed of the defendants, *George J. Atkinson*, *George McDonald* and *William G. Hess*; and on the *25th* day of *January*, 1894 at a meeting of said directors, by resolution duly passed by said Board of Directors, the duties of said finance committee, was prescribed, which required said committee, among other things, to make monthly examinations of the affairs of the Bank, including the counting of the cash, a comparison of the bills receivable with the accounts of the same, and report to the Board of Directors the amount of cash on hand, amount of bills receivable, the amount of deposits, and to make any suggestion, which in the opinion of the committee would be to the benefit of the Bank; said report to be filed for reference and examination.

Said Bank commenced business as hereinbefore averred, on the *1st* day of *February*, 1894; said finance committee wilfully and negligently failed and neglected to make an examination of the affairs of the *Farmers and Mechanics Bank*, which was a part of its duty, and the said defendant directors and their said officers, grossly neglected to require or cause said committee to make an examination at the time of the transfer and merging of said *Farmers and Mechanics Bank* to and into said *The Fifth Avenue Savings Bank.*

Said defendant directors, said committee, and the said officers of the said directors, each and all of them grossly neglected and likewise failed to make an examination of the books of said old Bank, and they failed and neglected to hold or have any meeting of said committee or of said directors, on the *1st* day of *February*, 1894, at the time of said transfer from said old Bank to the new Bank, or within any reasonable time thereafter, to receive the report of said finance committee of their examinations of the affairs of said old Bank, if any had been made, or to require said committee to make such examination.

Said Board of Directors did not meet again until the *9th* day of *February*, 1894, and at that time they grossly failed to require said finance committee or any one for them, nor did they, themselves, make or cause to be made an examination of the books and business of said old bank, notwithstanding, it was the special duty of said finance committee to have made such examination and to report the results thereof to said Board of Directors, before and at the time of the transfer of said old Bank to said new Bank.

The defendant Directors, negligently, by gross carelessness, failed to require said committee to make any examination of the affairs and business of said old Bank for more than *two* months after the said new Bank had succeeded to its business: nor did their said finance committee or any one for them, ever make a personal examination for them, of the books until near the close of the business of said new Bank, when it went into the hands of a Receiver, as hereinafter averred.

On the *3rd* day of *April*, 1*894*, said finance committee did submit to said Board of Directors, a written report of a pretended examination made of the business and affairs of said new Bank in words and figures following, to-wit: (*Report of committee.*)[1]

That said finance committee were in and about the Banking House of said *The Fifth Avenue Savings Bank*, together with its said officers constantly and were the most active of all the said Directors in the transaction of Business of the said Bank, and that the failure of the said finance committee to properly perform their duties in the examination of the affairs of said Bank was because of the knowledge which the defendants, *Atkinson* and *Loren*, had concerning the shortage of the old Bank which was carried into the new Bank, and concealed by their said Cashier.

Said finance committee was guilty of gross negligence in failing to make an examination of the affairs and business of said *Farmers and Mechanics Bank* prior to and at the time of the transfer or merging of the same into said new Bank, and said Directors were guilty of gross negligence and neglect in not having said committee count the money of the said old Bank on hand at the close of the business on *January 31st*, 1*894*, and which should have been turned over to said new Bank; that according to the books of said old Bank there was cash on hand *January 31st*, 1*894*, in said bank the sum of $*8,293.00*, which sum was not turned over to the defendant directors of said new Bank or to any of its authorized officers, that said finance committee and defendant directors were guilty of gross negligence, in failing, as they did, to examine the books of said old Bank, or to have them examined to ascertain thereby, as they could have easily done by such examination, what amount of money was due to the depositors of said old Bank at the date of the transfer of said accounts to said new Bank.

And the said finance committee and all of the said defendant directors, neglected to examine or cause to be examined before and at the time of the transfer of the *Farmers and Mechanics Bank* to *The Fifth Avenue Savings Bank*, all of the bills receivable, due and payable and belonging to said old Bank, or to see that its cash on hand

1. "**Report of Finance Committee,** *March 30th*, 1*894*.
To the Board of Directors of the *Fifth Avenue Savings Bank.*
Gentlemen: — Your committee appointed to examine condition of this Bank will report that we have performed that duty *this day at the close of business*, by counting the cash and examining all bills receivable, and find the same to agree with a statement as taken from the books. We are satisfied that all the bills receivable are good, as far as we are acquainted with the parties thereto. Respectfully submitted.
George McDonald.
George J. Atkinson.
William G. Hess."

and bills receivable were equal to the amount of money due to the depositors of said old Bank, according to the said agreement hereinbefore set forth, and neglected to see that said bills receivable were transferred and delivered according to said agreement into the custody of the proper officers of said new Bank.

Said defendant — *James M. Loren* — President of the Board of Directors, of the *Fifth Avenue Savings Bank*, and member and partner in said *Farmers and Mechanics Bank*, as hereinbefore averred, and who as such president received a salary of *Fifty* dollars a month, as hereinbefore stated, was guilty of gross negligence in this, that he neglected to take charge of the said bills receivable of the said *Farmers and Mechanics Bank* which were to be turned over and delivered to said new Bank, as aforesaid, but on the contrary he fraudulently, willfully and negligently assumed control of the said bills receivable in collusion with the said Cashier, *John A. Kight*, and collected the same through and in the name of the said *Fifth Avenue Savings Bank*, and deposited the proceeds derived therefrom in the said *Fifth Avenue Savings Bank* to the credit and account of the said *Farmers and Mechanics Bank*, and by the said *Loren's* check paid the amount of money so derived from the collection of said bills receivable in payment of the debts of said old Bank, other than upon obligations due their depositors, which said account appears on the books of the said new Bank. Said *The Fifth Avenue Savings Bank* did not assume and were not in any wise bound to pay the amount so as aforesaid, paid out by said *Loren*; that the defendant directors negligently permitted said *Loren* to wrongfully pay out said amount; and said defendant directors negligently permitted their said officers to pay the obligations of said old Bank out of the moneys belonging to said new Bank.

That at the date of the transfer or merging of the said *Farmers and Mechanics Bank* into *the Fifth Avenue Savings Bank* as appeared by the books in said *Farmers and Mechanics Bank* there was due from the said *Farmers and Mechanics Bank* to its depositors the sum of *$55,000.00*; that the assets of the said *Farmers and Mechanics Bank* amounted as aforesaid in cash to the sum of *$8293.00* in bills receivable of the amount and value of about *$21,000.00*; and by a slight or any examination of and balancing of the books of the said *Farmers and Mechanics Bank*, and by the exercise of ordinary care and diligence on the part of the said defendant directors and officers aforesaid, it could and would have been discovered that there was due to the depositors of said last named Bank the sum of *$55,000.00*, and that the money, the said *$8293.00*, if the same had been turned over to the said *The Fifth Avenue Savings Bank*, and the bills receivable of the value of *$21,000.00* as aforesaid, had also been turned over to *The Fifth Avenue Savings Bank*, and applied to the debts and obligations due the depositors, of said old Bank, would have left a shortage still of *$25,707.00*, and that by reason of the failure of the said defendant directors to see to and to have both said money and said bills receivable turned over and assigned to said New Bank, under said agreement, there was a shortage at the time of the transfer of the said *Farmers and Mechanics Bank* to the said *Fifth Avenue Savings Bank*,

of the sum of $*55,000.00*, which said defendants could have discovered by the exercise of ordinary care and diligence on their part, but that they wholly neglected and failed to do.

That said defendant directors wilfully failed and neglected to comply with section *Twenty-three* of the rules and By-laws of said *The Fifth Avenue Savings Bank*, which required the said Board of Directors to make an examination of the books and business of said Bank at least *once* each month.

That the said Cashier of said Bank wrongfully and wilfully paid out to one *D. E. Williams* certain wrongful and illegal commissions for making loans to the amount of $*4500.00*, which the defendants by reason of their mismanagement and inattention failed to discover, and by reason whereof said sum of $*4500.00* was wrongfully diverted from the funds of the Bank. That since the transfer and merging the old Bank into the new Bank, the said Cashier has wrongfully withdrawn from the funds of said Bank the sum of about $*10,000.00*, which the defendants by reason of their negligence as aforesaid failed to discover.

On or about the *13th* day of *January*, 1*896*, the said *The Fifth Avenue Savings Bank* ceased to do business, being largely involved, with its capital wasted by said mismanagement aforesaid, and insolvent, and on that day went into the hands of a receiver, and the said defendant, *John Field* was on the said *13th day* of *January*, 18*96*, appointed Receiver of said *Fifth Avenue Savings Bank*, and is now duly qualified and acting Receiver of said Bank.

The assets of said Bank as shown by the appraisement amounts to $*78,506.71*, and the debts and liabilities amount to about the sum of $*150,000.00*. The plaintiffs, *Charles E. Miesse*, after said Bank was organized and commenced business, as aforesaid, and before it ceased to do business and went into the hands of said Receiver, as aforesaid, and without any knowledge of the negligence, mismanagement and inattention of said defendant directors and officers of said Bank, hereinbefore charged and complained of, and relying upon the diligent and faithful performance of the duties by said directors and officers, and the solvency of said Bank, on the *1st* day of *November*, 18*95*, deposited in the said *The Fifth Avenue Savings Bank* the sum of *One Thousand* Dollars, and on the *13th* day of *December*, 18*95*, he made a further deposit in said Bank of the sum of $*1900.00*. For each of said sums he received from said Bank a certificate of deposit, by which it was stipulated that he was to be paid thereon by said Bank interest at the rate of *five* per cent.; during the time said Bank continued in business, as aforesaid, and from time to time in the years of 18*95* and 18*96* he deposited various sums of money in said Bank amounting in the aggregate to the sum of $*354.15*, and at the time said Bank ceased to do business and went into the hands of said Receiver, as aforesaid, there was due and owing him from said Bank on his said deposits the sum of $*3254.15*; and on the *10th* day of *April*, 18*96*, said receiver, paid him on said indebtedness a dividend of *25* per cent. amounting to the sum of $*813.54*, leaving a balance still due and unpaid to him from said Bank of $*2440.62* with interest thereon at the rate of six per cent., from the *10th* day of *April*, 18*96*.

The directors and officers of said Bank are defendants herein, and are charged with gross carelessness, mismanagement, and inattention to their duty as such directors and officers, that said balance cannot be fully paid from the assets of said Bank, and that the creditors cannot realize to exceed *twenty-five* per cent. on their claims, that by reason of said mismanagement of said Directors as hereinbefore set forth, said Bank has become insolvent, and the stock thereof has become worthless, and that the stockholders have been damaged each in the amount of his or her stock, and the plaintiff, *Mary E. Thomas*, by reason of the premises has been damaged in the sum of $*1,000.00*, as hereinbefore set forth, and by reason thereof said corporation has neglected to bring this action against said directors and officers.

On the *9th* day of *July*, 1*896*, and before the commencement of this action, the plaintiffs served a notice on said defendant, *John Field*, said Receiver of said *Fifth Avenue Savings Bank*, demanding that he as such Receiver, bring an action against the said directors of the said Bank, for the acts of negligence, mismanagement and inattention hereinbefore complained of, which said Receiver refused to do.

There are numerous other stockholders and creditors of *The Fifth Avenue Savings Bank*, who are and have been damaged and sustained losses in common with these plaintiffs by reason of the premises, but plaintiffs are unadvised as to the names of said creditors and stockholders or the extent of their respective claims against the defendant directors of said Bank, and they ask that said corporation be compelled to disclose who are its stockholders and creditors, setting forth their names and the amount due the creditors and the amount of stock held by each stockholder.

The plaintiffs and all the persons on whose behalf this suit is brought, being all stockholders (excepting the defendants herein) and all the creditors of said Bank, by reason of the premises, have been damaged in the sum of $*105,000.00.*

Wherefore, plaintiffs pray that an accounting may be had of all the debts due from the said corporation as well as all the assets thereof; that an accounting may be had of all the funds of said corporation which have, as hereinbefore alleged, been wasted and diverted from the legitimate channels of said corporation; that the amount of the loss which the said creditors and stockholders have sustained in the premises by reason of the aforesaid acts of the defendants, be ascertained and determined and that the said amount when so ascertained and determined may be restituted or restored to the said corporation for the benefit, *first*, of all its creditors, and *second*, of all its stockholders, excepting these defendants; that the mode of contribution to be made by the defendants, and equities and rights of all parties plaintiff, and those creditors and stockholders for whom they sue, as well as the liabilities of the defendants, be properly ascertained, adjusted, and determined, and that judgment for the sum of $*105,000.00* or such sum as shall be found to be the loss which the plaintiffs, and those for whom they sue, have sustained, be rendered against said defendants with interest at *6* per cent. from the

1st day of *February*, 1*894*; and for such other and further relief as is proper and equitable.

Kinkead and Merwine.
Vorhees and Vorhees.
Attys. for Plffs.

(*Verification.*)[1]

1. See the title VERIFICATIONS.

A precedent of a complaint against directors by stockholders for negligence and misconduct is found in note to Nelson *v.* Burrows, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 280, which, omitting the formal parts, is in words and figures as follows, to wit: "The plaintiffs, complaining on behalf of themselves and all others, the stockholders of the *Atlantic National Bank* of *New York*, who shall, in due time, come in and seek relief by and contribute to the expense of this action, by *Nash & Holt*, their attorneys, allege upon information and belief: — That the defendant, the *Atlantic National Bank*, is a corporation and banking association organized on or about the month of *June*, 18*65*, under and by virtue of the act of Congress of the United States, approved June 3, 1864, and known as the National Bank Act, and the various acts amending and extending the same, and that from the period of said organization until on or about *April 26*, 18*73*, the said *Atlantic National Bank* of *New York* transacted a large general banking business at the city of *New York*; that on or about said *April 26*, 18*73*, said banking association was insolvent and suspended payment, and refused to pay upon demand certain of its circulating notes, and that thereupon, on or about *April 28*, 18*73*, the comptroller of the currency duly appointed *Charles E. Strong*, receiver of the said banking association, and that the said *Charles E. Strong* thereupon duly accepted such appointment, and qualified as such receiver, and entered upon and has since been engaged in the discharge of the duties of such receivership, and that since said appointment of such receiver said banking association has not transacted any business or exercised any corporate powers.

That the capital stock of said bank was $*300,000* divided into *4,000* shares of the par value of $*75* each. That the plaintiffs at the time of the said insolvency and suspension of said bank were, and still are the owners and holders of certain shares of its capital stock in the amounts set after their respective names, as follows: (*Names and number of shares.*)

That at the time of the said suspension of payment by the said bank, the said bank was and has since been insolvent, and that its liabilities so far exceeded its assets as to entirely absorb its capital stock, and that the property and assets of said banking association were entirely insufficient to pay and satisfy its debts and liabilities over and above its liabilities to shareholders upon account of capital stock, and that the comptroller of the currency having so ascertained and determined and having decided that it was necessary, in order to pay the same, to enforce the individual liabilities of the shareholders of said banking association, as provided by the said acts of Congress and particularly by the *12th* section of said act of June 3, 18*64*, duly ordered and made an assessment upon all the shareholders of said bank, including the plaintiffs, to the full extent of the whole amount of their stock therein, at the par value thereof, in addition to the amounts invested in such shares.

That by reason of the liabilities of said bank, and the said assessment made necessary thereby as aforesaid, the shareholders of said bank, including the plaintiffs, have been obliged to pay, and have actually paid to the said receiver the full amount of said assessments.

That the defendant, *T*———, from about the year 18*66* until the said suspension of payments by said bank on *April 26*, 18*73*, was the cashier of said bank, and that the insolvency of said bank was caused by the defalcations and willful misconduct of said defendant *T*——— while acting as such cashier from about the year 18*69* to the suspension of said bank. That at times during that period said defendant *T*——— was engaged in speculative purchases and sales of stock upon margins to very large amounts. That in the course of such speculations said defendant *T*———, from time to time, in viola-

tion of his duty as such cashier, wrongfully appropriated to his own use and paid over to brokers for margins, or otherwise employed in such speculations, large amounts of the funds, assets, and securities belonging to said bank or held in the custody and control of said bank, to an amount in the aggregate exceeding $*425,000*, and that all of the substantial losses of said bank were due to the said misconduct of said cashier.

That at the time of the said suspension of said bank in 1873, *R. S. B*———, since deceased, (*Here followed other names*), were directors of said bank and constituted the board of directors thereof, each of said directors having been theretofore duly elected a director, and having accepted said office and trust, and having acted therein. That, as plaintiffs are informed and believe, the said *J. E. S*——— died insolvent, and that said *D. M. W*———, was in his lifetime a citizen of *New Jersey*, and that his personal representative, who is now administering his estate, is a citizen of *New Jersey*, and is beyond the jurisdiction of this court. That the defendant *A*———, was also a director of said banking association during a certain period, and until about a year before the said suspension of said bank, and that the following is a statement of the respective periods of service of said *R. S. B*———, and the defendants hereinafter named as directors of said bank, those holding office more than *one* year having been annually reelected during their period of service:

R. S. B———. from *June 27*, 1865, till suspension of bank (*and so on, alleging names and periods of service of directors*).

That on or about *March 30*, 1879, said *R. S. B*——— died, leaving a last will and testament; that on or about *April 7*, 1879, the said will was duly admitted to probate, and letters testamentary thereon duly issued to the defendants *L. C. B*———, *A. S*———, *W. R. B*———, and *A. S. W*———, as executors thereof, by the surrogate of *Orleans* county, to whom jurisdiction in that behalf belonged, and that said defendants thereupon accepted such appointment, and have since acted as such executors. That the said defalcations and the misappropriation of the funds of said bank by its said cashier were caused by, and were directly attributable to, and were the consequence and result of the negligence and misconduct of said directors, including the defendants, in the discharge of the duties of their said office, as hereinafter particularly stated. That about the month of *November*, 1869, the defendant, *T*———, then being cashier as aforesaid, became largely engaged in stock speculations, and wrongfully employed and lost in such speculations funds of said bank to a large amount; that said board of directors thereupon became fully informed that said cashier had been so engaged and had so employed the funds of said bank; that at a special meeting of said board of directors held on or about *November 17*, 1869, at which the said *B*———, *S*——— and *W*——— and the defendants *R*——— and *A*——— were present, after a full explanation of said employment by said cashier of the funds of said bank in said speculations, a settlement was agreed upon, whereby the father of said cashier was to give his note for the payment of $*5,000*, and the said cashier his individual note on demand with interest, for $*15,000*, the balance of the sum for which said cashier was indebted to said bank; that there, upon pursuant to the terms of settlement said notes were given, and it was resolved that $*15,000* of the loans then standing on the books of said bank in the name of *T*———, being the amount remaining unsecured as aforesaid, should be charged to profit and loss, and that fictitious entries should be made upon the books of said bank to the amount of $*15,000*. as an offset to such charge; that such fictitious entries were thereupon made upon the books of said bank, and that said directors at said meeting intentionally omitted to have any record of said meeting made upon the book of minutes of the meetings of the board of directors of said bank; and plaintiffs allege, upon information and belief, that the defendants, other than those present at said meeting, thereafter and long before the failure of said bank hereinafter mentioned, learned and had full knowledge of all the material facts connected with the employment of said money by said *T*———, in stock speculations, and the settlement thereafter had with said *T*———, in connection therewith; that said board of directors thereupon concealed the fact that said cashier had been engaged in said speculations, and that the bank had suffered such losses,

and continued said *T*——— in office as such cashier, knowing him to be untrustworthy, and without taking any precautions to prevent said cashier from again engaging in stock speculations, and again willfully employing the funds of said bank therefor.

That during almost all the period from said transaction in *November*, 1869, until the suspension of the bank in *April*, 1873, the defendant *T*——— was engaged in stock speculations at times to very large amounts; that during said period the directors of said bank failed and neglected to exercise any proper or efficient control or supervision over the said cashier, although knowing that he had speculated in stocks and was a person without means; that the substantial direction and management of said bank was left to said cashier; that there was no finance or executive committees of the board of directors; that meetings of board of directors at which a quorum were present were infrequent; that no effective system of examination was provided calculated to detect defalcation or misconduct by the officers of the bank; that a majority of said board opposed all attempts to establish any effective system of examination; that on or about *January 25*, 1872, at a regular meeting of the board of directors of said bank, at which *four* of said directors, said *S*——— and *B*———, and the defendants *R*——— and *S*——— were present, being less than a quorum of said board, various resolutions were proposed and adopted, including a resolution that any *three* directors of said bank might at any time examine any and all the securities and assets of said bank.

That thereafter, on or about *February 12*, 1872, at a regular meeting of said board of directors, at which were present said *S*———, and the defendants *R*———, *S*———, *S*———, and *R*———, being a quorum of said board, it was among other things moved that the minutes of the meeting on *January 25*, 1872, being a meeting at which a quorum were not present as aforesaid, be approved; that said motion was not carried; that thereupon said resolution that any *three* directors of said bank might at any time examine any and all the securities and assets of said bank, previously adopted at said meeting of *January 25*, 1872, as aforesaid, was again proposed, and was not adopted, and that thereupon and in lieu of said resolution, a resolution was adopted to the effect that whenever thereafter any *three* directors should request the president in writing to call a meeting of the board for the purpose of examining the affairs of said bank, it should be the duty of the president to call such meeting within *three* days after receiving such request in writing, to the end that such examination might be had by the authority of the board; that the proceedings at said meetings were duly entered upon the minutes of said board, and that all the directors knew of said proceedings, or might have known of the same, and were chargeable with knowledge thereof.

That the accounts of said defendant *T*——— on the books of said bank, either as cashier or as an individual depositor, if inspected, would have led persons of ordinary prudence to suspect that he was engaged in stock speculations to an immense extent, and plaintiffs allege that the directors know or had reason to suspect that the defendant *T*——— was speculating in stocks and employing the funds of the said bank therefor, or negligently violated their duty as directors to the shareholders of the bank, including the plaintiffs, by willfully retaining the defendant *T*——— in his position as cashier, knowing him to be an untrustworthy officer, and by omitting to exercise any proper or customary supervision or restraint over said cashier as aforesaid. That, by reason of the premises, the said directors were guilty of negligence and misconduct in their office as directors of said bank, whereby the plaintiffs have suffered damage to a large amount.

That after the appointment of said *Charles E. Strong* as such receiver, and before this action, application was duly made in behalf of plaintiffs to said receiver and to the comptroller of the currency, to have said receiver begin this action in behalf of the shareholders of said bank, but that said comptroller refused to authorize said receiver to bring such suit.

That the shareholders of said bank are very numerous, to wit: more than *one hundred* in number, and that some of them are unknown to plaintiffs, and cannot be ascertained by them; that it is impracticable to bring them all before the court, and that plaintiffs sue for the benefit of all of shareholders who may choose to join in this suit.

b. For Statements Made with Intent to Depreciate Stock.[1]

Form No. 7463.[2]

(*Venue and title of court and cause as in Form No. 5907*)[3] that whereas, on the *first* day of *January*, 1896, the *Daniel Webster Banking Company* was a corporation organized under the laws of *Alabama*, and the said plaintiff was the owner of a large amount of the capital stock of said *Daniel Webster Banking Company*, to wit, *thirteen hundred* shares, of the par value of *fifty* dollars each; that on the said *first* day of *January*, 1896, and for a long time prior thereto, the said *Richard Roe* was president of said company, and as such was the chairman of the *committee on loans* in said bank, and head of the financial affairs of said banking company.

That on or about the *twenty-sixth* day of *December*, 1895, the said *Richard Roe* stated to one *Abraham Kent* that the affairs of said bank were not in a good financial condition; that it had made several loans on insufficient security, and that one *John Smith*, to whom the said bank had loaned a large sum of money, to wit, *thirty thousand* dollars, was likely to be forced to make an assignment.

That the affairs of said bank were not, on said *twenty-sixth* day of *December*, 1895; in a bad condition financially, nor was said *John Smith* at said time in an embarrassed financial condition, all of which was well known to said *Richard Roe* on said *twenty-sixth* day of *December*, 1895. And said statements were made by said *Richard Roe* to said *Abraham Kent* with the intent of depreciating the market value of the stock of said bank, and with the further intent of enabling the said *Richard Roe* to buy said stock at less than its real value. Induced solely by said statements to said *Abraham Kent* made by *Richard Roe* as aforesaid, this plaintiff sold his said *thirteen hundred* shares of capital stock of the *Daniel Webster Banking Company*, on or about *January first*, 1896, for *forty-five thousand* dollars, and said stock was purchased by one *John Jones* for and in behalf of the said *Richard Roe*.

Wherefore plaintiffs pray that this court decree that the defendants who were directors as aforesaid are individually, and that the defendants who are executors of the will of *B. S. B*——— are as such executors, responsible to the plaintiffs for all losses resulting to the plaintiffs as such shareholders from the directors' negligence and misconduct in office as aforesaid; and that an account be taken of the damages suffered by respective plaintiffs and by any other shareholders of said banking association, who may in due time join in this suit, by reason of said negligence and misconduct in office, and that the several plaintiffs have judgment against the defendants who were directors as aforesaid, and against the said executors as such, for the respective amounts in which, upon said accounting, they shall appear to have respectively suffered damage in the respects aforesaid; and that such other relief in the premises, as may just be, granted, with the costs and disbursements of this action." Demurrer to this complaint was overruled and a judgment given the plaintiffs.

1. See also Forms Nos. 6906, 6907.

2. *Alabama.*—Acts (1893), p. 25, §§ 3, 4.

3. **For the formal parts** of bills in equity, complaints and declarations generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244. The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

That the real value of said stock was on the *first* day of *January*, 1*896*, *sixty-five thousand* dollars, and therefore plaintiff sues and claims as damages *twenty thousand* dollars.

Jeremiah Mason, Attorney for the Plaintiff.

[(*Concluding as in Form No. 5907.*)]

c. In Failing to Hold Meetings and Obtain Good Bonds.

Form No. 7464.

(Precedent in Buist *v.* Melchers, 44 S. Car. 47.)[1]

[(*Venue and title of court and cause, and commencement as in Form No. 5932.*)][2]

1. That heretofore, to wit: on or about the *9th* day of *September*, A. D. 1*892*, in a certain cause depending in this honorable court, to wit: in the Court *of Common Pleas* for the County of *Charleston*, in said State, entitled *E. M. Moreland* vs. *Assistance Building and Loan Association*, the plaintiff herein, *G. L. Buist*, was duly appointed receiver for said association, and by said court authorized and empowered to take charge of all and singular the assets of said corporation, and to bring, and continue, if already brought, all actions of any kind and description, and to prosecute the same in such manner as he may be advised by his counsel; and shall, whenever in the judgment of his counsel, or either of them, it be deemed expedient and proper, bring such action or actions against either the president and directors, or any one or more of them, for any alleged charges of negligence or otherwise, for and on behalf of said association, if he be requested so to do. Said *G. L. Buist* duly entered upon the discharge of his duties as such receiver, having qualified as required by said order, and ever since has been, and is now, the duly appointed receiver of said association, and has brought this action in conformity with the provisions of said order, and as requested so to do.

2. That under and by virtue of an act of the legislature of the State of South Carolina, entitled "An act to incorporate the Assistance Building and Loan Association of Charleston," approved on 21st day of December, A. D. 1882, the *Assistance Building and Loan Association* was created a body politic and corporate, for the purpose of making loans of money, secured by mortgage on real estate or personal property or by conveyance of the same to their members and stockholders, the capital stock of said association to consist of *two thousand five hundred* shares, but as soon as *one thousand* shares were subscribed, said association to organize and commence operations; said shares to be paid by successive monthly instalments of *one* dollar on each share.

3. By said charter it was further enacted that said corporation shall have power and authority to make any such rules and by-laws

1. Demurrer to this complaint was overruled.

2. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244. The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

for its government, as are not repugnant to the Constitution and laws of the land; shall have members and succession of members and officers as shall be ordained and chosen according to their said rules and by-laws made or to be made by them; shall have and keep a common seal, and may alter the same at will; may sue and be sued, plead and be impleaded, in any court of law or equity in this State, and shall have and enjoy all and every right and privilege incident and belonging to corporate bodies according to the laws of the land.

4. By said charter it was further enacted that the funds of said corporation shall be loaned to the members and stockholders upon the security of real and personal estate, and used in the purchase of real and personal estate for the benefit of its members and stockholders, on such terms and under such conditions and subject to such regulations as may, from time to time, be prescribed by the rules and by-laws of said corporation.

5. By said charter it was further enacted that whenever the funds of said corporation shall have accumulated to such an amount that, upon a fair and just valuation thereof, each stockholder and member shall have received, or be entitled to receive, the sum of *$200*, or property to that value, for each and every share of stock by him or her so held, and when such distribution and division of the funds shall have been so made, then this corporation shall cease and determine. All of which provisions of said charter will more fully appear by reference thereto in the *18th vol. Stat. So. Ca.*, page *5*.

6. Pursuant to the provisions of the said charter, the *Assistance Building and Loan Asssociation* was duly organized and commenced operations on or about the *7th* day of *August*, 1*883*, and made rules and by-laws for its government; a copy of said rules and by-laws are hereto annexed and made a part hereof, and marked "*Exhibit A.*"

7. That during the times hereinafter mentioned, the defendants, *Alexander Melchers* (president), *Daniel Ravenel*, *Patrick Darcy*, *Jacob Kruse*, *J. Orrin Lea*, *Lee Loeb*, *A. F. C. Cramer*, *W. H. Welch*, *Robert Martin*, *F. W. Cappelmann*, *J. Alwyn Ball*, and *B. Feldmann*, were duly elected and qualified directors of said *Assistance Building and Loan Association*; that is to say, the said *Daniel Ravenel*, from the organization of said association to *November*, A. D. 1*890*; the said *J. Orrin Lea*, from the organization of said association to the ——— day of *September*, 1*890*; the said *Lee Loeb*, from the ——— day of *September*, 1*890*, to the present time; the said *J. Alwyn Ball*, from the organization of said association to the ——— day of *September*, 1*885*; the said *Robert Martin*, from the ——— day of *July*, 1*891*, to the present time; the said *F. W. Cappelmann*, from the ——— day of *January*, 1*891*, to the present time; the said *B. Feldmann*, from the ——— day of *September*, 1*889*, to the present time; the said *Alexander Melchers*, from the organization of said association to the present time; the said *Patrick Darcy*, from the organization of said association to the present time; the said *Jacob Kruse*, from the organization of said association to the present time; the said *A. F. C. Cramer*, from the organization of said association to the present time; the said *W. H. Welch*, from the organization of said association to the

present time. Said defendant directors, during their said respective terms of office, were charged with all the duties and subject to all the responsibilities attached to said office of directors in said association, under the charter and by-laws of said association and laws of the land.

8. The said defendants and each and every of them so carelessly, negligently, wrongfully, and unlawfully, from time to time, performed and omitted to perform the various duties pertaining to their said offices, as directors in said association, as to cause a loss to said association of the sum of *$58,000.*

9. That among the other acts of negligence of defendants which caused the said loss, plaintiff alleges that said defendants, and each and every of them, while in office as directors, failed and neglected to meet statedly on the *7th* of each and every month, for the purpose of disposing of the funds and attending to the financial affairs of the corporation, as required by the by-laws of said association. Said defendants directors, while in office as aforesaid, also failed and neglected to hold on the *fourth* days after the monthly meetings, the special and other meetings, for the consideration of the securities offered for the loans of the funds of said association, as required by the by-laws of said association. Said defendants directors also failed and neglected, from time to time while in office as aforesaid, to inspect the books and accounts of the said association, and to audit the same, as required by law and by the by-laws of said association. Said defendants directors, while in office as aforesaid, failed and neglected to have the annual statements properly audited by *three* members of the corporation, as required by the by-laws of said association. Said defendants directors, while in office as aforesaid, failed and neglected to have orders on the treasurer of said association sanctioned by a majority of the board of directors, as required by the by-laws of said association. Said defendants directors, while in office as aforesaid, failed and neglected to appoint a suitable and proper person as treasurer of said association, and failed and neglected to require said treasurer to give a proper and sufficient bond to said association, as required by the by-laws of said association. Said defendants directors, while in office as aforesaid, allowed the funds of said association from time to time to accumulate in the hands of the treasurer of said association, instead of lending or distributing the same among the stockholders, as required by the charter and by-laws of said association. Said defendants directors, while in office as aforesaid, made, reported, and published annual statements for the stockholders of said association, purporting to show the condition of the affairs of said association, which statements were incorrect, misleading, and misrepresented the actual condition of said association. Said defendants directors, while in office as aforesaid, accepted, without verification by vouchers, incorrect and false statements from the treasurer of said association. Said defendants directors from time to time certified and represented that large sums of money, aggregating in the total the sum of *$67,272*, had been expended by them in the purchase and retirement of stock of said association, when in fact no such sum or sums was or could have been so expended;

failed and neglected to verify alleged purchases of stock reported by the treasurer, by calling for the production of the certificates of stock so alleged to have been purchased, and ascertaining that the same was purchased and properly canceled; allowed members of said association to be in arrears many months for their monthly dues, without enforcing the fines, forfeitures, sales, and penalties, required by the by-laws of the association; did not verify the cash balance reported to the credit of said association by its treasurer; allowed securities of said association to be surrendered without receiving adequate compensation therefor. By reason of the said several acts of negligence on the part of each and every of the said directors defendants herein, the said association has sustained a loss of *$58,000*, for which said defendants are jointly and severally liable.

10. In said action so brought by *E. M. Moreland* against the *Assistance Building and Loan Association*, it was alleged in the complaint and admitted in the answer of said association, filed by its attorneys, *Messrs. Mordecai & Gadsden* (which answer was sworn to by the defendant herein, *Alexander Melchers*, as president of said association), that on information and belief about *$50,000*, funds of said association, had been misappropriated by its treasurer, *R. F. Burnham*, and used for other purposes than those of the association; that it would be necessary to continue the operations of said association for about *forty-five* months, from the *1st* day of *August*, 1*892*, to replace said loss; that said association owned no assets, except a small amount of cash and the official bond of said treasurer, in the penal sum of *$5,000*, which bond was alleged to be in litigation and contested, and the bonds and mortgages or other collaterals of borrowing members of said association, which said bonds, mortgages, and collaterals were so alleged and admitted as assets, notwithstanding the allegation and admission in said complaint and answer that said association should have wound up and dissolved on the *1st* day of *August*, 1*892*, and notwithstanding the fact that the said funds so alleged to be misappropriated, were lost to said association through the negligence of defendants herein, the president and directors thereof, the restoration of which sum by said defendants, president and directors, would have enabled said association to wind up its affairs prior to said *1st* day of *August*, 1*892*, without the further collection of any monthly dues from the stockholders of said association, and without the foreclosure of mortgages or sales of collaterals belonging to any of said stockholders.

11. That although the said defalcation of the treasurer of said association was ascertained by, and the alleged insolvency of said association was known to, the board of directors of said association, on *25th* day of *March*, 1*892*, yet the defendants directors failed to notify the stockholders of the fact, until the *30th* day of *June*, A. D. 1*892*, when the defendant, *Alexander Melchers*, as president of said *Assistance Building and Loan Association*, called a conference of the stockholders of said association at *Harmony Circle Hall*, in the city of *Charleston*, at which conference plaintiff alleges on information and belief, the defendants, *Alexander Melchers*, *A. F. C. Cramer*, *Lee Loeb*, *P. Darcy*, *F. W. Cappelmann*, and *B. Feldmann*, were present;

at said conference the announcement was made for the first time to the stockholders of said association, that said association was hopelessly insolvent, and had, at the instance of the defendants directors, been placed in the hands of receivers, one of whom was the defendant director, *Lee Loeb*, and that the directors of said association made no resistance to an order of injunction restraining the association and its stockholders from enforcing the provisions of its charter and by-laws. At said conference, questions were put to the defendants directors who were present by stockholders in relation to the affairs of the association, the answers to which questions revealed the fact that said defendants were totally ignorant of the condition of said association; they not even being able to give the income of said association approximately for any given month or year. The defendant, *Lee Loeb*, then and there stated, that on the *1,250* shares which had composed the association up to *August 1st*, 1*891*, there had been bought by the association *519* shares; that since *August*, 1*891*, and up to *April*, 1*892*, some shareholders representing *109* shares, had bought themselves out of the association at *108* months, received satisfaction of their bonds and mortgages, and had their shares canceled; that there were outstanding *293* shares unborrowed on, and *330* shares borrowed on. Subsequently, on the *9th* day of *July*, 1*892*, *J. H. Loeb*, acting secretary of the association, and subsequently clerk for said receivers of said association, who preceded plaintiff herein, furnished the information that there were *623* shares outstanding, *330* borrowed on, *293* unborrowed on, and also furnished a statement of the names of the stockholders, and the number of shares held by each, a true memorandum of which statement is hereto annexed as a part hereof, marked exhibit "*B*." Said statement was made, or claimed to have been made, from an examination of the books of said association, made for plaintiff's predecessors in office and for the use and benefit of said association, and said services and examination were paid for out of the funds of said association. Said statement so furnished is at variance and irreconcilable with, and contradictory to, the annual statements published by the defendants directors, as will appear by said annual statements, copies of which are hereto annexed and made a part hereof, reference to which is prayed, and marked exhibits *C*, *D*, *E*, *F*, *G*, *H*, *I*, *K*.

12. Plaintiff alleges, that on or about the ——— day of *December*, 1*887*, the *Guaranty* or *Surety Company*, which had up to that date been upon the official bond of *R. F. Burnham*, treasurer of said association, withdrew therefrom. That an examination of the books, accounts, and vouchers was then made by the defendants directors, who reported the same in good order and correct, and thereupon *B. A. Muckenfuss* qualified as surety upon the said treasurer's bond in lieu and stead of said surety company; that said official bond is only in the penal sum of *five thousand* dollars, a sum totally inadequate to meet the losses sustained through the negligence of the defendants, as hereinbefore alleged. Plaintiff herein has instituted a suit upon said bond against the principal and surety thereon, the said *R. F. Burnham*, and the said *B. A. Muckenfuss*, but the said *R. F. Burnham* is solvent, and all liability thereon is contested by the defendants in

said suit. Even if said sum of *$5,000* be recovered in said suit, it will not replace the loss caused to said association through the negligence of defendants by the sum of *$53,000*. Plaintiff further alleges, that suits have been instituted by him upon bonds and for the foreclosure of mortgages against the borrowing members of said association, but the order appointing this plaintiff receiver expressly provides that no decree in such suits shall be carried into effect until there shall be a decision of the Supreme Court in a test case, brought to determine whether there be any further liability whatever to plaintiff on the part of the said borrowing members. And plaintiff alleges, that the liability of defendants herein is to plaintiff acting for all the members of said association, borrowers as well as non-borrowers, and is a primary liability to that of the borrowing members (if any such liability there be), and if the liability of defendants herein be speedily enforced, it will put an end to said suits against the borrowers, and avoid the necessity of all questions as to the respective liabilities of the members of said association, the one to the other.

13. Plaintiff alleges that the said association is insolvent, the only assets now in existence, and the property of said association, being the sum of *$826.96*, in cash in the hands of this plaintiff, and the said official bond of the treasurer, now in suit and contested as hereinbefore alleged; and that there are outstanding and unsatisfied about *293* shares of stock unborrowed on, upon which there is now due by said association to the holders thereof the sum of *$43,950*, with interest thereon from the *7th* day of *March*, *1892*, upon which date said association should have wound up and dissolved.

14. Plaintiff alleges that said several acts of negligence of said defendants herein were committed and omitted, notwithstanding that said defendants were more than once notified and matters were brought to their attention, and dissatisfaction expressed to them on the part of certain stockholders as to the condition of the affairs of said association, all of which should and ought to have produced such action upon their part as would have averted a large part of the loss so sustained through their negligence.

Wherefore, plaintiff prays judgment against said defendants in the sum of *fifty-eight thousand* dollars, with interest and costs. [(*Concluding as in Form No. 5932.*)][1]

d. In Failing to Collect Capital Stock.[2]

Form No. 7465.[3]

1. See note 2, *supra*, p. 772.

2. *Indiana.* — Horner's Stat. (1896), §§ 3859, 3865 *et seq.*

3. **Based on the facts** in the above complaint are substantially those set out in Clow *v.* Brown, 134 Ind. 287. In that case it was held that it is not necessary to allege the number of the directors or that the defendants constitute a majority.

Whether plaintiff sue all or a majority of the directors is immaterial, for whatever duty is enjoined, the violation of which will leave the company insolvent, is by the statute mandatory, and a refusal on behalf of any number of the directors is an assent to the violation of the statute. Clow *v.* Brown, 134 Ind. 287.

Averment of Corporate Existence. — In

(*Venue and title of court and cause as in Form No. 5915.*)[1] *The Crawfordsville Water Works Company* is a corporation organized under the laws of the state of *Indiana* in the year 1*885* for the purpose of constructing, owning and operating a system of water works at said city of *Crawfordsville*, *Montgomery* county, *Indiana*. That the said corporation was organized with a capital stock of *one hundred thousand* dollars, which was thereafter increased to, and now is, *two hundred thousand* dollars. That at the time of the organization of said corporation in the year 1*885* the defendants herein were by the stockholders of said company duly elected as the directors of said company, and thereupon the said defendants entered at once upon the duties of said offices, and proceeded to transact the business of the said company and to construct a system of water works at said city of *Crawfordsville*.

That by and with the knowledge and consent of the defendants the said company purchased material and goods of the plaintiff and thereby became indebted to the plaintiff in a large sum of money, which said indebtedness was reduced to judgment by this plaintiff, a judgment by the consideration of the *Montgomery Circuit* Court at its *January* term, 1*888*, being rendered in favor of the plaintiff herein, the then plaintiff, and against the said *Crawfordsville Water Works Company*, the then defendant, in the sum of *four thousand no hundred and nineteen* dollars. No part of said judgment has been paid and the same is in full force and virtue in law. On the *tenth* day of *February*, 1*888*, an execution on said judgment was issued. A return was made of said execution on the *eighteenth* day of *February*, 1*888*, that the same was unsatisfied.

Further complaining, plaintiff says that said corporation did not within *eighteen* months after its organization proceed to collect, and has never collected from the stockholders of said company any part of its capital stock. That the defendants were directors of said company at the time the indebtedness to this plaintiff was contracted by said company, and agreed to the contracting of said debt, as aforesaid, and said defendants have been directors of said company from the time of its organization to the time of the filing of this complaint, yet said defendants, directors as aforesaid, have failed, refused and neglected to collect any part of said company's capital stock and to put the same into the treasury of said company. That by reason of the neglect and failure on the part of the defendants aforesaid the said company has become insolvent, and plaintiff's judgment cannot be collected from said company. Wherefore (*concluding as in Form No. 5915*).[1]

Clow *v.* Brown, 134 Ind. 287, in an action against the directors of a water company to enforce a forfeiture for failure to collect the capital stock in the time allotted by law, the complaint sufficiently alleged that the company was organized under the "manufacturing and mining associations act," which alleges that the company was organized for the purpose of constructing, running and operating a water-works system, as that is the only act under which a company could have been organized for such purpose.

1. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

e. In Permitting Loans in Excess of Statutory Limit.

Form No. 7466.[1]

(Precedent in Buell *v.* Warner, 33 Vt. 570.)[2]

[(*Venue and title of court and cause as in Form No. 6950*)][3] in a plea of the case for that whereas heretofore, to wit: on the *4th* day of *November*, A. D. 18*34*, and before the committing of the grievances by the defendants, hereinafter complained of, the General Assembly of the State of *Vermont*, by "an act entitled an act to incorporate the President, Directors, and Company of the Farmers' and Mechanics' Bank," passed November 4, 1834, constituted the subscribers to the capital stock of the bank by said act established, their successors and assigns, a corporation and body politic, by the name of the *Farmers' and Mechanics' Bank*, to continue and have succession until the *1st* day of *January*, A. D. 18*50*, and to have and to enjoy all the privileges incident to corporations; by which said act it was provided, among other things, that said bank should be established in *Burlington*, in the county of *Chittenden*, and that the capital stock of said bank should be *one hundred and fifty thousand* dollars and should be divided into *three thousand* shares of *fifty* dollars each. Under which said act, certain persons subscribed and paid for, as required by the terms of said act, *three thousand* shares of the capital stock of the said bank, for *fifty* dollars each, and so became and were stockholders thereof, and members of said corporation; and said bank became and was duly organized under said act and commenced and was in operation agreeably to the provisions of said act, within one year from the passage thereof, at said *Burlington*, and did and continued to do business thereafter, as a monied corporation and bank, established at *Burlington*, under and by virtue of the provisions of said act, and of said organization, until afterwards, to wit, on the *2d* day of *November*, A. D. 18*64*, when, by another act of said General Assembly, entitled "An Act extending the charter of the Farmers and Mechanics' Bank," approved November 2d, 1846, the said act first above named was extended and continued in force until the *1st* day of *January*, 18*65*; by which last named act it was provided and enacted, among other things, that the said corporation, from and after the *31st* day of *December*, A. D. 18*49*, should be subject to all the stipulations and restrictions contained in or reposed by the general laws of the state, relating to banks and monied corporations, which then had been or thereafter might be enacted by the general assembly so long as the same should continue in force; which said last named

1. *Vermont.* — Stat. (1894), §§ 4035, 4103.

Analogous statutes exist in the following states:

Kentucky. — Barb. & C. Stat. (1894), §§ 583, 598.

Mississippi.—Anno. Code (1892), § 851.

New York. — Banks & B. Rev. Stat. (1889), p. 1554, par. 9, p. 1555, § 188.

Ohio. — Bates' Anno. Stat. (1897), § 3821-80, § 3821-84.

2. **Demurrer on the ground of duplicity** to this declaration was overruled.

3. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The words to be supplied in [ ] will not be found in the reported case, but should be added to make the form complete.

act afterwards and before the committing of the grievances by the defendants, hereinafter named, and while said act first above named was in full force, was duly accepted by said bank, to wit: on the *1st* day of *January*, A. D. 1847, at said *Burlington*, and said bank has continued its organization as such, and to do business as a monied corporation and bank at said *Burlington*, under and by virtue of said several acts, and said organization thereunder, and under the general laws of this state, relative to banks and monied corporations from thence continuing hitherto, having a capital stock actually paid in of *one hundred and fifty thousand* dollars, and at all times since said *31st* day of *December*, 1849, being subject to all the stipulations and restrictions contained in or imposed by the general laws of this state relating to banks and monied corporations, and in force in the same period. In which said bank so established, organized and doing business under said several acts and general laws as aforesaid, to wit: at *Burlington*, the plaintiff on the *15th* day of *January*, 1854, and at the time of the committing of the grievances by the defendants hereinafter mentioned, was, and from thence continuously hitherto has been and is a stockholder and member of said corporation, and as such the lawful owner of *eighty-four* (*84*) shares of the capital stock of said bank at the par value of *fifty* dollars per share, and then of great value, and, but for the wrongful acts of the defendants hereinafter set forth, would be still of great value, to wit: of the value of *five thousand* dollars, of which said bank, also the defendants, from and after the *2d Tuesday* in *January*, 1854, and throughout said year 1854, continuously and at the time of the committing of the grievances by the defendants as hereinafter complained of were and from thence hitherto have been with certain others their associates, to the number of *seven* in all, directors duly elected and appointed, and the defendants had accepted such trust as directors, and acted and were acting therein as such directors during all the time aforesaid, and so were bound by law to the faithful discharge of their duties as such directors according to the laws of this state.

And the plaintiff further says that the defendants, during the time they were so directors, and the plaintiff was so a stockholder in said bank, established and doing business as aforesaid, were unfaithful in the discharge of their said duties as said directors: for that the defendants wrongfully, and unjustly contriving and intending to injure the plaintiff in this behalf heretofore, to wit: on the *15th* day of *January*, A. D. 1854, and at sundry other days and times between that day and the *10th* day of *October*, 1854, at said *Burlington*, being such directors, and as such directors, and said defendants then and there during all that time, constituting a majority of the directors of said bank, and the plaintiff then and there during all that time, being such stockholder in said bank as aforesaid, did in connection, concert and concurrence with certain others, then directors of said bank, forming a majority in numbers of the directors thereof, knowingly and wrongfully, suffer, permit, consent to, and direct said bank to loan, advance, and pay out its money from time to time upon the name, promise and obligation of one, *William H. Wilkins*, for the repayment thereof, from time to time, taken by said bank, and that

said *Wilkins* should thereby become indebted therefor to said bank, at one time to the amount and extent of a large sum, to wit: *twenty-five thousand* dollars in the whole beyond the sum of *fifteen thousand* dollars (being *ten* per cent. of said capital stock of said bank actually paid in), for which said sum of *fifteen thousand* dollars, the said *Wilkins* then and there, at such times respectively stood and was indebted to said bank, upon and by reason of divers promissory notes, drafts, checks, and accounts unpaid then held and owned by said bank against said *Wilkins*, and which said *Wilkins* then was bound to pay to said bank, and said bank did then and there, to wit, on the said *15th* day of *January*, 1854, and on sundry other days and times between that day and the said *10th* day of *October*, 1854, through and by reason of such wrongful sufferance, permission, consent, and direction of said defendants, as such directors, from time to time, advance and pay out its moneys, upon such name, promise and obligation of said *Wilkins*, from time to time taken by said bank, for the re-payment thereof of such further large sums, to wit: *twenty-five thousand* dollars, for which the said *Wilkins* then and thereby became further indebted to said bank, in that sum, at one time, beyond said sum of *fifteen thousand* dollars, and in excess of the amount of *ten* per cent. of the capital stock of said bank actually paid in.

And so the plaintiff says that through and by means of such wrongful suffering, permission, consent and direction of said defendants as such directors, the said *Wilkins* did become and was indebted to said bank at one time, to an amount greater than *ten* per cent. of the capital stock of said bank actually paid in, and which said indebtedness was not for deposits made by said bank for the purpose of redeeming their bills, nor in the banks in commercial cities, nor did it arise on the purchase of any bill or bills of exchange: all of which the premises was well known to the defendants as such directors, when they suffered, permitted, consented to, and directed said bank so to loan, advance, and pay out its said moneys and when the same were so loaned, advanced and paid out as aforesaid.

And the plaintiff further says, that said *Wilkins* then was, and has ever since remained insolvent, and unable to pay said indebtedness, and the same has remained hitherto, and is now, unpaid and uncollectible.

And so said sum has by said wrongful acts and neglect of the defendants, become wholly lost to said bank, and so the plaintiff's said stock in said bank has been greatly reduced in value and the plaintiff has thereby suffered great loss, by and through such unfaithfulness and violation of law by said defendants as such directors, to wit, at *Burlington*, aforesaid. [(*Concluding as in Form No. 5960.*)][1]

1. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The words to be supplied in [ ] will not be found in the reported case, but should be added to make the form complete.

5. To Compel Directors to Convey Land to Corporation.[1]

Form No. 7467.

(Precedent in Sandy River R. Co. *v.* Stubbs, 77 Me. 595.)[2]

[(*Venue and title of court and cause as in Form No. 4271.*)][3]

1st. That said company was duly organized on the *eighth* day of *April*, A. D. 1879, for the purpose of building and operating a railroad from *Farmington* to *Phillips*.

2d. That *Abner Toothaker*, *Nathaniel B. Beal*, *William F. Fuller*, *Philip H. Stubbs*, and *Stephen Morrell* were duly elected directors of said company at a legal meeting of the stockholders of said company, holden at *Strong*, on the *eighth* day of *April*, A. D. 1879, were duly qualified, and entered upon the discharge of their duty, and continued to act in said capacity until the next annual meeting of said company, which was held at *Strong*, on the *seventeenth* day of *March*, A. D. 1880.

3d. That the said directors, in the discharge of their duties, were endeavoring to settle the damages of the various owners of land over which said railroad was to be built, and to purchase land at different points on the line of said road on which to build station houses and other buildings necessary for operating said railroad.

4th. That said directors in the discharge of their duties as aforesaid, had obtained a deed of certain land on which to build said road, from one *Elias H. Porter*, of *Strong*, and that said deed was duly delivered to said company, and that the company by virtue thereof became the owner in fee of the land described in said deed.

5th. That subsequently to the delivery of said deed, the company desired to obtain more land of said *Elias H. Porter*, and other land, for the purpose of erecting a station house and other necessary buildings in *Strong* village.

6th. That for the purpose of conferring with said *Elias H. Porter* in relation to the purchase of such other and additional land, the directors of said company, to wit: *Abner Toothaker*, *Nathaniel B. Beal*, *William F. Fuller*, *Philip H. Stubbs*, and *Stephen Morrell*, on the ——— day of *September*, A. D. 1879, assembled at the office of *Philip H. Stubbs*, in said *Strong*, and there met and conferred with said *Elias H. Porter* in relation to the purchase of such land as was required for the use of said company.

1. See also the title SPECIFIC PERFORMANCE.

2. In this case the bill was dismissed, there being a failure of proof.

3. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

The caption, following Stratton *v.* European, etc., R. Co., 76 Me. 269, might be as follows:

"State of *Maine*. To the Honorable Justices of the *Supreme Judicial* Court, sitting as a Court of Equity at, in and for the county of *Franklin*:

The bill of complaint of the *Sandy River Railroad Company*, a corporation doing business at said ——, in said county of *Franklin*, duly organized under the laws of said state, against *Philip H. Stubbs*. And now the said complainant gives the court here to understand and be informed:" But see also Form No. 4271, note 2.

7th. That while the negotiation for the purchase of such land between said directors and the said *Elias H. Porter* was in progress, said *Philip H. Stubbs*, who was then and there one of said directors, asked the said *Elias H. Porter* to retire for a few minutes from the conference, that he might go with him and view the land, which was only a short distance from the place in which the board of directors was assembled; that after a short time said *Stubbs* returned and informed his fellow directors that he had succeeded in purchasing the required land of said *Elias H. Porter*, and they would consequently have no further trouble in relation thereto; and the directors, relying upon this report of director *Stubbs*, and believing the business for which they had assembled to be fully accomplished, thereupon adjourned.

8th. That the directors of said company, relying upon said report of said *Stubbs*, and believing that the required land of said *Porter* had been purchased by said company, by its director and agent, *Philip H. Stubbs*, proceeded to change the location of their road in said *Strong* village, from the land on which it had previously been located, and of which they had a deed, to the land they supposed they had purchased through their director, *P. H. Stubbs*, and also proceeded to erect thereon a railway station and other buildings necessary for the convenient operation of said railroad at *Strong* village.

9th. That in fact said *Philip H. Stubbs* purchased said land for which the directors of said railroad company were negotiating, at the time he requested said *Porter* to withdraw from said conference, and took a deed thereof to himself, and paid to said *Porter* for and in consideration of the deed of said land to himself, the sum of *five hundred* dollars of his own money, and also surrendered to said *Elias H. Porter* the deed which said *Porter* had previously given to said *Sandy River Railroad Company.*

10th. That after the location of said road had been changed from the land of which said railroad company had a deed, to the land which they supposed they had purchased of *Elias H. Porter*, through their director, *Philip H. Stubbs*, and after they had caused a railway station and other buildings necessary for the convenient operation of said railroad at *Strong* village, to be erected thereon, they learned that said *Stubbs* had had said land conveyed to himself, and not to said railroad company — or to himself for their benefit — as they believed, and as they had been led to believe by the words and acts of said *Stubbs.*

11th. That they, thereupon, requested said *Stubbs* to convey to said railroad company the said land, and offered and tendered to him all the money he had paid therefor, together with interest, charges, and expenses, to wit: They tendered to him on the *twenty-eighth* day of *July*, A. D. 1883, the sum of *seven hundred* and *forty-two* dollars, and demanded of him a sufficient deed of the real estate conveyed to him by *Elias H. Porter*, as and under the circumstances aforesaid. But the said *Philip H. Stubbs* utterly refused, and still neglects and refuses, to convey said land to said company.

Whereupon the plaintiffs, believing that the said *Stubbs* has not acted in good faith in this transaction, and that the company is

entitled to the benefit of any purchase made of land of said *Elias H. Porter*, as above set forth, pray this honorable court to make and pass a decree requiring the said *Philip H. Stubbs* to execute a good and sufficient deed of the land conveyed to him by said *Elias H. Porter*, as above set forth, and your orators hereby offer to pay over to said *Stubbs* the said sum of *seven hundred and forty-two* dollars on delivery of said deed. [(*Concluding as in Form No. 4271.*)][1]

6. To Enforce Liability for Debts of Corporation.

a. Contracted Before Organization was Completed.

ULTRA VIRES CONTRACT.

Form No. 7468.[2]

(Precedent in Farmers' Co-operative Trust Co. *v.* Floyd, 47 Ohio St. 526.)[3]

[(*Venue and title of court and cause as in Form No. 5929.*)][1] The said plaintiff complains of the said defendants and says that it is a corporation duly organized under the laws of, and doing business in, the state of *Pennsylvania*; that the said defendants, from the *6th* day of *May*, 1878, until the *11th* day of *April*, 1883, were associated together in the buying and selling of wool, and doing a general merchandising business in wool, under the name and style of "*The Wool Growers' Exchange*;" that the places of business of said association were at *Steubenville*, *Jefferson* county, *Ohio*, and the city of *Philadelphia*, state of *Pennsylvania*; that in the formation of said association the said defendants, *John F. Hartshorn*, *Nathaniel Wells*, *S. N. Orr*, *Benjamin Griffith*, *William M. Lee*, *J. D. Whitham*, *A. C. Ault*, *Davidson S. Gault*, *Virginius P. Duvall* and *John Floyd*, undertook in their names as incorporators to organize a corporation for said association under the laws of the state of *Ohio*, under the name of "*The Wool Growers' Exchange*," and did obtain a pretended certificate of incorporation from the secretary of the state of *Ohio*, for that purpose, but said plaintiff avers that said defendants, or either of them, or any person for them or on their behalf, never had or procured said association to be properly or legally incorporated under the laws of the state of *Ohio*, or of any other state. Said plaintiff avers that said pretended incorporators set forth in their said pretended certificate, filed with the secretary of state, that the capital stock of said organization shall be *fifty thousand* dollars ($50,000), and yet they, said pretended incorporators, gave notice to the pretended stockholders to meet for

1. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

2. *Ohio.* — Bates' Anno. Stat. (1897), § 3244, providing in effect that as soon as ten per cent. of the capital stock has been paid in the subscribers of the articles of incorporation certify that fact to the secretary of state. They are liable to any person affected to the amount of any deficiency in the actual payment of the ten per cent.

3. Demurrers to the petition in the case cited as a precedent were overruled.

the purpose of choosing directors, when less than $*3,000* of the capital stock had been subscribed, and less than $*2,000* of the capital stock paid in, and said pretended stockholders, including said incorporators, did meet on the *19th* day of *June*, 1878, and held an election under said notice and elected said defendants, *William M. Lee*, president; *John Floyd*, vice president; *J. D. Whitham*, treasurer; *Benjamin Griffith*, secretary, and *Davidson S. Gault*, *R. C. Vance*, *S. N. Orr*, *John Medill*, *John Farris* and *John Coad*, directors of said pretended corporation. Plaintiff says that afterwards, to wit, *March sixteenth*, 1881, the said defendant, *A. C. Ault*, was added to said pretended board of directors.

Plaintiff says that at no time has there been more than $*3,000* of the pretended capital stock of $*5,000* of said pretended corporation subscribed, nor more than $*2,000* paid in, and that all of said defendants, incorporators, officers and directors, knew during all the time they conducted the business of said association, that not more than $*3,000* of the capital stock had been subscribed, and not more than $*2,000* paid in. Said plaintiff further says that said incorporators, nor any of them, nor any person for them, gave any notice by publication of the opening of the books of said corporation for subscription to the capital stock; neither were the books ordered opened, nor in fact opened for subscription to the capital stock. Said plaintiff further says that from the time of the organization of said pretended corporation or association, until its close by assignment on the *11th* day of *April*, 1883, said defendants had control of the affairs of said association, and did a large business in the buying and selling of wool, amounting to thousands of dollars annually, borrowed large sums of money, contracting a large indebtedness.

Plaintiff further says that on or about *April 1*, 1881, said defendants removed the business of the said association to *Philadelphia*, state of *Pennsylvania*, contrary to the provisions of the pretended charter of said association.

Plaintiff says that between the *1st* day of *August* and the *1st* day of *December*, A. D. 1882, it sold to said defendants, doing business under the name of "*The Wool Growers' Exchange*," as aforesaid, *31,840* pounds of wool, which was delivered to said defendants at the city of *Philadelphia*, state of *Pennsylvania*, and that on the *8th* day of *January*, 1883, there was a balance due said plaintiff from said defendants, on account of said wool so sold and delivered to them, the sum of $*3,195*.

Plaintiff says that the said pretended charter obtained by said defendants was under the act of the general assembly of the state of *Ohio*, entitled "An act supplementary to an act entitled an act to provide for the creation and regulation of incorporated companies in the state of Ohio, passed May 1, 1852, passed April 13, 1867, as amended April 20th, 1874, as amended April 11, 1876, as amended March 12, 1877, as amended March 28, 1878," and that said pretended charter sets forth the object of said Association as follows: "That we have associated ourselves together for the purpose of forming an organization to establish a wool house and handle wool, merchandise, produce, and furnishing supplies to wool growers and others on

commission and purchase or sale, or in such other manner as will be for the best interest of the stockholders herein, and to do a general commission business in the articles above enumerated, and also for the purpose of dissemination through bureaus or journals useful knowledge and information pertaining to the improvement and protection of wool growing interests."

Plaintiff says that under said pretended charter and said act of the general assembly of the state of *Ohio* under which the said pretended charter was obtained, said defendants had no authority or power as a corporation to buy or sell wool, and that therefore all of said acts of said defendants in a pretended corporate capacity in the buying and selling of wool, and in the buying of said wool from said plaintiff were *ultra vires* and invalid. Plaintiff says that said defendants on the *8th* day of *January*, 1*883*, through said defendant, *J. D. Whitham*, their agent, executed and delivered to plaintiff, as evidence of said indebtedness, a promissory note, of which the following is a true copy: (*setting out copy of note*).[1]

Plaintiff further says that no part of said [note] has been paid.

Plaintiff says that at the time of the sale of said wool, and the acceptance of said promissory note, it had no knowledge of the manner in which said defendants were conducting said business, but relied upon all the members of said Association, jointly and severally, for the payment of their said claim.

Said plaintiff further says, that said *Wool Growers' Exchange*, as a corporation or association, is wholly insolvent, having no property whatever out of which it can make its said claim, and that the debts against said *Wool Growers' Exchange* are more than $*40,000*. Plaintiff says that at the time of the selling of said wool and the issuing of said promissory note as aforesaid, all of said defendants were the active business managers of said association and had full knowledge of the failure of said association as aforesaid to obtain and carry into effect a complete charter, and had also full knowledge that buying or selling of wool was beyond the scope and authority of said pretended corporation as aforesaid.

Plaintiff avers that said defendants, *J. D. Whitham*, *R. C. Vance*, *S. N. Orr* and *A. C. Ault*, did business under their initials and that plaintiff does not know and cannot ascertain their full name.

1. **Promissory note referred to** in the text was as follows:

"*Cochrantown*, *Pa.*, *Jan. 8*, 1*883*.

March 20th after date, for value received, we jointly and severally promise to pay to *The Farmers' Co-operative Trust Company*, or order, *thirty-one hundred and ninety-five* dollars, with interest, and in case of default of payment at maturity, an additional *five* per cent. for the collection of the same. And we jointly and severally empower any attorney of record in this commonwealth, or elsewhere, to appear for us, or either of us, and confess judgment against us, or either of us, for the same and accrued interest, together with said five per cent. attorney's fees, with costs of suit, release of errors, and without stay of execution; and for value received we jointly and severally do waive the right and benefit severally of any law of this or any state exempting property, real or personal, from sale, and if levy is made on land, we do also jointly and severally waive the right of inquisition, and consent to the condemnation thereof, with full liberty to sell the same fi. fa. with release of errors thereon.

J. D. Whitham, Treas.
J. D. Whitham."

Plaintiff therefore says that said defendants are jointly and severally indebted to said plaintiff, in the sum of *$3,195*, with interest from the *8th* day of *January*, A. D. 1*883*.

Wherefore plaintiff prays judgment against said defendants, and each of them, for said sum of *$3,195*, with interest upon the same from the *8th* day of *January*, 1*883*, and costs of suit. [(*Concluding as in Form No. 5929.*)][1]

b. Contracted in Excess of Statutory Limit.[2]

BILL IN BEHALF OF ALL THE CREDITORS.

Form No. 7469.[3]

(*Venue and title of court and address as in Form No. 4270.*)[1] Your orator, *John Doe*, of the city of *Chicago* in the county of *Cook*, in the state of *Illinois*, who brings this suit in behalf of himself and of all other creditors of the *Roe Nail Company*, a stock corporation hereinafter mentioned and described, who may choose to join in and contribute to the expenses of this suit, respectfully represents:

1. For the formal parts of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

2. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 32, par. 16.

Analogous statutes exist in the following states:

Alabama. — Civ. Code (1886), § 1619.

California. — Deering's Supp. (1893), p. 831, § 309.

Idaho. — Rev. Stat. (1887), § 2776.

Maine. — Rev. Stat. (1883), c. 47, § 40.

Maryland. — Pub. Gen. Laws (1888), art. 11, § 7.

Massachusetts. — Pub. Stat. (1882), c. 106, § 60, par. 3.

Mississippi.—Anno. Code (1892), § 853.

New Mexico. — Comp. Laws (1884), § 205.

New York. — Banks & B. Rev. Stat. (1889), p. 1960, § 23.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 3171, § 57.

Rhode Island. — Gen. Laws (1896), c. 180, § 15.

South Carolina. — Rev. Stat. (1893), § 1559.

South Dakota. — Dakota Rev. Code (1885), p. 804, § 409.

Tennessee. — Code (1896), § 2337.

Texas. — Rev. Stat. (1895), art. 711.

Vermont. — Stat. (1894), § 3724.

Wyoming. — Rev. Stat. (1887), § 523.

United States. — 16 Stat. at L. 98.

3. Proceeding in Equity, not at Law. — The individual liability of the directors and officers assenting to an indebtedness exceeding the capital stock cannot be enforced by an action at law at the suit of a single creditor, but the remedy must be in a court of equity, where the rights and liabilities of the parties may be determined and properly adjusted. Low *v.* Buchanan, 94 Ill. 76; Stone *v.* Chisolm, 113 U. S. 302; Hornor *v.* Henning, 93 U. S. 228; Lewis *v.* Montgomery, 145 Ill. 30; Moulton *v.* Connel-Hall-McLester Co., 93 Tenn. 377; Tradesmen Pub. Co. *v.* Car Wheel Co., 95 Tenn. 634; Merchants' Bank *v.* Stevenson, 10 Gray (Mass.) 232.

In Stone *v.* Chisolm, 113 U. S. 302, the allegations of the complaint are set out in full, and were not questioned as to their form and sufficiency, the proceeding having been dismissed on oral demurrer for the reason that an action at law would not lie, the proper remedy being by a suit in equity. This was also the case in Low *v.* Buchanan, 94 Ill. 76. See also Woolverton *v.* Taylor, 132 Ill. 197, for a discussion of the liability of directors and corporation officers under the Illinois statute, in which the bill was brought by the complainants and other creditors of the corporation who might come in and contribute to the expenses of the suit. In that case it was held that the proceeding was not for the recovery of a penalty.

That heretofore, to wit, on the *first* day of *June*, 1869, the *Roe Nail Company* was legally incorporated in *St. Clair* county, in the state of *Illinois*, under an act of the general assembly of the state of *Illinois*, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," approved and in force February eighteenth, 1857. That by the terms of the organization of said *Roe Nail Company* its capital stock was limited to and not exceeding the sum of *one hundred and sixty-one thousand* dollars, all of which said stock was paid in within *four* years from the said date of the incorporation of the said *Roe Nail Company*. That on the *fifth* day of *January*, 1876, the said *Roe Nail Company* being then and there a stock corporation legally incorporated and existing under and by virtue of the laws of the state of *Illinois* as hereinabove set forth, with a capital stock limited to and not exceeding the sum of *one hundred and sixty-one thousand* dollars as aforesaid, was then and there by and with the consent of one or more of all of its directors hereinafter mentioned indebted to its various creditors in various sums amounting in the aggregate to a large sum of money in excess of and exceeding the capital stock of said stock corporation, to wit, in the sum of *one hundred thousand* dollars in excess of the said capital stock of the said stock corporation.

On said last mentioned day and date the defendants, *Richard Roe*, *Abraham Kent*, *John Jones*, *James Smith*, *Abram Jones*, *John Brown* and *Daniel Webster* were the sole directors of said stock corporation. On said day and date the said stock corporation being so indebted then and there by and with the consent of the said *Richard Roe*, *Abraham Kent*, *John Jones*, *James Smith*, *Abram Jones*, *John Brown* and *Daniel Webster*, directors as aforesaid, became indebted to your orator for goods, wares and merchandise then and there sold and delivered by your orator to said stock corporation, by and at the request of the said directors, the defendants herein, which last mentioned indebtedness, contracted and incurred as aforesaid by said stock corporation, the said *Richard Roe*, *Abraham Kent*, *John Jones*, *James Smith*, *Abram Jones*, *John Brown* and *Daniel Webster*, directors aforesaid, assenting thereto, amounted to a large sum of money, to wit, the sum of *three thousand* dollars, and all of which said last mentioned sum then was and yet is in excess of the amount of the capital stock of said stock corporation, and which sum the said stock corporation has wholly neglected and refused to pay to your orator.

That on or prior to said last mentioned day and date at times to your orator unknown, the said stock corporation being so indebted then and there by and with the consent of the said *Richard Roe*, *Abraham Kent*, *John Jones*, *James Smith*, *Abram Jones*, *John Brown* and *Daniel Webster*, sole directors as aforesaid, became indebted to the various other creditors, whose names are to your orator unknown, in various sums, the amounts of which are to your orator unknown. Which sums then were and yet are in excess of the amount of the capital stock of said stock corporation, and which said sums the said stock corporation has wholly neglected and refused to pay to said other creditors.

Whereby and by force of the statute in such case made and provided the said defendants have become personally and individually liable for such excess to the creditors of said stock corporation, including your orator, and your orator entitled to said sum of *three thousand* dollars, or his pro rata share in said excess of indebtedness of said stock corporation so exceeding the amount of the said stock corporation as aforesaid. (*Continuing as in Form No. 4270, including the interrogating part,*[1] *and concluding as in Form No. 4270, with prayer for an accounting;*[2] *for an ascertainment of the excess of the indebtedness over the capital stock, the amount of this excess which each trustee may have assented to, and the extent to which the funds of the incorporation may be resorted to for the payment of the debts; for the ascertainment of the number and names of the creditors, the amount of their several debts; for a determination of the sum to be recovered of the trustees and apportioned among the creditors in a manner which the trial by jury and the rigid rules of common-law proceedings render impossible; for an adjustment of the relative rights of the creditors with respect to the corporation and its directors and trustees; for a receiver;*[3] *for an injunction;*[4] *and for general relief.*)

c. For Declaring Dividends When Corporation was Insolvent.[5]

1. Interrogatories. — For examples of the interrogating parts of such a bill see *supra*, Form No. 7456, and also Form No. 6645.

2. Prayer for an Accounting. — For examples of prayers seeking for an accounting, generally, see the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 272; and also *infra*, Form No. 7470, and *supra*, Form No. 7462.

3. Prayer for Receiver. — For examples of prayers seeking the appointment of receivers, generally, see the title RECEIVERS; also *infra*, Form No. 7470, and *supra*, Form No. 7456.

4. Prayer for Injunction. — For examples of prayer for injunction, generally, see the title INJUNCTIONS; also *infra*, Form No. 7476, and *supra*, Form No. 7456.

5. *Pennsylvania.* — Pepp. & L. Dig. (1894), p. 3171, § 55.

Analogous statutes exist in these states:

Arkanas. — Sand. & H. Dig. (1894), § 1349.

California. — Deering's Supp. (1893), p. 830, § 309.

Colorado. — Mills' Anno. Stat. (1891), § 492.

Connecticut. — Gen. Stat. (1888), § 1932.

Delaware. — Rev. Stat. (1893), p. 573, c. 147, § 7.

Florida. — Rev. Stat. (1892), § 2163.

Idaho. — Rev. Stat. (1887), § 2596.

Illinois. — Myers' Rev. Stat. (1895 p. 332, § 19.

Indiana. — Thornton's Stat. (1897), § 5219.

Iowa. — Code (1897), § 1621.

Kansas. — Gen. Stat. (1897), c. 66, § 32.

Kentucky. — Barb. & C. Stat. (1894), § 548.

Maine. — Rev. Stat. (1883), c. 46, § 47.

Maryland. — Pub. Gen. Laws (1888), art. 11, § 9.

Massachusetts. — Pub. Stat. (1882), c. 106, § 60, par. 1.

Michigan. — How. Anno. Stat. (1882), § 4149.

Minnesota. — Stat. (1894), § 2568.

Mississippi. — Anno. Code (1892), § 852.

Missouri. — Rev. Stat. (1889), §§ 2515, 2841.

Montana. — Civ. Code (1895), § 438.

Nevada. — Gen. Stat. (1885), § 890.

New Hampshire. — Pub. Stat. (1891), c. 150, §§ 3, 5.

New Jersey. — Gen. Stat. (1895), p. 911, § 7.

New Mexico. — Comp. Laws (1884), § 204.

New York. — Banks & B. Rev. Stat. (1889), p. 1856, § 14, p. 1958, § 13, p. 1983, § 19.

North Dakota. — Rev. Codes (1895), § 2892.

Ohio. — Bates' Anno. Stat. (1897), § 3269-4.

BILL ON BEHALF OF ALL THE CREDITORS.

Form No. 7470.

(*Title of court and cause, and address as in Form No. 4278.*)[1] Your orator on behalf of himself and all other creditors of the *Roe Coal Mining Company* who may become parties to this suit complains and says:

I. That the *Roe Coal Mining Company* is now and was during all the time the things hereinafter mentioned occurred, a corporation organized under an act of the general assembly of the state of *Pennsylvania* passed July 18, 1863, and entitled "An act relating to corporations for mechanical, manufacturing, mining and quarrying purposes."[2]

That said company was organized as aforesaid for the purpose of mining coal in said state, and was engaged in said business at the time the things hereinafter mentioned occurred, and that the authorized capital stock of said company was *five hundred thousand* dollars divided into *five thousand* shares of *one hundred* dollars each.

II. That the defendants *Richard Roe*, *James Smith*, *John Jones*, *Abraham Kent*, *Daniel Webster*, *Samuel Short* and *William West* are now, and during all the time the things hereinafter mentioned occurred were, duly elected and qualified directors of said company. And said defendants do now and during all of said time have constituted the entire board of directors of said company.

III. That on the *twentieth* day of *December*, 1897, the board of directors of the *Roe Coal Mining Company*, constituted as aforesaid, held a meeting at the principal office of the company in the county of *Schuylkill*. At said meeting each and every one of the defendants herein was present in person.[3]

Said board of directors did then and there declare a dividend of *three* per cent. on the capital stock of said company, which said dividend amounted to *fifteen thousand* dollars.

Oklahoma. — Stat. (1893), § 958.

Oregon. — Hill's Anno. Laws (1892), § 3231.

South Dakota. — Dakota Rev. Code (1885), p. 804, § 409.

Tennessee. — Code (1896), §§ 2197, 2228.

Texas. — Rev. Stat. (1895), art. 670.

Vermont. — Stat. (1894), § 3723.

Virginia. — Code (1887), § 1138.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4265.

West Virginia. — Code (1891), c. 53, § 40.

Wisconsin. — Laws (1893), c. 59.

Wyoming. — Rev. Stat. (1887), § 515.

1. For the formal parts of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The heading of the bill might be similar to that in Hoopes *v.* Stidham, 13 W. N. C. (Pa.) 266.

Parties Defendant. — The company should not be joined as co-defendant. Archer *v.* Rose, 3 Brews. (Pa.) 264; Bright *v.* McCullough, 1 Leg. Rec. (Pa.) 281; Sheriff *v.* Globe Oil Co., 1 Brews. (Pa.) 489; Young *v.* Allegheny Oil Co., 10 Phila. (Pa.) 525.

Parties Plaintiff. — The action must be brought in behalf of all the creditors. Sheriff *v.* Globe Oil Co., 1 Brews. (Pa.) 489.

2. For this act see Pepp. & L. Dig. Pa. (1894), p. 3169, § 46.

3. Absence or Objection of Director. — The statute provides that the directors shall be exempt from liability if they are absent at the time of making the dividend or object thereto at said time and file their written objections with the clerk of the company. Pepp. & L. Dig. Pa. (1894), p. 3171, § 55.

To the declaring of said dividend none of the defendants at the time objected or filed their objections in writing with the clerk of said company. Said dividend was by said defendants paid to the stockholders of said company on or about the *first* day of *January*, 1*898*.

IV. That the *Roe Coal Mining Company* on the *twentieth* day of *December*, 1*897*, when said dividend was declared by the defendants as aforesaid, was hopelessly insolvent, in that said company did not then have assets sufficient to pay its liabilities or to discharge its debts which were then due and payable.

V. That at the time the said dividend was declared the said company was indebted to your orator for goods sold and delivered by him to said company on the *first* day of *July*, 1*897*, and there was then due to your orator on said account from said company a large sum of money, to wit, *two thousand three hundred* dollars.

For and on account of which said indebtedness by the consideration of the Court *of Common Pleas* of *Schuylkill* county, No. *828*, at its *January* term, 1*898*, a judgment was rendered in favor of your orator and against said company for *two thousand three hundred and twenty-one* dollars and *eighty-four* cents, his damages and costs.[1] A writ of fieri facias[2] was issued on said judgment on the *second* day of *February*, 1*898*, directed to the sheriff of said county of *Schuylkill*, and on the *eighth* day of *March*, 1*898*, of said writ the sheriff of said county made return that[3] he did on said *second* day of *February*, 1*898*, go to the principal office of the *Roe Coal Mining Company* in the county of *Schuylkill* during the usual office hours of said day and did then and there demand of *Richard Roe*,[4] the president of said company, to pay the amount due with the officer's fees, or exhibit to him real or personal estate of the corporation, subject to be taken

1. Judgment and proceedings thereon must be set forth, as well as the grounds on which it is expected to charge the officers personally. Pepp. & L. Dig. Pa. (1894), p. 3173, § 67.

In Bright *v.* McCullough, 1 Leg. Rec. (Pa.) 281, and in Archer *v.* Rose, 3 Brews. (Pa.) 264, the allegation was similar to the one in the above form.

2. For provisions relating to executions against corporations and the duty of the officer to whom the writ is directed see Pepp. & L. Dig. Pa. (1894), p. 2003, § 182, p. 2004, § 183, p. 3173, § 66; Bacon *v.* Morris, 10 Phila. (Pa.) 93; Archer *v.* Rose, 3 Brews. (Pa.) 264.

3. Necessary Allegations. — The conditions necessary to fix the liability of officers are that a judgment be recovered against the corporation and that it shall neglect, for the space of thirty days after demand made, on execution, to pay the amount due, with the officer's fees, or exhibit to him real or personal estate of the corporation, subject to be taken on execution, sufficient to satisfy the same, and the execution shall be returned unsatisfied. Pepp. & L. Dig. Pa. (1894), p. 3173, § 66.

A bill not showing compliance with these conditions is demurrable. Wagner *v.* Corcoran, 2 Pa. Dist. Rep. 440.

The bill should show that a demand was made and when. Young *v.* Allegheny Oil Co., 10 Phila. (Pa.) 525.

A return of nulla bona is not sufficient to found a bill or to enforce the liability of officers for the debts of the corporation. A bill alleging that such a return was made, and also that no exhibit of real or personal estate was made, was held bad on demurrer, it being held that the return must show that no exhibit of real or personal property sufficient to satisfy the debt was made. Bacon *v.* Morris, 10 Phila. (Pa.) 93. Sheriff's return is set out in Hoopes *v.* Stidham, 13 W. N. C. (Pa.) 266.

4. This allegation is materially alike to the one made in the bill in Archer *v.* Rose, 3 Brews. (Pa.) 264; and the court in passing on that bill declared this allegation as to the proceedings under the fieri facias sufficient.

in execution, sufficient to satisfy the same, but that the said corporation has neglected for more than *thirty* days to comply with said request, and has not exhibited real or personal estate of the said corporation subject to be taken on execution, sufficient to satisfy the same. That he cannot find any real or personal property of said corporation subject to be taken in execution sufficient to satisfy the same, and hence has returned the said execution unsatisfied.

Your orator further says that said return of said sheriff contains a true and accurate report of the proceedings had by him in the execution of said writ, and that each and every act was done by said sheriff when and where and in the manner set forth in said return. And that no part of said judgment has been paid and the same is in full force and virtue in law.

VI. Wherefore your orator prays for a decree

(1) declaring the rights of the parties in the premises;

(2) ordering an account of the debts and liabilities of the *Roe Coal Mining Company*, the amount of the same, and the names of the persons to whom the same were due at the time of the filing of this bill;

(3) compelling the defendants to pay the sum of *fifteen thousand* dollars, or so much of said sum as shall be necessary to discharge the debt of your orator and of the other creditors of the *Roe Coal Mining Company*;

(4) appointing a receiver to take charge of said money and to distribute the same, after paying the costs of this suit, pro rata among the said creditors of said company;

(5) granting such other and further relief as to your honors may seem just and proper in the premises.[1]

Jeremiah Mason, Solicitor for Complainant.

d. For Failure to File Certificate or Report.[2]

Form No. 7471.

(*Commencement as in Form No. 5911.*)[3]

First. That at all the times hereinafter mentioned the said defendants were and they are now directors and stockholders of *The Kent Gold*

1. **Form of Prayer.** — See prayer given in Lexow *v.* Pennsylvania Diamond Drill Co., 5 Pa. Dist. Rep. 492.

2. *Colorado.* — Mills' Anno. Stat. (1891), §§ 487, 491. Similar or analogous statutes are found in the following states:

Arkansas. — Sand. & H. Dig. (1894), §§ 1337, 1347.

Connecticut. — Gen. Stat. (1888), §§ 1937, 1938.

Delaware. — Rev. Stat. (1893), p. 577, c. 70, § 20.

Michigan. — How. Anno. Stat. (1882), § 4256.

Minnesota. — Stat. (1894), §§ 2813, 2824.

Montana. — Civ. Code (1895), § 451.

New Mexico. — Comp. Laws (1884), § 149.

North Dakota. — Rev. Codes (1895), §§ 2906, 3158, 3161.

New York. — Banks & B. Rev. Stat. (1889), p. 1957, § 12.

Ohio. — Bates' Anno. Stat. (1897), §§ 3821–76, 3821–84.

Rhode Island. — Gen. Laws (1896), c. 180, §§ 2, 3.

Vermont. — Stat. (1894), § 3722.

3. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

Mining Company, which, at all said times, was and is now a corporation duly incorporated and existing under and by virtue of the laws of the state of *Colorado*, and had its principal office and did its business chiefly, during all of said times, in the county of *Arapahoe* in said state.

Second. That[1] *The Kent Gold Mining Company* is indebted to the plaintiff on a certain promissory note made and delivered to him in payment for services rendered by him to said company and at its request between the *first* day of *May*, 1897, and the *first* day of *September*, 1897, which said note is payable to him and of which the following is a copy. There are no indorsements or credits thereon. (*Here set out copy of note.*)

Third. There is due and owing to the plaintiff from said company on said note *twenty-five hundred* dollars with interest thereon from the *fifteenth* day of *September*, 1897, no part of which said sum has to this plaintiff been paid.

Fourth. During all of the year 1897 the defendants were and still are the sole directors of said company.[2]

Fifth. No report has been filed by said company in the office of the recorder of deeds of *Arapahoe* county,[3] in which said county during said year of 1897 the principal business of said company was carried on,[4] during the year next preceding the *ninth* day of *May*, 1898, the date of the filing of this complaint.

Sixth. The capital stock of said company has never been fully paid in, nor has a certificate[5] signed by the president and a majority of the directors of said company, stating the amount of the capital stock fixed and paid in, ever been filed by said company either in the office of the secretary of the state of *Colorado* or in the office of the recorder of deeds of said *Arapahoe* county.

Wherefore (*concluding as in Form No. 5911*).

Parties Defendant. — In the case of Bradford *v.* Gulley, (Colo. App. 1897) 50 Pac. Rep. 314, a demurrer for defect of parties defendant on ground that the company should be joined as one of the defendants was overruled.

1. Stating the cause of action in a similar manner in a complaint on a note was considered sufficient. Rhodes *v.* Hutchins, 10 Colo. 258.

2. The contract of indebtedness on which the action is brought, the default of the corporation, and the directorship of the defendants, as of such dates as to show the liability of the defendants under the statute must be set out in complaint. Anfenger *v.* Anzeiger Pub. Co., 9 Colo. 377; Bradford *v.* Gulley, (Colo. App. 1897) 50 Pac. Rep 314.

3. Report. — The statute governing the filing of an annual report is Mills' Anno. Stat. (1891), § 491. See also list of statutes cited *supra*, note 2, p. 792.

4. Business Carried On in County. — It must be alleged that the corporation carried on its business in the county in the recorder's office of which it is claimed the report should have been filed. Anfenger *v.* Anzeiger Pub. Co., 9 Colo. 377.

5. Certificate. — The statute governing the filing of a certificate is Mills' Anno. Stat. Colo. (1891), § 487. See also list of statutes cited *supra*, note 2, p. 792.

A precedent of a complaint of a similar character is found in Miller *v.* White, 8 Abb. Pr. N. S. (N. Y. Supreme Ct.) 47. The action was brought by plaintiff against the trustees of a corporation under the General Manufacturing Companies act of 1848, seeking to charge them with the debt of the company after judgment recovered against the company. The allegations of the complaint, omitting the formal parts, were as follows:

"That the *Gutta Percha Manufacturing Company* are and during the years 1864, 1865 and 1866 were, a corporation

e. For Making and Publishing False Certificates.[1]

created by and under the laws of the State of *New York*, and were organized *March 2*, 1859, pursuant to an act of the legislature of said State entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," passed February 17, 1848, and the acts amendatory thereto, and the term of its existence is *thirty* years.

That on *January 1*, 1865, the said *Gutta Percha Manufacturing Company* was indebted unto the plaintiff. That during the month of *January*, 1865, an action to recover said indebtedness was commenced in the *supreme* court of the State of *New York*, by the plaintiff, against said *Gutta Percha Manufacturing Company*. That a summons in said action was duly served upon the president of said company. That said company duly appeared and answered in the cause, and such proceedings were thereupon had that, on *June 27*, 1866, a judgment was duly rendered and entered in such action, in favor of the plaintiff, and against the said *Gutta Percha Manufacturing Company*, for the sum of *twenty-four thousand seven hundred and thirty-four* dollars and *sixty-two* cents. That execution thereon was issued to the sheriff of the city and county of *New York*, and returned wholly unsatisfied. That said judgment is wholly unpaid, and is in full force and owing by said company to the plaintiff, with interest. That defendants *Moores M. White*, *John P. White* and *Warren Lazelle*, were duly elected trustees of such corporation in 1861, and, with the exception of *John P. White*, have since continued to be and to serve as such, and are now trustees thereof, and that *John P. White* continued as such trustee until *February 16*, 1865. That defendant *Samuel W. Torrey* was, on *February 15*, 1865, elected a trustee of said corporation, and accepted the trust, and served as such, and on *March 21* was re-elected trustee of said corporation, and accepted said trust, and has served and continued to be such trustee from his said election in *February*, 1865, until the present time. That the county of *New York* is the county in which said corporation was located, in which its principal office has been, and in which its business has been carried on.

That neither the said corporation nor the trustees thereof, nor did any of them, within *twenty* days from *January 1*, 1865, make, file or publish a report, as required by law in such case made and provided, verified by the oath of the president or secretary thereof, and file the same in the office of the clerk of the county where the business of the said corporation was carried on, nor within *twenty* days from *January 1*, 1866, nor within *twenty* days from *January 1*, 1867, nor have they, or any of them, ever, at any time during the years 1865, 1866, 1867, or 1868, made, published, signed, or verified, or caused to be made, published, signed, or verified, or filed in the office of such clerk, any such report, as is by law required, since *January 17*, 1862.

Wherefore, plaintiff demands judgment against defendants, jointly and severally, for said sum of," etc.

1. *New Jersey.* — Gen. Stat. (1895), p. 918, § 56, providing that if any certificate made, or any public notice given by the officers of any company in pursuance of the provisions of the New Jersey statutes, shall be false in any material representations, all the officers who shall have signed the same shall be jointly and severally liable for all of the debts of the company contracted while they were stockholders or officers thereof. Similar or analogous statutes exist in the following states:

California.— Civ. Code (1897), §§ 316, 321.

Colorado. — Mills' Anno. Stat. (1891), § 494.

Delaware. — Rev. Stat. (1893), p. 580, c. 70, § 31.

Idaho. — Rev. Stat. (1887), § 2603.

Illinois. — Myers' Rev. Stat. (1895), p. 332, § 21.

Indiana. — Thornton's Stat. (1897), § 5217.

Kentucky. — Barb. & C. Stat. (1894), § 549.

Massachusetts. — Pub. Stat. (1882), c. 106, § 60.

Minnesota. — Stat. (1894), § 3173.

Montana. — Civ. Code (1895), § 445.

Nebraska.— Anno. Comp. Stat. (1891), c. 16, § 140.

Nevada. — Gen. Stat. (1885), § 889.

New Jersey. — Gen. Stat. (1895), p. 918, § 56.

New York. — Coll. Rev. Stat. (Supp. 1892), p. 4097, § 31.

North Carolina. — Code (1883), § 686.

Form No. 7472.

(Precedent in Waters *v.* Quimby, 27 N. J. L. 297.)[1]

[(*Commencement as in Form No. 6946*)][2] for that whereas *James M. Quimby*, *William Wright*, *Gamaliel Gay*, *Alonzo D. Perry*, *Andrew Lemassena*, *Theodore P. Howell*, *Roswell Van Buskirk*, *Daniel Price*, *David M. Fitzgerald*, *John Hartshorne*, *Samuel Meeker*, and *Michael Gibney*, on the *15th* day of *July*, A. D. 1*853*, at *Newark*, in said county, associated themselves together in a company for the purpose of manufacturing and selling fire-arms, and became incorporated under the act of the State of *New Jersey* entitled, "An act to authorize the establishment and to prescribe the duties of companies for manufacturing and other purposes," and did record a certificate of such association in the office of the clerk of the county of *Essex*, and did therein certify that the name assumed to designate such company, and to be used in its business and dealings, was the *Perry Patent Arm Company*, and did also therein further certify and make known that the capital stock of said company was $*300,000*, divided into *3,000* shares, of $*100* each, and to commence business with a capital stock of $*288,000*, divided into *2,880* shares, of $*100* each; and did, by said certificate, further make known that the said defendants, *James M. Quimby*, was a stockholder in said company to the amount of *480* shares; the said *John Hartshorne*, to the amount of *80* shares; the said *Samuel Meeker*, to the amount of *160* shares; the said *Daniel Price*, *80* shares; the said *Alonzo D. Perry*, *480* shares, and the said *Michael Gibney*, *360* shares; and did, in all other things, comply with the provisions of said act under which said company was formed; and whereas the said the *Perry Patent Arm Company*, while the said defendants were stockholders and officers of said company, became indebted to the plaintiffs in the amount of *two* drafts, or bills of exchange, both bearing date the *17th* day of *February*, A. D. 1*854*, drawn by one *Amos R. Carter* upon the said the *Perry Patent Arm Company*, one payable, *five* months after date, to the order of *William Glaze & Co.* for $*1,402.37*, and the other payable, *six* months after date, to the order of the said *William Glaze & Co.*, for $*1,410.36*, which

North Dakota. — Rev. Codes (1895), § 2893.
Ohio. — Bates' Anno. Stat. (1897), § 3245*b*.
Oklahoma. — Stat. (1893), § 959.
Oregon. — Hill's Anno. Laws (1893), § 3231.
Pennsylvania. — Pepp. & L. Dig. (1894), p. 3172, § 58.
Rhode Island. — Gen. Laws (1896), c. 180, § 20.
South Dakota. — Dakota Rev. Code (1885), p. 804, § 409, par. 2.
Tennessee.—Code (1896), §§ 2067, 2068.
Texas. —Rev. Stat. (1895), § 4390.

Parties Plaintiff. — It is not necessary to make the corporation a party. The directors are personally liable. Salmon *v.* Richardson, 30 Conn. 360.

1. Plaintiffs recovered judgment in this case, which was upheld upon a motion in arrest.

For other precedents of declarations and complaints in actions for false representations made to the public by directors or officers of corporations see *ante*, Forms Nos. 6920, 6921, 6922, and the forms given in the notes thereto.

2. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the complaint.

said drafts or bills of exchange were endorsed and delivered by the said payees to the plaintiffs, and were accepted by the said the *Perry Patent Arm Company*, and were afterwards, when due and payable, duly presented to the said acceptors for payment, and the payment of the same was by them refused; and whereas afterwards, on the *16th* day of *September*, A. D. 1*854*, the said plaintiffs prosecuted their suit or action, in the *Circuit* Court in the county of *Essex*, against the said *Perry Patent Arm Company* for the recovery of the money due and owing upon the said *two* bills of exchange; and such proceedings were thereupon had, that afterwards on the *27th* day of *September*, A. D. 1*855*, the said plaintiffs, by the consideration and judgment of the said court, recovered against the said the *Perry Patent Arm Company* the sum of $*3,009.16* damages, and $*47.49* costs of suit, as by the record, etc., appears, which judgment still remains in full force, etc., not satisfied, etc. And whereas the said *James M. Quimby*, as president and director of the said *Perry Patent Arm Company*, *John Hartshorne*, as secretary and treasurer thereof, and the said *Samuel Meeker*, *Daniel Price*, *Alonzo D. Perry*, and *Michael Gibney*, as directors of said company, and a majority of the same, on the *9th* day of *January*, A. D. 1*855*, at *Newark* aforesaid, did, within *thirty* days after the payment of the last instalment of the capital stock so fixed upon as the amount of capital stock of the said company, with which they would commence business, make a certificate, and did sign and swear to the same, and within the said *thirty* days, record the said certificate in a book kept for that purpose in the office of the clerk of the county of *Essex*, and did also publish the said certificate in a newspaper circulating in the said county of *Essex*, as required in said act, by which certificate the said defendants did, under oath, certify and make known that the amount of capital stock of the said the *Perry Patent Arm Company*, with which, by the original certificate of incorporation thereof it was declared that the said company would commence business, was $*288,000*, divided into *2,880* shares, of $*100* each, and that the whole amount of said capital so fixed upon had been paid into the treasury of the said company in cash, the last payment thereof having been made on the *twenty-ninth* day of *December*, 1*854*, and did in all things comply with the said act in making and giving publicity to the said certificate. And the said plaintiffs aver, and in fact say, that the said capital stock of $*288,000*, so fixed upon as stated in the said certificate, was not paid into the treasury of said company in cash, as in the said certificate and publication thereof is certified and made known, and as required by the said act under which the said company was incorporated; and that the said certificate and the public notice given by the same are false and untrue in the said material representation thereof, by means whereof the said defendants, as stockholders and officers of said company as aforesaid, became liable to the said plaintiffs to pay to them the said debt so due and owing to them by the said the *Perry Patent Arm Company* as aforesaid; and whereby an action hath accrued to the plaintiffs to demand and have of the said defendants the said sum of money so due and owing to the plaintiffs as aforesaid, according to the form, force, and effect of the said act hereinbefore mentioned, and

which the said defendants have neglected and refused to pay, to the damage of the plaintiff of $7,000 *et inde producit sectam*, etc. [(*Concluding as in Form No. 6946.*)][1]

7. To Recover on Contract of Guaranty.[2]

Form No. 7473.

(Precedent in Cambria Iron Co. *v.* Keynes, 56 Ohio St. 507.)[3]

[(*Venue and title of court and cause as in Form No. 5929.*)][1] Plaintiff is a corporation duly incorporated under the laws of the state of *Pennsylvania*, and located at *Johnstown*, in said state.

On the *21st* day of *September*, 1891, in consideration the plaintiff would furnish *The Motherwell Iron & Steel Company* of *Logan, Ohio*, which is a corporation duly organized under the laws of the state of *Ohio*, with certain material then used by said *Motherwell Iron & Steel Company* for manufacturing purposes, consisting of iron, steel and other merchandise, an itemized account of which material so furnished the said company is hereto attached (marked "*Exhibit A*,") and made a part of this petition, the defendants guaranteed to plaintiff to be ultimately responsible for the payment of all material purchased by the said *Motherwell Iron & Steel Company* for its use, from plaintiff during the season of 1891 and 1892.

The plaintiff in consequence of said guarantee, a copy of which is hereto attached (marked "*Exhibit B*,")[4] and made a part of this petition, sold and furnished the said *Motherwell Iron & Steel Company* material as aforesaid to the amount of $3,937.86.

The said sum was due and payable in installments as follows: (*setting out installments*).[5]

The time of payment given the said *Motherwell Iron & Steel Company* by plaintiff has elapsed, yet the said *Motherwell Iron & Steel Company* has not paid the same nor any part thereof, and plaintiff requested payment thereof from said defendants and each of them, but no part thereof has been paid.

As evidence of the aforesaid indebtedness, the said *Motherwell Iron & Steel Company* executed and delivered to plaintiff its *four* certain promissory notes for the respective sums and dates as fol-

1. **For formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

2. See also the title GUARANTY.

3. Plaintiff in the case recovered judgment.

4. **The guaranty** upon which the action was founded was as follows: "*Logan, Ohio, September 21*, 1891. We the undersigned directors of the *Motherwell Iron & Steel Company* of *Logan, Ohio*, do hereby guarantee the ultimate payment of all material purchased of the *Cambria Iron Company* of *Johnstown, Pa.*, for the use of said company during the season of 1891 and 1892. *Robt. W. Keynes, I. N. Collins, L. A. Culver, S. H. Bright, B. R. Higgins, D. M. Motherwell, M. D. Moore.*"

5. **Installments** mentioned in the text were as follows:

July 24, 1892	$1,405 98
August 22, 1892	781 07
September 19, 1892	1,295 36
October 12, 1892	209 51
August 3, 1892	245 94

lows: (*setting out itemized statement*),[1] which said notes the plaintiff now brings into court and surrenders up the same.

The plaintiff avers and charges the fact to be that the said *Motherwell Iron & Steel Company* is wholly and totally insolvent; that all its personal and real property has been levied upon by the sheriff of this county by virtue of execution placed in his hands for more than the value of the real estate and personal property levied upon, and the same is beyond the reach of plaintiff for the purpose of subjecting the same to the payment of the aforesaid indebtedness. The said *Motherwell Iron & Steel Company* has been declared by due process of law, under the statute in such case as made and provided, to be insolvent, and a receiver has been appointed for all its property and rights of action and is now in possession of the same.

Wherefore plaintiff asks judgment against the said defendants for the said sum of *$3,937.86*, with interest on *$1,405.98* from the *24th* day of *July*, 1892; interest on *$781.07* from *August 2nd*, 1892; interest on *$1,295.36* from *September 19th*, 1892; interest on *$209.51* from *October 12th*, 1892, and interest on *$245.94* from the *31st* day of *August*, 1892. [(*Concluding as in Form No. 5929.*)][2]

8. To Recover Penalty.[3]

a. For Failing to Exhibit Books.

Form No. 7474.[4]

(Precedent in Lewis *v.* Brainerd, 53 Vt. 510.)[5]

[(*Commencement as in Form No. 5950.*) (*After proper allegation of incorporation of the St. Albans Iron and Steel Works*, of *St. Albans*, *the*

1. **Itemized statement** referred to in the text was as follows:

"*January 21*, 1892, *$1,405.98*, due *six* months after date.

February 19, 1892, *$781.07*, due *six* months after date.

March 16, 1892, *$1,295.36*, due *six* months after date.

April 9, 1892, *$209.51*, due *six* months after date.

And the sum of *$245.94* not evidenced by note, due and payable *August 3*, 1892."

2. See note 1, *supra*, p. 797.

3. See also the title FINES, IMPRISONMENT, PENALTY AND FORFEITURE.

4. *Vermont.* — Stat. (1894), § 3682. See also the following analogous or similar statutes:

Colorado. — Mills' Anno. Stat. (1891), p. 628, § 488.

Connecticut. — Gen. Stat. (1888), § 1939.

Florida. — Rev. Stat. (1892), § 2133.

Maine. — Rev. Stat. (1883), c. 46, §§ 10, 19.

Michigan. — How. Anno. Stat. (Supp. 1890), § 3208*e*4.

Missouri. — Rev. Stat. (1889), § 2504.

New Hampshire. — Pub. Stat. (1891), c. 148, §§ 12, 14.

Nevada. — Gen. Stat. (1885), § 818.

New Jersey. — Gen. Stat. (1895), p. 914, § 36.

New Mexico. — Comp. Laws (1884), § 224.

New York. — Banks & B. Rev. Stat. (1889), p. 1728, § 1; Banks & B. Rev. Stat. (Supp. 1893), p. 4104, § 53.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4270.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 1757.

5. The declaration contained three counts on special demurrer. The first two counts were adjudged insufficient, and the third count, the one given above, was pronounced sufficient.

declaration was as follows:)][1] and whereas also it is provided by section 7 of chapter 86 of the General Statutes of the state of *Vermont*, relating to private corporations as follows: (*setting out provision*).[2]

And whereas, it is provided by section 8 of said chapter of said statutes, as follows: (*setting out provision*).[3]

And whereas, it is provided by section 13 of said chapter, as follows: (*setting out provision*).[4]

And whereas, the *St. Albans Iron and Steel Works*, of *St. Albans* aforesaid, is a private corporation as aforesaid, so chartered as aforesaid, and doing business at *St. Albans* aforesaid.

And whereas, the said plaintiff was before and at the time of the committing of the wrong and grievance by the said defendant as hereinafter mentioned, and is now a stockholder in said corporation, having become, to wit: the *first* day of *January*, A. D. 1873, the purchaser and holder, and has been since hitherto and is now the possessor, holder and owner of *twenty-five* shares of the capital stock of said corporation, of the par value of *one hundred* dollars each. And whereas, the said plaintiff, as such stockholder, was and is entitled at all seasonable and proper times to examine the books and records of said corporation, according to the form, force and effect of the statute aforesaid.

And whereas, before and at the time of the committing of the wrong and grievance by the said defendant as hereinafter mentioned, the said defendant was the recording officer of said corporation, duly and legally elected and appointed by the directors of the said corporation under the title and designation of "Treasurer of the *St. Albans Iron and Steel Works*," which said office the said defendant had accepted, to wit: at *St. Albans* aforesaid, which said office the said defendant has continued to hold, from the time of his election and appointment hitherto, but more particularly on the *18th* day of *July*, A. D. 1876, to wit: at *St. Albans* aforesaid, and as such recording officer was the holder, keeper and legal custodian of certain books

1. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The matter to be supplied in [ ] does not appear in the reported case, but should be added to complete the declaration.

2. **Vt. Gen. Stat., c. 86, § 7,** referred to in the text is as follows: "The clerk of every such corporation shall at all times have the custody of the by-laws and records of said corporation, and shall at all proper and seasonable times exhibit and show the same to the owner of any share of stock of such corporation, his agent or attorney, on demand, and give certified copies of such by-laws and records, when required, on a reasonable compensation therefor being tendered to such clerk."

3. **Vt. Gen. Stat., c. 86, § 8,** referred to in the text is as follows: "If any such clerk shall wilfully neglect or refuse to exhibit and show any such by-laws or records in his possession, he shall forfeit and pay to the person injured the sum of ten dollars for every twenty-four hours such clerk shall so neglect and refuse, to be recovered in an action on the case."

4. **Vt. Gen. Stat., c. 86, § 13,** referred to in the text is as follows: "The term 'clerk' of a corporation, as used in this chapter, shall be construed to mean the recording officer, whether he be styled 'clerk,' 'secretary,' 'cashier,' or however designated, and the term 'treasurer' as used in this chapter shall be construed to mean the officer who has the care and custody of the funds of such corporation, by whatever name he may be designated."

and records of said corporation, to wit: a book then and there entitled and called a ledger, and a certain other book entitled and called a journal, and a certain other book entitled and called a stock-ledger, and a certain other book entitled and called a transfer book, and certain other books appertaining and belonging to the said defendant, in his official capacity, and all which said books were the property of said corporation, and the records and entries therein solely appertained to the business and affairs of said corporation.

And the said plaintiff further says, that afterwards and at a seasonable and proper time, to wit: on the *18th* day of *July*, A. D. 1*876*, to wit: at *St. Albans* aforesaid, he the said plaintiff did request the said defendant as the recording officer of said corporation, and having the care and custody of the said books and records, so legally elected and acting therein as aforesaid, and on various other days at seasonable and proper times, and at the office of the said defendant, to wit: at *St. Albans* aforesaid, to exhibit and show to the said plaintiff the said books and records of said corporation, of which he the said defendant was the holder, keeper and legal custodian, as such recording officer as aforesaid. Yet the said defendant did not nor would exhibit or show to the said plaintiff the said books and records, but then and there, wrongfully, wilfully, unwarrantably and unlawfully neglected and refused so to do, to wit: at *St. Albans* aforesaid, and did so neglect and refuse from thence until, to wit: the *10th* day of *January*, A. D. 1877, to wit: at *St. Albans* aforesaid.

Wherefore and by reason of all which, and by force of the statute aforesaid, an action hath accrued to the plaintiff, to have and demand of the said defendant *ten* dollars for every *twenty-four* hours said defendant did so neglect and refuse to exhibit and show to the said plaintiff the said books and records of said corporation, of which he the said defendant was the legal custodian as aforesaid, amounting in all to a great number, to wit: *175* periods of time of *twenty-four* hours each, to wit: at *St. Albans* aforesaid, yet the said defendant, well knowing the premises, hath not [paid the same or any part of the same to this plaintiff for the recovery of which, with just costs, the plaintiff brings suit. (*Concluding as in Form No. 5950.*)][1]

b. For Failing to Post Statement.[2]

Form No. 7475.[3]

1. See note 1, *supra*, p. 799.

2. *California.* — Laws (1897), p. 38, *amending* Laws (1880), p. 134, *amending* Laws (1874), p. 866.

3. **Founded on the facts** in Chapman *v.* Doray, 89 Cal. 52. In that case defendant, by answer, denied that the mining company "had an office for the transaction of its business in the town of *Howland Flats*" or any other place. It was held that under the statute it was the duty of every corporation to have an office and a principal place of business, and that the directors of a mining company could not evade liabilities for failure to post monthly reports at the office of the company by failing to have such an office.

Necessary Allegations. — It must be alleged that money had been received and liabilities incurred, also that the corporation had a place of business where the itemized account or balance sheet should have been posted. Hewlett *v.* Epstein, 63 Cal. 184.

It is necessary to allege that neither an itemized account nor balance sheet was posted. Eyre *v.* Harmon, 92 Cal. 580.

(*Title of court and cause, and commencement as in Form No. 5910.*)[1]

I. That during the year 1889 the *Smith Mining Company* was a corporation duly organized and existing under and by virtue of the laws of the state of *California*, for the purpose of carrying on and conducting the business of mining.

II. That said corporation was, during the year aforesaid, and now is, the owner of certain valuable mining claims and interest in the county of *Sierra*, in the state of *California*.

III. That during the whole of the year last above mentioned said corporation had its principal office for the transaction of its said business in the town of *Howland Flat*, in said *Sierra* county.

IV. That the plaintiffs and the said defendant were, during the whole of the year last above mentioned, and still are, stockholders of and in said corporation.

V. That the said defendant was, during the whole of the year last above mentioned, and still is, one of the board of directors of said corporation, and the president and acting superintendent of the said corporation.

VI. That during the months of *January*, *February*, *March*, *April*, *May*, *June* and *July* of the said year last above mentioned the said corporation was engaged in its said business of mining, working its mines, and during each of said months did employ large numbers of men and employees in the carrying on and furtherance of its said mining business, and did during each of the said months incur certain liabilities, and received and disbursed divers sums of money.

VII. That it became and was the duty of the said defendant and his co-directors, as required by the provisions of an act of the legislature of the state of *California*, approved February 26, 1897, entitled (*setting out title of act*), which said act provided as follows: (*setting out the act in full or in substance*), to make and have posted in the said office of the company in said *Sierra* county, on the *second Monday* of each of said months an itemized account, or balance sheet, for the previous month, embracing a full and complete statement of all disbursements and receipts, showing from what sources such receipts were received, for what, and to whom such disbursements were made, and for what object and purpose the same were made, and also all indebtedness, or liabilities, incurred, or existing, at such time, and for what purpose the same had been incurred, and the balance of

It is not necessary to show actual damage. Shanklin *v.* Gray, 111 Cal. 88.

Several Violations. — It is proper to set forth in one count several violations of the statute. Plaintiff can then prove any one in his power to, as they constitute separately or together but one cause of action. Loveland *v.* Garner, 71 Cal. 541. In Chapman *v.* Doray, 89 Cal. 52, several violations were alleged.

Recovery of but a single penalty can be had for past delinquencies. Love land *v.* Garner, 71 Cal. 541. But a recovery for past delinquencies does not bar an action for delinquencies occurring after action commenced. Schofield *v.* Doray, 89 Cal. 55.

Lis Pendens. — The pendency of an action for a past delinquency, under such a statute, is no bar to a subsequent action for a delinquency occurring after the commencement of the prior action. Shanklin *v.* Gray, 111 Cal. 88.

1. For the formal parts of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

money, if any, on hand at the time for making and posting said itemized account or balance sheet.

VIII. That, disregarding his said duty and obligation as such director, the said defendant failed, refused, and neglected to make or cause to be made such an itemized account or balance sheet on the *second Monday* of each of said months, and to post, or cause to be posted, the same in the office of said company in said county of *Sierra*, or to make, or have made, and to post, or have posted, such an itemized account, or balance sheet, upon the *second Monday* of any one of said months, or upon any other day.

Wherefore, (*concluding as in Form No. 5910*).[1]

9. To Set Aside Conveyance Made by Directors.[2]

Form No. 7476.[3]

(Precedent in Beecher *v.* Schieffelin, 4 Civ. Proc. Rep. (N. Y. Supreme Ct.) 230.)[4]

Supreme Court, *New York* County.

Herbert W. Beecher, as manager of the *Metropolitan Publishing Company*, Plaintiff,[5]
against
Bradhurst Schieffelin, individually, and as president and one of the trustees of the *Metropolitan Publishing Company*; *Lucy C. Schieffelin*, otherwise known as *Lucy C. Hewitt*, individually, and as secretary of the *Metropolitan Publishing Company*; *Victor Dessart*, individually, and as one of the trustees of the *Metropolitan Publishing Company*; and the said *Metropolitan Publishing Company*, Defendants.

The plaintiff, *Herbert W. Beecher*, complaining as manager of the *Metropolitan Publishing Company*, alleges as follows:

I. That said defendant, *The Metropolitan Publishing Company*, was, at the times hereinafter mentioned, and now is, a domestic corporation, organized *December*, *9*, 1*880*, pursuant to and in accordance with the provisions of an act of the legislature of the state of *New York*, entitled "An act to authorize the formation of corporations for Manufacturing, Mining and Mechanical or Chemical purposes," passed February 17, 1848, and of the several acts extending and amending said act.

That a copy of the certificate of the incorporation of said company

1. For the formal parts of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

2. Consult also the title RESCISSION AND CANCELLATION.

3. The right to bring an action to set aside an alienation of property made by one or more directors is given by statute. Bliss' Anno. Code N. Y. (1890), § 1781, par. 5.

4. **Demurrer to this complaint** was overruled.

5. This action may be maintained by one employed as a manager. Bliss' Anno. Code N.Y. (1890), § 1782; Beecher *v.* Schieffelin, 4 Civ. Proc. Rep. (N. Y. Supreme Ct.) 230.

is hereto annexed, marked schedule "*A*," and made a part of this complaint.

II. That on or about the *16th* day of *December*, 1*882*, said defendant, *Bradhurst Schieffelin*, was elected to fill the office of president and one of the trustees of said company, and said defendant, *Victor Dessart*, and one *M. Buchanan*, were also elected to fill the office of trustees of said company for the period of *one* year from the said date; and that on or about the *20th* day of *June*, 1*883*, said defendant *Lucy C. Schieffelin*, otherwise known as *Lucy C. Hewitt*, was elected to fill the office of secretary and treasurer of said company until the next annual election, on or about *December 15*, 1*883*.

That on or about the *29th* day of *December*, 1*882*, said plaintiff and said defendant, *The Metropolitan Publishing Company*, entered into an agreement in writing, marked schedule "*B*," and made a part of this complaint, wherein and whereby said plaintiff was engaged as the manager of the affairs of said company from the *1st* day of *January*, 1*883*, until the *1st* day of *January*, 1*884*.

III. That the principal business of said company consisted, until the *27th* day of *August*, 1*883*, of the publication, at the city of *New York*, of a weekly newspaper, known as "*House and Home*," which newspaper had a large number of subscribers, aggregating at least *14,000*, and was until said date in receipt of a large amount of money from advertisements, aggregating for the preceding year at least $*6,000*.

IV. Upon information and belief, said plaintiff further alleges that the capital stock of said company was divided among the following persons, viz: said defendant, *Bradhurst Schieffelin*, *75* shares; said plaintiff, *15* shares; said defendant, *Lucy C. Schieffelin*, otherwise *Hewit*, *8* shares, and said *M. Buchanan* and *Victor Dessart*, each *one* share.

V. Upon information and belief, said plaintiff further alleges that on or about the *9th*, *16th* and *23d* days of *July*, 1*883*, a notice, of which the following is a copy, was published in said newspaper: (*setting out notice*).[1]

That on said *28th* day of *July*, 1*883*, the requisite number of stockholders failed to attend said meeting, whereupon the same was adjourned until the *10th* day of *August*, 1*883*; that on said adjourned day said meeting was further adjourned until the *11th* day of *August*, 1*883*; that on said adjourned day said meeting was further adjourned until the *14th* day of *August*, 1*883*, but no notice of said adjournment was published; that on said adjourned day a resolution was passed not to increase the capital stock of said company, as specified in said notice; and that thereupon, without any previous notice to said plaintiff, and in spite of his protest, said defendants, as such officers of said company, without notice being given to said *Buchanan* of said meeting, and in his absence, passed a

1. **Notice referred to** in the text was as follows: "*Metropolitan Publishing Company*, Notice. A meeting of the stockholders of the *Metropolitan Publishing Company* will be held on the *28th* day of *July*, 1*883*, at the office, *252 Broadway*, *New York*, at *12* o'clock, noon, for the purpose of increasing the capital stock to *one hundred thousand* dollars.

B. Schieffelin,
M. Buchanan, Trustees."

resolution whereby they attempted to assign and transfer all the property and assets pertaining to said newspaper, the "*House and Home*," together with the income and receipts of the same due, and to become due, to said defendant, *Bradhurst Schieffelin*, in satisfaction of a pretended indebtedness to said *Bradhurst Schieffelin* from said company.

VI. Said plaintiff further alleges that said attempted alienation and assignment was a violation of the duties of said defendants, and a breach of the trust reposed in them, and was without warrant or authority in law; and said plaintiff alleges that the same was made in pursuance of a scheme to turn over to said *Bradhurst Schieffelin* the property and assets of said company, and enable him to possess himself thereof and appropriate the same to his own use, and in this manner to render valueless the stock of said company and to effectuate a dissolution thereof without due process of law and to oust said plaintiff from his said office of manager of said company and to deprive him of the same and to violate the aforesaid agreement between said plaintiff and said company and to enable said defendants, or some of them, to organize another company and publish said newspaper under another name, for the purpose of cheating and defrauding the creditors of said company.

VII. Said plaintiff further alleges that on or about the *14th* day of *August*, 1*883*, said *Bradhurst Schieffelin*, in pursuance of the aforesaid scheme, fraudulently and unlawfully took possession of the property pertaining to said newspaper the "*House and Home*," and unlawfully diverted and appropriated the same to his own use, and also took possession of and appropriated to his own use the receipts and income of said company from advertisers and subscribers, which have amounted, as deponent is informed and believes, to at least *fifty dollars* (*$50*) per diem, since said *14th* day of *August*, 1*883*, until the commencement of this action, and said *Bradhurst Schieffelin* has also removed the books and accounts of said defendant, *The Metropolitan Publishing Company*, from the office of said company, in the city of *New York*, to the state of *New Jersey*.

VIII. Said plaintiff further alleges upon information and belief, that said *Bradhurst Schieffelin* has not paid any part of the indebtedness of said company, since said *4th* [*14th*] day of *August*, 1*883*, to the creditors of said company, and which indebtedness, said plaintiff alleges, amounts to a large sum of money, but not as large as the value of the assets of said company, so as aforesaid unlawfully appropriated by him, and has not issued the edition of said newspaper, the "*House and Home*," for the weeks ending *August 27* and *September 3*, 1*883*, and that unless restrained by the judgment of this court said individual defendants will render said company insolvent and forfeit its rights, privileges and franchises.

Wherefore said plaintiff asks judgment against said defendants, and each of them, as follows:

I. That said individual defendants may be compelled to account for their official conduct in the management and disposition of the funds and property committed to their charge.

II. That said individual defendants may be compelled to pay to

the said defendant, *The Metropolitan Publishing Company*, which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost or wasted by a violation of their duties.

III. That the aforesaid alienation and assignment of the property of said defendant, the *Metropolitan Publishing Company*, to said *Bradhurst Schieffelin* may be set aside.

IV. That said defendants may be enjoined and restrained from collecting or receiving any debt or demand, or from paying out, or in any way transferring or delivering, to any person any money, property or effects of said defendant, *The Metropolitan Publishing Company*, during the pendency of this action.

V. That a receiver of the property of said defendants, *The Metropolitan Publishing Company*, be appointed by this court, with the usual powers of receivers in like cases.

VI. For such other or further relief in the premises as to the court shall seem just, together with the costs of this action. [(*Concluding as in Form No. 5926.*)][1]

III. CRIMINAL PROSECUTIONS AGAINST.

1. For Combining to Control Cost of Insurance.[2]

Form No. 7477.[3]

(*Commencing as in Form No. 5189*)[4] that on the *twelfth* day of *May*, *1891*, in the county of *Leavenworth* and state of *Kansas*, one *John Doe* was president of the *Webster Fire Insurance Company*, a corporation organized by and under the laws of *Kansas*. On said date said *John Doe*, president as aforesaid, did then and there on behalf of the said *Webster Fire Insurance Company* unlawfully agree and combine together with and enter into a contract, agreement and combination with the *Abraham Kent Insurance Company*, a corporation organized under the laws of *Kansas*, and with divers other corporations and persons, the names of which are now unknown to the grand jury, which said agreement, contract and combination is and was designed and intended to control the cost and rate of insurance within the state of *Kansas* by threatening persons and corporations in the insurance business with injury to their business, if such persons and corporations refused to demand the same cost and rate as should be named by the defendant and by the corporations and other persons with whom said defendant has combined, in violation of the laws of *Kansas*. (*Concluding as in Form No. 5189.*)[4]

1. **For the formal parts** of bills in equity, complaints and declarations, generally, see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, *ante*, p. 244.

The matter to be supplied in [ ] is not found in the reported case, but should be added to complete the form.

2. *Kansas.* — Gen. Stat. (1897), c. 145, §§ 4, 6. This law was decided to be valid. Matter of Pinkney, 47 Kan. 89; State *v.* Phipps, 50 Kan. 609.

3. The charging part of the above form is similar to that in the complaint in Matter of Pinkney, 47 Kan. 89.

4. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. For Concurring in Making False Report.[1]

Form No. 7478.

(*Commencing as in Form No. 6656*)[2] that the said *John Doe* heretofore, to wit, on the *thirteenth* day of *November*, A. D. 1897, was a duly elected director of the *Daniel Webster Banking Company*, a corporation organized under the laws of *Montana* for the purpose of transacting the business of banking, and then engaged in said business in said county. On the day and date and in the county aforesaid, *John Doe*, director as aforesaid, did unlawfully, knowingly and wilfully concur in the making by said banking company of a written report of said banking company's pecuniary condition, in which said report the assets of said banking company on said day and date were alleged to be *one hundred and fifty thousand* dollars. Said report was false and untrue in that, as *John Doe* at the time he concurred in the making of the same well knew, the assets of said banking company were not on said day *one hundred and fifty thousand* dollars, but were in truth and in fact much less than said sum, contrary to (*concluding as in Form No. 6656*).[2]

1. *Montana.*— Pen. Code (1895), § 988. Analogous statutes exist in the following states:

Arizona. — Pen. Code (1887), § 882.

California. — Deering's Pen. Code (1885), § 564.

Colorado. — Laws (1897), c. 33, § 13.

Connecticut. — Gen. Stat. (1888), §§ 2920, 2921.

Florida. — Rev. Stat. (1892), § 2461.

Idaho. — Rev. Stat. (1887). § 7121.

Indiana. — Thornton's Stat. (1897), § 5063.

Iowa. — Code (1897), § 1887.

Kansas.—Gen. Stat. (1897), c. 18, § 57.

Kentucky. — Barb. & C. Stat. (1894), §§ 549, 550.

Louisiana. — Rev. Laws (1897), § 877.

Maryland. — Pub. Gen. Laws (1888), art. 27, § 97.

Massachusetts. — Stat. (1894), c. 522, § 101.

Michigan. — How. Anno. Stat. (Supp. 1890), § 3208*f*, 7.

Minnesota. — Stat. (1894), §§ 2520, 6765.

Missouri. — Rev. Stat. (1889), § 5805.

Nebraska.— Anno. Comp. Stat. (1891), p. 1024, § 135.

Nevada. — Gen. Stat. (1885), § 889.

New Hampshire. — Pub. Stat. (1891), c. 165, § 32.

New Jersey. — Gen. Stat. (1895), p. 1078. § 157.

New York. — Banks & B. Rev. Stat. (1882), p. 1438, § 39.

North Carolina. — Laws (1889), c. 453, § 2.

North Dakota. — Rev. Codes (1895), §§ 3249, 7527.

Ohio. — Bates' Anno. Stat. (1897), § 3821–85.

Oklahoma. — Laws (1897), c. 4, § 57.

Oregon. — Hill's Anno. Laws (1892), §§ 1802, 1803.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1190, § 238.

South Dakota. — Laws (1891), p. 88, § 24.

Tennessee.— Code (1896), §§ 2067, 2068.

Utah. — Comp. Laws (1888), § 4690.

Vermont. — Stat. (1894), § 4161.

Virginia. — Code (1887), § 1171.

Wisconsin. — Sanb. B. Anno. Stat. (1889), § 4435.

Wyoming. — Laws (1888), p. 193, § 21.

2. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

Two or more offenses are defined by the statute; one being concurrence in making a statement, another, concurrence in the publication of such statement. See list of statutes cited *supra*, note 1; Cross *v.* Sackett, 6 Abb. Pr. (N. Y. Super. Ct.) 247.

And in People *v.* Cooper, 53 Cal. 647, it was held that a demurrer to an indictment which charged the defendant with the commission of both these offenses should have been sustained for the reason that more than one offense was charged.

3. For Concurring in Vote to Make Illegal Loan.[1]

Form No. 7479.

(*Commencing as in Form No. 5145.*)[2] That heretofore, to wit, on the *twenty-eighth* day of *May*, 1895, *The Smith Banking Company* was a corporation organized under the laws of *North Dakota* for the purpose of carrying on the business of banking, and that the principal place of business of said company was in the county aforesaid. On said day and date *John Doe* was a duly elected and qualified and acting director of said company.

On said day and date the amount of the capital stock then paid in and of which said company was possessed was *fifty thousand* dollars, and the whole amount of the loans and discounts of said banking company was *one hundred and forty-nine thousand* dollars.

On said day and date and in the county aforesaid a meeting of the board of directors of said banking company was held and said *John Doe*, director as aforesaid, was present. A quorum of said board of directors being then and there in attendance, it was then and there voted to loan on said day of the money of said banking company *five thousand* dollars to one *Richard Roe*. In said vote said *John Doe*, with full knowledge[3] of the facts aforesaid, did wilfully concur[4] contrary to (*concluding as in Form No. 5145*).[2]

4. For Divulging Contents of Telegram.[5]

1. *North Dakota.* — Rev. Codes (1895), § 7518. Analogous statutes exist in the following states:

Connecticut. — Gen. Stat. (1888), §§ 1804, 1824.

Georgia. — 2 Code (1895), § 1916.

Illinois. — Myers' Rev. Stat. (1895), p. 162*d*, § 11.

Kansas. — Gen. Stat. (1897), c. 18, §§ 33, 59.

Kentucky. — Barb. & C. Stat. (1894), §§ 585, 598.

Michigan. — How. Anno. Stat. (1882), § 3216.

Minnesota. — Gen. Laws (1897), c. 228, §§ 3, 15.

Montana. — Civ. Code (1895), § 584; Pen. Code (1895), § 999.

New York. — Banks & B. Pen. Code (1882), § 595.

Oklahoma. — Stat. (1893), § 2447.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 314, § 90.

South Carolina. — Laws (1897), p. 463.

South Dakota. — Dak. Rev. Code (1885), p. 1243, § 643.

2. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

3. This allegation is made although every director of a corporation is deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this law. N. Dak. Rev. Codes (1895), § 7532.

4. A director who is present at a meeting of the directors is deemed to have concurred unless he at the time causes, or in writing requires, his dissent therefrom to be entered in the minutes of the directors. N. Dak. Rev. Codes (1895), § 7533.

5. *Nevada.* — Gen. Stat. (1885), § 922. Analogous statutes exist in the following states:

Arizona. — Pen. Code (1887), § 1011.

Arkansas. — Sand. & H. Dig. (1894), § 1908.

California. — Deering's Pen. Code (1885), § 619.

Colorado. — Mills' Anno. Stat. (1891), § 1392.

Florida. — Rev. Stat. (1892), § 2734.

Idaho. — Rev. Stat. (1887), § 7167.

Illinois. — Myers' Rev. Stat. (1895), p. 1471, § 7.

Indiana. — Thornton's Stat. (1897), § 2284.

Form No. 7480.

(*Commencing as in Form No. 1129.*)[1] The said *John Doe* heretofore, to wit, on the *twentieth* day of *December*, 1897, was the secretary of *The Smith Telegraph Company*, a company incorporated under the laws of the state of *Ohio* for the purpose of receiving and transmitting messages by wire, and on said day engaged in said business in the county of *Washoe* and state of *Nevada*.

On said day and date and in the county and state last aforesaid said *John Doe*, secretary, did, as agent of said telegraph company, at its office in said county, receive a telegraph message over the wires of said company from one *John Jones* of *Cleveland*, *Ohio*, directed to one *James Smith* of ———, *Washoe* county, *Nevada*, and said *John Doe* did then and there wilfully and maliciously divulge the contents of said telegraph message to one *Richard Roe*; said *Richard Roe*, as said *John Doe* then well knew, not being then the agent or attorney of said *James Smith* or of said *John Jones*, contrary to (*concluding as in Form No. 1129*).[1]

5. For Embezzlement.[2]

Iowa. — Code (1897), § 2162.
Louisiana. — Rev. Laws (1897), § 921.
Maine. — Rev. Stat. (1883), c. 53, § 1.
Maryland. — Pub. Gen. Laws (1888), § 252.
Michigan. — How. Anno. Stat. (1882), § 3708.
Minnesota. — Stat. (1894), § 6782.
Mississippi. — Anno. Code (1892), § 1301.
Missouri. — Rev. Stat. (1889), § 3861.
Montana. — Pen. Code (1895), § 1065.
Nebraska. —Anno. Comp. Stat. (1891), p. 834, § 6.
New Jersey. — Gen. Stat. (1895), p. 3458, § 14.
New York. — Banks & B. Rev. Stat. (1882), § 641.
North Carolina. — Laws (1889), c. 41, § 1.
North Dakota. — Rev. Codes (1895), § 7584.
Ohio. — Bates' Anno. Stat. (1897), § 3466.
Oklahoma. —Stat. (1893), § 2508.
Oregon — Hill's Anno. Laws (1892), § 2002.
Pennsylvania. — Pepp. & L. Dig. (1894), p. 1332, § 615.
Rhode Island. — Gen. Laws (1896), c. 279, § 44.
Tennessee. — Code (1896), §§ 1837, 1838.
Texas. — Rev. Stat. (1895), Pen. Code, art. 231.
Utah. — Comp. Laws (1888), § 4720.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7335.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4557.

1. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. *Connecticut.* — Laws (1895), c. 109, § 1. Analogous statutes exist in the following states:
Alabama. — Crim. Code (1886), §§ 3796, 3795.
Arizona. — Pen. Code (1887), § 790.
Arkansas. — Sand. & H. Dig. (1894), § 1710.
California. — Deering's Pen. Code (1885), § 506.
Colorado. — Mills' Anno. Stat. (1891), § 1255.
Delaware. — Rev. Stat. (1893), p. 942, c. 153, § 1.
Florida. — Rev. Stat. (1892), § 2459.
Georgia. — Pen. Code (1895), § 188.
Idaho. — Rev. Stat. (1887), § 7066.
Illinois. — Myers' Rev. Stat. (1895), p. 457, par. 76.
Indiana. — Thornton's Stat. (1897), § 2046.
Iowa. — Code (1897), § 4842.
Kansas.—Gen. Stat. (1897), c. 100, § 95.
Kentucky. — Barb. & C. Stat. (1894), § 1202.
Louisiana. — Rev. Laws (1897), § 907.
Maine. — Rev. Stat. (1883), c. 47, § 82.
Maryland. — Pub. Gen. Laws (1888), §§ 74, 75, 93.

Form No. 7481.

[(*Commencing as in Form No. 4937*)][1] that the said *Charles D. Fuller*, at said town of *Hartford*, on the *fourth* day of *September*, 1866, was, and for more than *one* year prior thereto had been, a teller in the *Hartford National Bank*, a corporation then and there duly and legally established, organized and existing under and by virtue of the laws of the *United States* as an incorporated bank, and having a banking-house and a place of business at and in said town of *Hartford*, and did

Massachusetts. — Pub. Stat. (1882), c. 203, § 41.
Michigan. — How. Anno. Stat. (Supp. 1890), § 3208*f*7.
Minnesota. — Stat. (1894), § 6709, art. 2.
Mississippi. — Anno. Code (1892), § 1058.
Missouri. — Rev. Stat. (1889), § 3549.
Montana. — Pen. Code (1895), § 894.
Nebraska. — Anno. Comp. Stat. (1891), p. 1020, § 121.
Nevada. — Gen. Stat. (1885), § 1691.
New Hampshire. — Pub. Stat. (1891), c. 165, § 32.
New Jersey. — Gen. Stat. (1895), p. 1077, § 152.
New Mexico. — Comp. Laws (1884), § 749.
New York. — Banks & B. Rev. Stat. N. Y. (1882), p. 2495, § 59.
North Carolina. — Code (1883), § 1014.
North Dakota. — Rev. Codes (1895), § 7462.
Ohio. — Bates' Anno. Stat. (1897), §§ 3821–85.
Oklahoma. — Stat. (1893), § 2386.
Oregon. — Hill's Anno. Laws (1892), § 1770.
Pennsylvania. — Pepp. & L. Dig. (1894), p. 1190, § 237.
Rhode Island. — Gen. Laws (1896), c. 279, §§ 16, 17.
South Carolina. — Rev. Stat. (1893), Crim. Stat., § 150.
South Dakota. — Dakota Rev. Code (1885), p. 1234, § 597.
Tennessee. — Code (1896), § 6576.
Texas. — Rev. Stat. (1895), Pen. Code, art. 938.
Utah. — Comp. Laws (1888), § 2282, par. 16.
Vermont. — Stat. (1894), § 4950.
Virginia. — Code (1887), § 3716.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7119.
West Virginia. — Code (1891), c. 145, § 19.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4418.
Wyoming. — Laws (1888), p. 193, § 21.

1. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

The words to be supplied in [ ] are not found in the reported case, but should be added to make the precedent complete.

The first count was for theft, and, omitting the formal parts, was as follows: "That heretofore, to wit, on or about the *4th* day of *September*, 1866, at the town of *Hartford* in said county, *Charles D. Tuller*, of said *Hartford*, with force and arms, *ten* bonds of the *United States*, issued by authority of and under the laws of the *United States*, each of the denomination and value of *one thousand* dollars, and bearing interest at the rate of *six* per cent., commonly called *five-twenty* bonds, and numbered respectively *4189*, *4190*, *4191*, *4192*, *4193*, *4194*, *4195*, *4196*, *4197* and *4198*, — *three* notes of the *United States*, issued by authority of and under the laws of the *United States*, each of the denomination and value of *one thousand* dollars, bearing interest at the rate of *seven and three-tenths* per cent., commonly called *seven-thirty* notes, and numbered respectively *59972*, *59973* and *59977*, — *eight* notes of the *United States*, issued by authority of and under the laws of the *United States*, each of the denomination and value of *five hundred* dollars, and bearing interest at the rate of *seven and three-tenths* per cent., commonly called *seven-thirty* notes, and numbered respectively *100139*, *69680*, *69681*, *69682*, *69683*, *69653*, *69654* and *69655*, — *three* notes of the *United States*, issued by the authority of and under the laws of the *United States*, each of the denomination and value of *five hundred* dollars, and bearing interest at the rate of *seven and three-tenths* per cent., commonly called *seven-thirty* notes, and numbered respectively *180654*, *180655* and *85657*, — *two* notes of the *United*

during all the time last aforesaid, by virtue of his said office as teller in said bank, have access to the bills, notes and other choses in action belonging to and being the property of other persons, and by them deposited with said bank, in the said banking-house of said bank, for safe keeping; and did, on or about the *fourth* day of *September*, 1*866*, and while teller of said bank as aforesaid, and while in the employment thereof, fraudulently and feloniously take and purloin from the banking-house of said bank, and secrete, embezzle and appropriate to his own use *ten* other bonds of the *United States* issued by authority of and under the laws of the *United States*, each of the denomination and value of *one thousand* dollars, and bearing interest at the rate of *six* per cent., commonly called *five-twenty* bonds, and numbered respectively *4189*, *4190*, *4191*, *4192*, *4193*, *4194*, *4195*, *4196*, *4197* and *4198* — *three* notes of the *United States*, issued by authority of and under the laws of the *United States*, each of the denomination and value of *one thousand* dollars, bearing interest at the rate of *seven and three-tenths* per cent., commonly called *seven-thirty* notes, and numbered respectively *59972*, *59973* and *59977* — *eight* notes of the *United States*, issued by authority of and under the laws of the *United States*, each of the denomination and value of *five hundred* dollars, and bearing interest at the rate of *seven and three-tenths* per cent., commonly called *seven-thirty* notes, and numbered respectively *100139*, *69680*, *69681*, *69682*, *69683*, *69653*, *69654* and *69655* — *three* notes of the *United States*, issued by authority of and under the laws of the *United States*, each of the denomination and value of *five hundred* dollars, and bearing interest at the rate of *seven and three-tenths* per cent., commonly called *seven-thirty* notes, and numbered respectively

States, issued by authority of and under the laws of the *United States*, each of the denomination and value of *one thousand* dollars, and bearing interest at the rate of *seven and three-tenths* per cent., commonly called *seven-thirty* notes, and numbered respectively *83901* and *83896*, — *two* notes of the *United States*, issued by authority of and under the laws of the *United States*, each of the denomination and value of *one hundred* dollars, bearing interest at the rate of *seven and three-tenths* per cent., commonly called *seven-thirty* notes, and numbered respectively *594843* and *163641*; — all of the value of *twenty thousand and seven hundred* dollars, of the goods and estate of *Loyal Wilcox*, feloniously did steal, take and carry away, against the peace and contrary to the statute in such case made and provided."

The second count was for embezzlement, the material parts of which are set out in Form No. ---- in the text.

Other Precedents. — In Thalheim *v.* State, 38 Fla. 174, the indictment, omitting the formal parts, alleged that the defendant "*Carl Thalheim*, late of the county of *Marion* aforesaid, laborer, on the *first* day of *May*, in the year of our Lord one thousand eight hundred and *ninety-four*, with force and arms, at and in the county of *Marion* aforesaid, did embezzle and fraudulently convert to his own use certain money of the *Anglo-Continental* (late *Ohlendorff's*) *Guano Works*, a corporation created and existing under the laws of the *Empire of Germany*, of which corporation he, the said *Carl Thalheim*, was then and there the servant and agent, without the consent of said corporation, to wit: *eighteen thousand* dollars, of the value of *eighteen thousand* dollars of the money and property of said corporation, a more particular description of which is to the jurors unknown, which then and there came into the possession of him, the said *Carl Thalheim*, and was under his care by nature of his said employment."

For other precedents and forms of indictments of this character see Com. *v.* Pratt, 137 Mass. 99, and the title EMBEZZLEMENT.

180654, *186655* and *85657* — *two* notes of the *United States*, issued by authority of and under the laws of the *United States*, each of the denomination and value of *one thousand* dollars, and bearing interest at the rate of *seven and three-tenths* per cent., commonly called *seven-thirty* notes, and numbered respectively *83901* and *83896* — *two* notes of the *United States*, issued by authority of and under the laws of the *United States*, each of the denomination and value of *one hundred* dollars, bearing interest at the rate of *seven and three-tenths* per cent., commonly called *seven-thirty* notes, and numbered respectively *594843* and *163641*, all of the value of *twenty thousand and seven hundred* dollars, the property and estate of *Loyal Wilcox*, of said *Hartford*, the same having been by him, the said *Wilcox*, deposited with said bank for safe keeping, and then and there being deposited in said banking-house, with intent to defraud and prejudice the said *Loyal Wilcox* and the said bank, against the peace and contrary to the form of the statute in such case made and provided. [Wherefore (*concluding as in Form No. 4937*).][1]

6. For Failing to File Report.[2]

Form No. 7482.[3]

(*Commencing as in Form No. 6615*)[4] that *John Doe*, *Richard Roe*, *James Smith*, *Daniel Webster* and *Abraham Kent* in said county of *Hancock* heretofore, to wit, on the *first* day of *July*, 1*880*, were then,

1. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. *Indiana.* — Thornton's Stat. (1897), §§ 4899, 4900; Horner's Stat. (1896), §§ 3638, 3639.

Analogous statutes exist in the following states:

Alabama. — Pen. Code (1886), § 4159.

Arizona. — Civ. Code (1887), §§ 257, 262.

California. — Statutes (1893), p. 184, § 3.

Connecticut. — Gen. Stat. (1888), §§ 1818, 1819.

Delaware. — Laws (1897), c. 381, § 5.

Kansas. — Gen. Stat. (1897), c. 18, §§ 27, 38, 59.

Kentucky. — Barb. & C. (1894), §§ 593, 598.

Maine. — Freeman's Stat. (Supp. 1895), p. 268, § 1, p. 270, § 3, p. 280, § 2.

Maryland. — Laws (1894), c. 329, § 7*b*.

Massachusetts. — Stat. (1894), c. 317, § 45; Stat. (1895), c. 157.

Michigan. — How. Anno. Stat. (1882), § 4109, p. 1292, § 107.

Missouri. — Rev. Stat. (1889), §§ 7538, 7541.

Montana. — Civ. Code (1895), § 577; Pen. Code (1895), § 999.

Nebraska. — Comp. Stat. (1893), p. 286, §§ 6, 10, p. 632, §§ 3, 5.

Nevada. — Gen. Stat. (1885), §§ 1082, 1167.

New Hampshire. — Pub. Stat. (1891), c. 165, §§ 24, 25.

North Carolina. — Code (1883), § 1693.

North Dakota. — Rev. Codes (1895), § 3158.

Oklahoma. — Stat. (1893), § 1075.

Oregon. — Hill's Anno. Laws (1892), §§ 1998, 1999.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1116, § 43.

Rhode Island. — Gen. Stat. (1896), c. 179, §§ 10, 12.

South Dakota. — Laws (1893), c. 22, § 1.

Texas. — Laws (1897), c. 112, § 7.

3. **Founded on the facts** in State *v.* Hanna, 84 Ind. 183. In that case one director was prosecuted. The indictment failed to allege that the board of directors had not complied with the law. As the statute requires the acts to be done by the board of directors, and no failure on the part of the board was alleged, the court held the indictment insufficient.

and there the sole directors of the *McCordsville Buck Creek Gravel Road Company*, a gravel road company then and there duly organized under and by virtue of the laws of the state of *Indiana*, doing business in said state, and operating and having a gravel road in the county of *Hancock*, in said state, and that said persons then and there composed and constituted the board of directors of said company; that said *John Doe*, *Richard Roe*, *James Smith*, *Daniel Webster* and *Abraham Kent*, being then and there directors and composing the board of directors as aforesaid, did then and there unlawfully, negligently, and wilfully fail, neglect and refuse to make out or cause to be made out a full, true and complete statement of all moneys, rights, credits, property, and assets of every kind, owned or held by said company, together with the amount of its liabilities, showing the amount of capital stock and gross receipts for the preceding year, with the amount paid out for repairs, for improvements, on account of litigation, on account of its officers, and on account of all other expenses, properly classified, and to swear to the same, and to cause a majority of said directors to swear to the same, and to cause the clerk, or secretary, of said board of directors to attest the same, and to file and record the said statement, or the report, in the recorder's office of *Hancock* county, and to record or cause the same to be recorded in the miscellaneous records in said recorder's office, or other proper record in said office for the recording of such statements, or reports, or cause the same all and singular to be done, and did then and there, and on and upon the said *first* day of *May*, 1*881*, still being directors of said company, and still constituting the board of directors as aforesaid, so unlawfully, negligently and wilfully fail, neglect and refuse to prepare, swear to, attest, file and record the same, or to cause the same to be done of all and singular or as required by law, contrary to (*concluding as in Form No. 6615*).[1]

7. For Fraud Relating to Subscription to Stock.[2]

Form No. 7483.

(*Commencing as in Form No. 6683*)[1] that heretofore, to wit, on the *twentieth* day of *December*, 1*897*, *John Doe* was secretary of *The Webster Printing Company*, a corporation organized under and existing by virtue of the laws of *Minnesota*. On said day and date and in the county of *Aitkin* and state of *Minnesota* said *John Doe* did wilfully and unlawfully sign the name of one *John Jones* to a paper entitled and headed in the words following, to wit, "List of the subscribers to the capital stock of *The Webster Printing Company*, with the

1. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. *Minnesota.* — Stat. (1894), § 6761. Analogous statutes exist in the following states:

Arizona. — Pen. Code (1887), § 875.

California. — Deering's Pen. Code (1885), § 557.

Idaho. — Rev. Stat. (1887), § 7114.

Montana. — Pen. Code (1895), § 980.

North Dakota. — Rev. Codes (1895), § 7515.

Oklahoma.—Stat. (1893), § 2444.

South Dakota. — Dak. Pen. Code (1885), § 639.

Utah. — Comp. Laws (1888), § 4683.

amounts subscribed," and said *John Doe* did then and there write opposite to the name of *John Jones*, signed as aforesaid, the words following, to wit, "*Ten* Shares," meaning and intending to indicate and show thereby that said *John Jones* had then and there subscribed for *ten* shares of said company's stock and would pay therefor for each share, as stated in said paper, the sum of *one hundred* dollars lawful money of the United States, although said *John Doe* then well knew said *John Jones* did not intend ever to comply with the terms of said subscription. (*Concluding as in Form No. 6683.*)[1]

8. For Influencing Legislation.[2]

Form No. 7484.

(*Commencing as in Form No. 5152*)[1] that *John Doe* heretofore, to wit, on the *fourth* day of *June*, 1897, in the county and state aforesaid, was president of the *Smith Manufacturing Company*, a corporation organized under the laws of the state of *Florida*; that on said

1. For the formal parts of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. *Florida.* — Laws (1897), p. 72, § 2. The title of this act is "An Act to prevent the use of money for political purposes by corporations."

Statutes Governing Bribery of Legislators — *Alabama.* —Crim. Code (1886), § 3913.

Arizona. — Pen. Code (1887), § 124.

Arkansas. — Sand. & H. Dig. (1894), § 1491.

California. — Deering's Pen. Code (1885), § 85.

Colorado. — Mills' Anno. Stat. (1891), § 364.

Connecticut. — Laws (1895), c. 317, § 2.

Georgia. — Pen. Code (1895), § 268.

Idaho. — Rev. Stat. (1887), § 6412.

Illinois. — Starr & C. Anno. Stat. (1885), p. 763, par. 53.

Indiana. — Thornton's Stat. (1897), § 2122.

Iowa. — Code (1897), § 4875.

Kansas. — Gen. Stat. (1897), c. 100, § 217.

Louisiana. — Rev. Laws (1897), § 860, subs. 2.

Maine.—Freeman's Rev. Stat. (Supp. 1895), c. 122, § 6.

Maryland. — Pub. Gen. Laws (1888), p. 466, § 23.

Massachusetts.—Stat. (1891), c. 349, § 1.

Michigan. — How. Anno Stat. (1882), § 9241.

Minnesota. — Stat. (1894), § 6343.

Mississippi. — Anno. Code (1892), § 1193.

Missouri. — Rev. Stat. (1889), § 3716.

Montana. — Pen. Code (1895), § 164.

Nebraska.— Anno. Comp. Stat. (1891), p. 1031, §§ 175, 176.

Nevada. — Gen. Stat. (1885), § 1685.

New Hampshire. — Pub. Stat. (1891), c. 280, § 20.

New Jersey. — Gen. Stat. (1895), p. 1054, § 24.

New York. — Banks & B. Rev. Stat. (1882), p. 2502, § 9.

North Carolina. — Code (1883), § 2852.

North Dakota. — Rev. Codes (1895), § 6926.

Ohio. — Bates' Anno. Stat. (1897), § 6900.

Oklahoma. — Stat. (1893), § 1958.

Oregon. — Hill's Anno. Laws (1887), § 1828.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1125, § 61.

South Carolina. — Crim. Stat. (1893), § 225.

South Dakota. — Dak. Rev. Code (1885), p. 1154, § 121.

Tennessee. — Code (1896), § 6701.

Texas. — Rev. Stat. Pen. Code (1895), art. 125.

Vermont. — Stat. (1894), § 5085.

Virginia. — Code (1887), § 3744.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7202.

West Virginia. — Code (1891), c. 147, § 4.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4482.

Wyoming. — Rev. Stat. (1887), § 939.

date during the pendency before the house of representatives of the state of *Florida*, at its regular session of 1897, of a certain bill to enable cities and towns to manufacture and distribute gas and electricity, with the purpose of fraudulently and feloniously influencing the act and vote of *Richard Roe*, a member of said house of representatives and on said day representing the county of *Gadsden* as one of the representatives thereof, and to fraudulently induce the said *Richard Roe*, in his official capacity as a member of said house of representatives, to vote against said bill, said *John Doe*, president as aforesaid, and then and there acting for and in behalf of said *Smith Manufacturing Company*, did on the day and date and in the county aforesaid corruptly offer and promise said *Richard Roe*, member as aforesaid, the sum of *five hundred* dollars, contrary to (*concluding as in Form No. 6360*).[1]

9. For Issuing False Certificate of Stock.[2]

Form No. 7485.

(*Commencing as in Form No. 6762.*)[1] that, heretofore, to wit, on the *eighth* day of *January*, 1889, *John Doe* was president and *Richard Roe* secretary of the *Smith Publishing Company*, a corporation organized under the laws of the state of *Illinois*. On said day in said county said *John Doe* and *Richard Roe* did knowingly and designedly issue to said *John Doe four* certain false certificates of ownership, each for the sum of *one hundred* shares of the capital stock of the *Smith Publishing Company* with intent to defraud the said company,[3] contrary to (*concluding as in Form No. 6762*).[1]

1. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. *Illinois.* — Myers' Rev. Stat. (1895), p. 467, par. 119. Analogous statutes exist in the following states:

Arkansas. — Sand. & H. Dig. (1894), § 1604.

Colorado. — Mills' Anno. Stat. (1891), § 1390.

Florida. — Rev. Stat. (1892), §§ 2468, 2469.

Maine.—Rev. Stat. (1883), c. 121, § 10.

Massachusetts.—Stat. (1894), c. 452, § 2.

Michigan. — How. Anno. Stat. (1882), § 9349.

Minnesota. — Stat. (1894), §§ 2836, 6762.

Missouri. — Rev. Stat. (1889), § 3572.

Montana. — Pen. Code (1895), § 981.

New Hampshire. — Pub. Stat. (1891), c. 273, § 12.

New Jersey. — Gen. Stat. (1895), p. 1083, § 189.

North Dakota. — Rev. Codes (1895), § 7425.

Oklahoma. — Stat. (1893), § 2351.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1190, § 238.

Rhode Island. — Gen. Laws (1896), c. 279, § 20.

Tennessee. — Code (1896), § 6585.

Vermont. — Stat. (1894), § 4970.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4436.

Wyoming. — Rev. Stat. (1887), § 1054.

3. The statement of the offense in above form is substantially like one of the counts of the indictment in West *v.* People, 137 Ill. 189. In that case such a count was declared to be sufficient, and also that but one count was necessary. Several counts were set forth in the indictment, one similar to that in the above form, and another the same except that instead of the word "false" the word "fraudulent" was used, and another count the same in all respects save that "simulated" was used instead of "false."

10. For Making False Entries.[1]

IN BOOKS.

Form No. 7486.[2]

(*Commencing as in Form No. 6752.*)[3] The said *John Doe* heretofore, to wit, on the *thirty-first* day of *December*, 1897, was a director, officer, manager and servant of the *Smith Banking Company*, a corporation organized under the laws of the state of *California* for the purpose of transacting a banking business and was engaged in said business on said day in the county aforesaid. On said day and in the town of *Howland Flat*, *Sierra* county, there then and there came, and was under the control and possession of said *John Doe* as manager and director of said company, a certain record known as a note register, which said record was then and there the property of and kept by the said corporation, and the said *John Doe*, while said record was so in his possession and under his control, by virtue of his trust as said officer, then and there, to wit, on the *thirty-first* day of *December*, 1897, with intent in him, the said *John Doe*, to defraud said corporation in the sum of *three thousand* dollars, did wilfully, unlaw-

1. *California.* — Pen. Code (1897), § 563. The offense is not termed in the statute a felony; but it comes under the definition of felony given in Pen. Code (1885), § 17; People *v.* War, 20 Cal. 117.

Analogous statutes exist in the following states:

Alabama. — Crim. Code (1886), § 3819.
Arizona. — Pen. Code (1887), § 881.
Arkansas. — Sand. & H. Dig. (1894), § 1607.
Connecticut. — Laws (1895), c. 109, § 1.
Delaware. — Rev. Stat. (1893), p. 942, c. 153, § 3.
Florida. — Rev. Stat. (1892), § 2467.
Idaho. — Rev. Stat. (1887), § 7120.
Iowa. — Code (1897), § 1623.
Kansas. — Gen. Stat. (1897), c. 100, § 151.
Kentucky. — Barb. & C. Stat. (1894), § 1186.
Louisiana. — Rev. Laws (1897), § 877.
Massachusetts. — Stat. (1885), c. 223.
Michigan. — How. Anno. Stat. (Supp. 1890), § 3208*f*7.
Minnesota. — Stat. (1894), §§ 2520, 6764.
Mississippi. — Anno. Code (1892), § 1108.
Missouri. — Rev. Stat. (1889), § 3643.
Montana. — Pen. Code (1895), § 987.
Nebraska. — Anno. Comp. Stat. (1891), p. 1024, § 135.
Nevada. — Gen. Stat. (1885), § 818.
New Hampshire. — Pub. Stat. (1891), c. 165, § 32.
New Jersey. — Gen. Stat. (1895), p. 1077, § 152.
New Mexico. — Comp. Laws (1884), § 224.
North Dakota. — Rev. Codes (1895), §§ 3249, 7526.
Ohio. — Bates' Anno. Stat. (1897), §§ 3821–85.
Oklahoma. — Laws (1897), c. 4, § 57.
Oregon. — Hill's Anno. Laws (1892), § 1802.
Pennsylvania. — Pepp. & L. Dig. (1894), p. 1190, § 238.
South Dakota. — Laws (1891), c. 27, § 24.
Tennessee. — Code (1896), § 6577.
Utah. — Comp. Laws (1888), §§ 2281, 4889.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4270.
West Virginia. — Code (1891), c. 145, § 21.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4435.
Wyoming. — Laws (1888), p. 193, § 21.

2. An indictment similar to the one given above was declared sufficient in People *v.* Leonard, 103 Cal. 200.

3. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

fully and feloniously make in said record the following false entries, to wit:[1]

Number	Date	Maker	Amount
275	*Dec. 31*, 1897	*Jones*	$*3000*

contrary to (*concluding as in Form No. 6752*).[2]

IN REPORTS.[3]

Form No. 7487.

(Copied from the record in Cochran *v.* U. S., 157 U. S. 286.)[4]

United States of America, }
District of *Colorado.* } ss.

At the *November* term of the *district* court of the United States of

1. Description of False Entry. — The particular entry complained of should be specified and at least the substance of it given. People *v.* Palmer, 53 Cal. 615; People *v.* Leonard, 103 Cal. 200.

2. For the formal parts of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

3. *Federal Statute.* — U. S. Rev. Stat. (1878), § 5209. Analogous statutes exist in the following states:

Arizona. — Pen. Code (1887), § 876.

California. — Deering's Pen. Code (1885), § 558.

Idaho. — Rev. Stat. (1887), § 7115.

Iowa. — Code (1897), § 1887.

Kansas. –Gen. Stat. (1897), c. 18, § 61.

Louisiana. — Rev. Laws (1897), § 877.

Massachusetts. — Pub. Stat. (1894), c. 522, § 101.

Michigan. — How. Anno. Stat. (Supp. 1890), § 3208*f*7.

Minnesota. — Stat. (1894), § 2575.

Missouri. — Rev. Stat. (1889), § 2754.

Montana. — Pen. Code (1895), § 982.

Nebraska. — Anno. Comp. Stat. (1891), p. 95, § 9.

North Dakota. — Rev. Codes (1895), § 7516.

Ohio. — Bates' Anno. Stat. (1897), §§ 3821–85.

Oklahoma. — Stat. (1893), § 2445.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1190, § 238.

South Dakota. — Dak. Pen. Code (1885), § 640; Laws (1891), p. 27, § 24.

Wyoming. — Laws (1888), p. 193, § 21.

For the statutes relating to false entries and reports generally by corporate officers see *supra*, note 1, p. 815.

In U. S. *v.* Berry, 85 Fed. Rep. 208, defendants were indicted under U. S. Rev. Stat., § 5209, for making false entries. The indictment contained fifty-two counts. In the first, third, and every other odd-numbered count of said indictment the defendants were charged jointly with committing the offense of making the false entries in the reports of the association. In the second, fourth, and every other even-numbered count, Charles L. Mosby was charged with committing the offense of making false entries and T. D. Berry with aiding and abetting him therein. One of the even-numbered counts is set out in the report of the case. A demurrer to the twenty-six even-numbered counts was sustained, but overruled as to the twenty-six odd-numbered counts. The even-numbered counts were insufficient in failing to charge the proper intent on the part of the aider and abettor.

4. The original indictment contained twelve counts. The defendants were convicted on the first count — the one set out in the above form. The supreme court of the United States, however, granted a new trial because of error committed by the trial judge in his charge.

America in and for the district of *Colorado*, in the year of our Lord one thousand eight hundred and *ninety-three*, begun and held at the city of *Denver*, within said district, on the *first Tuesday* in *November*, in the year of our Lord one thousand eight hundred and *ninety-three*.

The grand jurors of the United States within and for the district of *Colorado*, good and lawful men, duly selected, impaneled, sworn, and charged, on their oath present that *Robert H. Sayre*, late of said district, on the *thirtieth* day of *September* in the year of our Lord one thousand eight hundred and *ninety-two*, at said district, *William H. Cochran* being then and there president, the said *Robert H. Sayre* being then and their assistant cashier, of a certain national banking association then and there known and designated as the *First National Bank* of *Del Norte*, *Colorado*, which said association had been theretofore created and organized under and by virtue of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and *sixty-four*, which said association was then and there acting and carrying on a banking business in the city of *Del Norte*, in said district, under said act of Congress, and the acts amendatory thereof, did make, in a certain report of the condition of the *First National Bank* at *Del Norte*, in the State of *Colorado*, at the close of business on the *thirtieth* day of *September*, 1892, made to the *Comptroller of the currency* in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain entry under the head of "liabilities" in said report, numbered "*19*," which said entry was then and there in the words and figures following — that is to say, "*19*, liabilities other than those above stated, none"— and which said entry, so as aforesaid made in said report, then and there purported to show and did in substance and effect indicate and declare that said association had no other debt and liability other than those debts and liabilities named and set forth in said report under said head of "liabilities" in said report.

And the jurors aforesaid on their oaths aforesaid do further present that the said entry so made as aforesaid was then and there false in this, that the debts and liabilities named and set forth in said report under the head of "liabilities" in said report did not name and set forth all of the debts and liabilities of said association, as he, the said *Robert H. Sayre*, then and there well knew.

And that the said entry so made as aforesaid was then and there false in this, that the said association was then and there indebted and liable to the *Hanover National Bank* of *New York* city in the sum of *five thousand* dollars, evidenced by a certain promissory note executed by the said *Robert H. Sayre* and *one A. H. Clark* and payment thereof guaranteed by said association to said *Hanover National Bank* of *New York* City, as he, the said *Robert H. Sayre*, then and there well knew.

And said debt and liability of said association to said *Hanover National Bank* of *New York* City was not mentioned and set forth and included in any manner in said report, as the said *Robert H. Sayre* then and there well knew, and that the said false entry was

then and there feloniously made as aforesaid with the felonious intent then and there on the part of him, the said *Robert H. Sayre*, to injure and defraud said association and certain persons to the said jurors unknown, and to deceive any officer of the said association and any agent appointed by the *Comptroller of the Currency* to examine the affairs of said association, and the jurors aforesaid upon their oaths aforesaid do further present that *William H. Cochran*, late of said district, on the *thirtieth* day of *September*, in the year of our Lord one thousand eight hundred and *ninety-two*, in said district, being then and there president of said national banking association as aforesaid, and before the said offense as hereinbefore set forth was committed in the form aforesaid, to wit, on said *thirtieth* day of *September*, A. D. 1*893*, at *Del Norte*, in said district, did unlawfully and feloniously counsel, aid, abet, and procure the said *Robert H. Sayre* to do and commit the said offense and misdemeanor in the manner and form aforesaid. Contrary to the form of the statute of the United States in such case made and provided and against their peace and dignity.

Henry V. Johnson,
United States District Attorney for *Colorado*.

(*Indorsed*) No. *960*.
United States *district* court, district of *Colorado*.
United States vs. *Wm. H. Cochran*.
Aid and abetting the making false entry in report to *Comptroller of Currency*. R. S. 5209.
"A true bill" — *Henry P. Steele*, foreman.
Filed *Nov. 22*, 1*893* — *Francis W. Tupper*, clerk.

11. For Making False Statements.[1]

Form No. 7488.

(*Commencing as in Form No. 6745*)[2] of the crime of making, while an officer of an insurance company doing business in the said state, a false statement for the purpose of obtaining insurance business, which said felony was committed as follows:

1. *Arkansas* — Sand. & H. Dig. Ark. (1894), § 4129. Analogous statutes exist in the following states:
Iowa. — Code (1897), §§ 1739, 1740.
Massachusetts. — Pub. Stat. (1890), c. 522, § 90.
Michigan. — How. Anno. Stat. (Supp. 1890), § 4244*b*.
Minnesota. — Stat. (1894), § 3173.
Tennessee.—Code (1896), §§ 3305, 3317.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 1946*b*, 1946*e*.

2. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

Indorsement upon the indictment was as follows: "*May* sessions, 1*892*. *District* court United States, *eastern* district of *Pennsylvania*.

The United States of America vs. *Nelson F. Evans*. True bill. *Harry W. Jayne*, foreman. Indictment. Misapplication of the funds of a national banking association by an officer thereof; aiding and abetting in the misapplication of the funds of a national banking association by an officer thereof; conspiracy to misapply funds of a national banking association by officers thereof.

Filed *May 17*, 1*892*.
Witnesses: *James Glenworth*," etc.

The said *John Doe* heretofore, to wit, on the *first* day of *December*, 1897, was the treasurer of *The Daniel Webster Fire Insurance Company*, a corporation organized under the laws of *Arkansas* for the purpose of insuring against loss by fire, and on said day and date said company was engaged in said business in said state.

On said date and in the county and state aforesaid *John Doe*, treasurer as aforesaid, did, for the purpose of getting one *Richard Roe* to insure his dwelling-house in *The Daniel Webster Fire Insurance Company*, wilfully and feloniously state to said *Richard Roe* that the assets of said company on said day exceeded its liabilities of all kinds whatsoever by *one hundred thousand* dollars. Said statement was false, as was well known to said *John Doe* when he made said statement, against the peace (*concluding as in Form No. 6745*).[1]

12. For Misapplication of Funds.[2]

INDICTMENT AGAINST AIDER AND ABETTOR.

Form No. 7489.

(Copied from the record in Evans *v.* U. S., 153 U. S. 584.)[3]

In the *District* Court of the United States for the *Eastern* District of *Pennsylvania*. *May* Session, 1892.
Eastern District of *Pennsylvania*, ss.

The United States of America
against
Nelson F. Evans.
} Indictment.

The grand inquest of the United States of America, inquiring in and for the *eastern* district of *Pennsylvania*, upon their respective oaths and affirmations, respectfully do present, that heretofore, to wit, on the *eighth* day of *May*, A. D. 1891, the said *Nelson F. Evans*, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, and fraudulently aid and abet one *Harry H. Kennedy* (the said *Harry H. Kennedy* being then and there cashier of a certain national banking association then and there known and designated as *The Spring Garden National Bank*, in the state of *Pennsylvania*, which said association had been theretofore created and organized under and by virtue of

1. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. *Federal Statute.* — U. S. Rev. Stat. (1878), § 5209. Analogous statutes exist in the following states:

Arizona. — Pen. Code (1887), § 881.

California. — Deering's Pen. Code (1885), § 563.

Idaho. — Rev. Stat. (1887), § 7120.

Michigan. — How. Anno. Stat. (Supp. 1890), § 3208*f*7.

Montana. — Pen. Code (1895), § 987.

Ohio. — Bates' Anno. Stat. (1897), §§ 3821–85.

Oklahoma. — Stat. (1893), § 2454.

Pennsylvania. — Pepp. & L. Dig. (1894), §§ 238, 1190.

Utah. — Comp. Laws (1888), § 2282.

Wyoming. — Laws (1888), p. 193, § 21.

For the statutes relating to embezzlement by corporate officers see note 2, p. 808; also the title EMBEZZLEMENT.

3. There were originally in the indictment one hundred and forty-six counts. The one given above was count number eight and was considered sufficient.

acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at *Philadelphia*, in the said district, under the acts of Congress in such case made and provided), then and there to wilfully misapply a certain large amount of the moneys, funds and credits then and there belonging to the said national banking association for the use, benefit, and advantage of the said *Nelson F. Evans*, then and there with intent in him, the said *Nelson F. Evans*, to injure and defraud the said national banking association — that is to say, the said *Harry H. Kennedy*, late of the district aforesaid, heretofore, to wit, on the day and year aforesaid, in the district aforesaid, and within the jurisdiction of this court, being then and there cashier, as aforesaid, of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently, and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of *seventy-five hundred* dollars, in the manner and by the means following, that is to say, a certain promissory note, dated, to wit, *Philadelphia*, *November 10*, 1*890*, made and drawn by a certain person, to wit, *A. B. Nettleton*, for the sum of, to wit, *seventy-five hundred* dollars, due and payable *March 13*, 1*891*, at the said bank, had been theretofore, to wit, upon the day and year aforesaid, discounted by the said bank, and was then and there overdue and unpaid, and held by the said bank as and for funds and credits, as aforesaid, whereupon the said *Harry H. Kennedy* did then and there, with intent to injure and defraud the said national banking association, knowingly, unlawfully and fraudulently wilfully misapply the same, in that he then and there surrendered and delivered the same to the said *Nelson F. Evans*, without receiving therefor for the said bank the sum of *seventy-five hundred* dollars, or any part thereof; and the said *Nelson F. Evans* did then and there knowingly and unlawfully aid and abet the said *Harry H. Kennedy*, then and there cashier as aforesaid, knowingly, unlawfully and fraudulently, to wilfully misapply the said funds and credits of the said national banking association, as aforesaid, then and there, with intent in him, the said *Nelson F. Evans*, to injure and defraud the said national banking association, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

Robert Ralsten,
Acting U. S. Attorney.

13. For Not Having Shot-firers in Mine.[1]

Form No. 7490.

(Precedent in State *v.* Murlin, 137 Mo. 300.)

[State of *Missouri* against *W. E. Murlin.* } In the *Macon Circuit* Court.][2]

1. *Missouri.* — Laws (1895), p. 226, § 7077.

2. **For the formal parts** of crimina complaints, indictments and informa-

Robert W. Barrow, prosecuting attorney in and for *Macon* county and state of *Missouri*, informs the court that at the county of *Macon* and state of *Missouri*, on the *twenty-seventh* day of *June*, 1895, one *W. E. Murlin* then and there was the agent of the *Kansas & Texas Coal Company*, a corporation, the owner of the mine hereinafter mentioned, and that said *W. E. Murlin* then and there as said agent and as superintendent of the mine hereinafter named, was in charge of, managing and operating mine number *46* of the aforesaid company, and that said mine number *46* then and there was a coal mine, where the coal was removed and taken from its original stratum by blasting off of the solid, and that said *W. E. Murlin* then and there willfully and unlawfully directed, operated, and worked said mine number *46*, then and there willfully and unlawfully having coal blasted off of the solid in said mine and removed therefrom in the various rooms thereof without then and there having and keeping shot-firers employed in said mine to fire all or any shots after the employees, miners, and other persons had retired from said mine, and without having any shot-firers whatever employed in or at work in said mine while so blasting off of the solid as required by the laws and statutes of *Missouri*, in section 7077, of the session acts of 1895, at page 227 thereof, but then and there willfully and unlawfully permitted, directed, and caused the miners in the various rooms of said mine to fire their own shots, while other employees, miners, and persons were still in said mine, in blasting off of the solid as aforesaid against the peace and dignity of the state.

[*Robert W. Barrow*, Prosecuting Attorney.

(*Verification.*)][1]

14. For Obtaining Deposits Under False Pretenses.[2]

tions, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

1. The words to be supplied in [ ] are not found in the reported case, but should be added to complete the precedent.

2. *Massachusetts.* — Pub. Stat. (1882), c. 203, § 59. Analogous statutes exist in the following states:

Alabama. — Crim. Code (1886), § 3811.

Arizona. — Pen. Code (1887), § 829

Arkansas. — Sand. & H. Dig. (1894), § 1573.

California. — Deering's Pen. Code (1885), § 532.

Colorado. — Mills' Anno. Stat. (1891), § 1379.

Connecticut. — Gen. Stat. (1888), § 1581.

Delaware. — Rev. Stat. (1893), p. 967, c. 418, § 1.

Florida. — Rev. Stat. (1892), § 2465.

Georgia. — Pen. Code (1895), § 658.

Idaho. — Rev. Stat. (1887), § 7096.

Illinois. — Myers' Rev. Stat. (1895), c. 38, § 96.

Indiana. — Thornton's Stat. (1897), § 2393.

Iowa. — Code (1897), § 5041.

Kansas. — Gen. Stat. (1897), c. 100, § 101.

Kentucky. — Barb. & C. Stat. (1894), § 1208.

Louisiana. — Rev. Laws (1897), § 813.

Maine. — Rev. Stat. (1883), c. 126, § 1.

Maryland. — Pub. Gen. Laws (1888), p. 486, § 82.

Michigan. — How. Anno. Stat. (1882), § 9161.

Minnesota. — Stat. (1894), § 6712.

Mississippi. — Anno. Code (1892), § 1086.

Missouri. — Rev. Stat. (1889), § 3564.

Montana. — Pen. Code (1895), § 880.

Nebraska. — Anno. Comp. Stat. (1891), p. 1022, § 125.

Form No. 7491.

(Precedent in Com. *v.* Howe, 132 Mass. 251.)[1]

[(*Commencing as in Form No. 6744.*)][2] The jurors for the Commonwealth of *Massachusetts*, on their oaths present that *Sarah E. Howe*, of *Boston* aforesaid, on the *fifth* day of *May*, in the year of our Lord one thousand eight hundred and *seventy-nine*, at *Boston* aforesaid, being a person of evil disposition, and devising and intending by unlawful ways and means to obtain and get into her hands and possession the goods, merchandise, chattels and effects of the honest and good citizens of this Commonwealth, and with intent to cheat and defraud, did then and there, unlawfully, knowingly and designedly, falsely pretend and represent to one *Emily E. Dadman* that theretofore a fund of *fifteen hundred thousand* dollars had been left under a legacy directing that said sum should be used to establish and carry on a charitable institution of deposit for the benefit of single women and widows; that, in pursuance of said direction and by virtue of said legacy and fund, an institution had been theretofore originated, established, lawfully organized and thereafterwards carried on under the name of the *Ladies' Deposit*; that the same then was, and theretofore had been, a benevolent institution for women who had not income enough to support them; that said fund had been left by certain *Quakers* who had thereby founded said institution, which had been supported by means of said fund and other bequests left by *Quakers*; that said *Ladies' Deposit* then had a branch department in said *Boston*, and that said branch department was and theretofore had been similar to those charitable institutions in said *Boston* that support people; that said *Ladies' Deposit* had theretofore paid to all its depositors interest amounting to a sum very many times larger than the principal sum on deposit; that the payment of extraordinarily large rates of interest to deserving needy persons had

Nevada. — Gen. Stat. (1885), § 4683.
New Hampshire. — Pub. Stat. (1891), c. 273, § 1.
New Jersey. — Gen. Stat. (1895), p. 1080, § 171.
New Mexico. — Comp. Laws (1884), § 758.
New York. — Banks & B. Rev. Stat. (1882), p. 2493, § 53.
North Carolina. — Code (1883), § 1025.
North Dakota. — Rev. Codes (1895), § 7489.
Ohio. — Bates' Anno. Stat. (1897), § 6858.
Oklahoma. — Stat. (1893), § 2419.
Oregon. — Hill's Anno. Laws (1892), § 1777.
Pennsylvania. — Pepp. & L. Dig. (1894), p. 1200, § 265.
Rhode Island. — Gen. Laws (1896), c. 279, § 14.
South Carolina. — Rev. Stat. (1893), Crim. Stat. § 163.
South Dakota. — Dak. Rev. Code (1883), p. 1238, § 618.
Tennessee. — Code (1896), § 6568.
Utah. — Comp. Laws (1888), § 4677.
Vermont. — Stat. (1894), § 4960.
Virginia. — Code (1887), § 3722.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7165.
West Virginia. — Code (1891), c. 145, § 23.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4423.
Wyoming. — Rev. Stat. (1887), § 1037.

1. There were several counts. On the count given in above form the defendant was convicted.

2. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

been, by the founders of said institution, declared to be the medium through which the charitable aims of said institutions should be effected, in respect to such deserving needy persons as were unwilling to accept charity, and to be their purpose and object in establishing said *Ladies' Deposit*; that said institution from the date of its origin as aforesaid thereto had never admitted as its depositors any but deserving needy persons from a class confined to single women and widows; that she, said *Howe*, was then and there the acting president of said branch department; that she, said *Howe*, had been connected with said institution since the year eighteen hundred and *fifty-nine*. And the said *Howe* then and there asked and requested said *Dadman* in consideration thereof to pay and deliver to her, said *Howe*, the sum of *six hundred* dollars as and for a deposit to the credit and account of her, said *Dadman*, in said *Ladies' Deposit*. And the said *Dadman*, then and there believing the said false pretences and representations so made as aforesaid by her, the said *Howe*, and being deceived thereby, was induced, by reason of the false pretences and representations so made as aforesaid, to pay and deliver as and for a deposit as aforesaid, and did then and there pay and deliver to the said *Howe*, as and for a deposit as aforesaid, and said *Howe* did then and there receive from her, said *Dadman*, the sum of *six hundred* dollars of the proper moneys, goods, merchandise, chattels and effects of said *Dadman*. And the said *Howe* did then and there receive and obtain the said moneys, goods, merchandise, chattels and effects of the said *Dadman* by means of the false pretences and representations aforesaid, and with intent to cheat and defraud. Whereas, in truth and in fact, said fund had not been left in manner and form aforesaid to be used in manner as aforesaid; and said institution was not originated, established, lawfully organized and carried on in manner and form as aforesaid; and said institution was not a benevolent institution as aforesaid; and said fund was not left by *Quakers* as aforesaid; and said institution was not supported as aforesaid; and said *Ladies' Deposit* did not have a branch department in said *Boston* as aforesaid; and was not similar to said charitable institutions in said *Boston*, in manner and form aforesaid; and said *Ladies' Deposit* had not theretofore paid all its depositors interest in manner and form as aforesaid; and the founders of said institution had not declared the purpose and object of their establishing said *Ladies' Deposit* to be as aforesaid; and had not declared the payment of extraordinarily large rates of interest as aforesaid, to be the medium of effecting the charitable aims of said institution in manner and form as aforesaid; and the persons admitted as depositors to said institution were not confined to single women and widows as aforesaid; and said *Howe* was not then and there the acting president of said branch department, and said *Howe* had not been connected with said institution since the year eighteen hundred and *fifty-nine*, as aforesaid; all of which she, said *Howe*, then and there well knew. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said *Howe*, by means of the false pretences aforesaid, on the said *fifth* day of *May*, in the year of our Lord eighteen hundred and *seventy-nine*, at *Boston* aforesaid, unlawfully, knowingly and designedly, did receive and obtain from said *Dadman* the said

moneys, goods, merchandise, chattels and effects, of the proper moneys, goods, merchandise, chattels and effects of the said *Dadman*, with intent to defraud, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided. [(*Concluding as in Form No. 6744.*)][1]

15. For Obtaining Loan on Forged Certificates.[2]

Form No. 7492.

(Precedent in Com. *v.* Coe, 115 Mass. 482.)[3]

[(*Commencing as in Form No. 6744*) *James A. Coe*, late resident of *Boston*, in the county of *Suffolk* and Commonwealth aforesaid][1] at *Boston*, in said county, on *January 4*, 1873, being a person of an evil disposition and devising and intending by unlawful ways and means to obtain and get into his hands and possession the goods, merchandise, chattels and effects of the honest and good citizens of this Commonwealth, and with intent to cheat and defraud one *John Ferris*, and with the view and intent to effect the loan hereinafter mentioned, did then and there unlawfully, knowingly and designedly falsely pretend and represent to said *John Ferris*, that a certain paper writing and certificate which he said *Coe* then and there had and produced to said *Ferris*, and which was of tenor following, to wit, (*setting out verbatim copy of certificate*),[4] was then and there a good, valid, and genuine certificate of ownership of stock in said company, lawfully and duly issued and signed by said *Lothrop* and *Parker*, and was then and there of the value of *ten thousand* dollars. And the said *Ferris* then and there believing the said false pretences and representations, so made as aforesaid by the said *Coe*; and being deceived thereby was induced, by reason of the false pretences and representations so made as aforesaid, to loan and deliver, and did then and there loan and deliver to the said *Coe*, upon the security and pledge of the said certificate, then and there by said *Coe* delivered to

1. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

The words enclosed by [ ] will not be found in the reported case, but should be added to make the precedent complete.

2. *Massachusetts.* — Pub. Stat. (1882), c. 203, § 59. See also list of analogous statutes cited *supra*, note 2, p. 821.

3. The indictment contained two counts. On the first, the verdict was not guilty. On the second, the one given in the form above, the defendant was convicted.

4. **The certificate referred** to in the text was as follows:

"No. *59*. *Eastern Railroad Company*. *100* shares.

Be it known that *John Ferris* of *Boston* is a proprietor of *one hundred* shares in the capital stock of the *Eastern Railroad Company*, subject to all assessments thereon, and to the provisions of the charter and the by-laws of the corporation, the same being transferable by an assignment thereof in the books of the corporation, or by a conveyance in writing recorded in said books; and when a transfer shall be made or recorded in the books of the corporation and this certificate surrendered, a new certificate or certificates will be issued.

Dated at *Boston* this *third* day of *January*, A. D. 1873

Thornton K. Lothrop, President.

John B. Parker, Treasurer."

(SEAL)

said *Ferris* as such security for said loan, the sum of *seven thousand* dollars, *one* check and order for the payment of money of the value of *seven thousand* dollars, *one* piece of paper of the value of *seven thousand* dollars, of the proper moneys, goods, merchandise, chattels and effects of said *Ferris*. And the said *Coe* did then and there receive and obtain the said moneys, goods, merchandise, chattels and effects of the said *Ferris* as such loan, by means of the false pretences and representations as aforesaid, and with intent to cheat and defraud the said *Ferris* of the same moneys, goods and merchandise, chattels and effects. Whereas in truth and in fact, said writing and certificate was not then and there a good, valid and genuine writing and certificate of ownership of stock in said company, duly and lawfully issued and signed by said *Lothrop* and *Parker*, but was then and there a false, forged and counterfeit writing and certificate, and was not then and there of the value of *ten thousand* dollars, but was then and there of no value, all of which he said *Coe* then and there well knew. And so the jurors aforesaid upon their oaths aforesaid do say that the said *Coe*, by means of the false pretences aforesaid, on the said *fourth* day of *January*, in the year of our Lord eighteen hundred and *seventy-three*, at *Boston* aforesaid, unlawfully, knowingly and designedly did receive and obtain from said *Ferris* the said moneys, goods, merchandise, chattels and effects, of the proper moneys, goods, merchandise, chattels and effects of the said *Ferris*, with intent to defraud him of the same, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided. [(*Concluding as in Form No. 6744.*)] [1]

16. For Obstructing Official Examination of Corporation.[2]

1. See note 1, *supra*, p. 824.

2. *Minnesota.* — Stat. (1894), § 3151. Analogous statutes exist in the following states:

Colorado. — Mills' Anno. Stat. (1891), § 3211.

Kansas. — Gen. Stat. (1897), c. 18, §§ 14, 59.

Kentucky. — Barb. & C. Stat. (1894), § 752.

Maine. — Rev. Stat. (1883), c. 47, §§ 50, 120.

Massachusetts. — Pub. Stat. (1882), c. 116, § 4.

Michigan. — How. Anno. Stat. (Supp. 1890), § 4323*b*3.

Missouri. — Rev. Stat. (1889), § 5805.

Montana. —Civ. Code (1895), § 630; Pen. Code (1895), § 999.

Nevada. — Stat. (1891), p. 163, § 79.

New Hampshire. — Pub. Stat. (1891), c. 167, § 10, c. 168, § 18

New Jersey. — Gen. Stat. (1895), p. 130, § 51.

New York. — Banks & B. Rev. Stat. (1889), p. 1572, § 277, p. 1842, § 7.

North Carolina. — Laws (1887), c. 412, § 3.

North Dakota. — Rev. Codes (1895), § 143.

Ohio. — Bates' Anno. Stat. (1897), §§ 272, 288.

Oregon. — Hills' Anno. Laws (1887), §§ 3572, 3584.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 3464, § 26.

Rhode Island. — Gen. Laws (1896), c. 178, § 41.

South Dakota. — Laws (1895), c. 102, § 2.

Tennessee. — Code (1896), § 3237.

Texas. — Rev. Stat. (1895), §§ 3051, 3052, 4569.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 2806.

West Virginia. — Code (1891), p. 554, § 5.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 1968.

Wyoming. — Rev. Stat. (1887), § 630.

Form No. 7493.

(*Commencing as in Form No. 6620*)[1] of the crime of refusing to appear and testify before the insurance commissioner of the state of *Minnesota*, which said crime was committed as follows:

The said *John Doe*, on the *thirtieth* day of *March*, A. D. 1897, was the treasurer of *The Webster Insurance Company*, a corporation organized under the laws of the state of *Minnesota* for the purpose of insuring property against loss by fire. On said day and date and in the county aforesaid said *John Doe*, treasurer as aforesaid, was personally served with a summons by *Richard Roe*, the duly appointed and acting insurance commissioner of the state of *Minnesota*, to appear and testify before him, the said *Richard Roe*, on the *sixth* day of *April*, A. D. 1897, at *ten* o'clock *A.* M., at number *109 Green* street in the city of ——— and county aforesaid.

Said *John Doe*, on said *sixth* day of *April*, A. D. 1897, was in the city, county and state aforesaid, but he, the said *John Doe*, on the day and date last aforesaid, did wilfully and without any cause whatsoever refuse to appear and testify before said commissioner; contrary to (*concluding as in Form No. 6620*).

17. For Overdrawing Account.[2]

Form No. 7494.

[*Passaic Oyer and Terminer and General Gaol Delivery*, *January* term, A. D. 1852, *Passaic* county, to wit:

The jurors of the state of *New Jersey* for the body of the county of *Passaic*, upon their oath present, that before and at the time of the commission of the misdemeanor hereinafter charged, at *Paterson*, in the county of *Passaic* and state of *New Jersey*, there was an incorporated bank, using the name and style of "*the President, Directors, and Company of the Employes Bank at Paterson*," and incorporated by and organized and existing under and by virtue of certain acts of the legislature of the said state, that is to say, an act entitled "An act to establish the Employes Bank of Paterson, passed on the eleventh day of December, A. D. eighteen hundred and twenty-four," and a supplement thereto entitled "A supplement to the act entitled an act to establish the Employes Bank at Paterson, passed the eleventh day of December, A. D. eighteen hundred and twenty-four," which supplement was passed on the third day of March, A. D. eighteen hundred and thirty-five, and an act entitled "An act to extend the charter of the Employes Bank of Paterson," passed on the second day of March, A. D. eighteen hundred and forty-one; and that, at the time of the com-

1. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. *New Jersey.* — Gen. Stat. (1895), p. 1077, § 152. Analogous statutes exist in the following states:

Arizona. — Pen. Code (1887), § 879.

California. — Deering's Pen. Code (1885), § 561.

Idaho. — Rev. Stat. (1887), § 7118.

Montana. — Pen. Code (1895), § 985.

North Dakota. — Rev. Codes (1895), § 7523.

Oklahoma. — Stat. (1893), § 2452.

Utah. — Comp. Laws (1888), § 4687.

mission of the misdemeanor hereinafter charged][1] *John Doe*, late of the city of *Paterson*, in the county of *Passaic* aforesaid, was, and had been for more than *one* year prior thereto, the cashier of the said incorporated bank. That said *John Doe*, cashier as aforesaid, on the *thirteenth* day of *December*, A. D. 18*50*, and for more than *one* year prior thereto, had and kept an account of his business and dealings with said bank. That on the day and date last aforesaid there was no sum or balance of money due from or owed by said bank to said *John Doe* on account of said business or dealings, or on any account whatever. Said *John Doe*, on the said day and date, well knowing the premises, did unlawfully and knowingly draw from the said bank, on his own account and for his own private use and benefit, *twenty-eight hundred and fifty* dollars, lawful money of the United States, of the money of the said bank, and did thereby unlawfully and knowingly overdraw his account with the said bank for his own private use and benefit,[2] [contrary to the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same.]

Jeremiah Mason,
Prosecutor of *Passaic* County.

18. For Paying Dividend Leaving Funds Insufficient to Meet Liabilities.[3]

Form No. 7495.

(*Commencing as in Form No. 6607.*)[4] that *John Doe* heretofore, to wit, on the *twentieth* day of *December*, 1897, was the president of and a director in *The Smith Banking Company*, a corporation organized and then existing under and by virtue of the laws of the state

1. The words in [ ] are adapted from the indictment set out in State *v.* Stimson, 24 N. J. L. 9.

2. The charging part of the indictment is based on State *v.* Stimson, 24 N. J. L. 478, the indictment in which case was declared to be sufficient.

3. *Tennessee.* — Code (1896), § 2067, 2068. Analogous statutes exist in the following states:

Arizona. — Pen. Code (1887), § 878, par. 1.

Colorado. — Mills' Anno. Stat. (1891), § 2222.

Connecticut.—Gen. Stat. (1888), § 1932.

Georgia. — Pen. Code (1895), § 210.

Idaho. — Rev. Stat. (1887), § 7117, par. 1.

Indiana. — Thornton's Stat. (1897), § 3021.

Iowa.—Code (1897), §§ 1620, 1621, 1888.

Kansas. — Gen. Stat. (1897), c. 18, §§ 37, 59.

Kentucky. — Barb. & C. Stat. (1894), §§ 548, 550.

Maine. — Rev. Stat. (1883), c. 47, § 82, par. 5.

Michigan. — How. Anno. Stat. (1882), § 3387.

Minnesota. — Stat. (1894), § 2793.

Montana. — Pen. Code (1895), § 984, par. 1.

Nebraska. — Anno. Comp. Stat. (1891), p. 95, § 10, p. 529, § 15.

New Hampshire. — Pub. Stat. (1891), c. 163, § 10.

New York. — Banks & B. Rev. Stat. (1882), p. 1406, § 28.

North Dakota. — Rev. Codes (1895), §§ 3240, 3248.

South Dakota. — Laws (1891), c. 27, §§ 13, 15, 23.

Utah. — Comp. Laws (1888), § 2516.

Virginia. — Code (1887), § 1169.

4. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

of *Tennessee*: that on said day the total assets of said banking company were *fifty thousand* dollars, and the total amount of the liabilities of said company on said day, apart from and in addition to the said company's liability to its stockholders on and by reason of their, the said stockholders, owning the shares of said company's capital stock, was *fifty-five thousand* dollars: that on said day the board of directors of said company did vote to pay and did then and there pay to the stockholders of said company a cash dividend of *five* per cent. on the par value of said company's stock, which said dividend, paid as aforesaid, amounted to a large sum of money, to wit, *two thousand five hundred* dollars.

Said *John Doe* on the day and date and in the county aforesaid, knowing the facts aforesaid, did wilfully and unlawfully concur in the vote and participate in the proceedings by which the dividend was paid as aforesaid. Contrary to (*concluding as in Form No. 6607*).[1]

19. For Receiving Commission on Sales.[2]

Form No. 7496.

(*Commencing as in Form No. 6134.*)[1] that *John Doe*, yeoman, of said county, on the *thirty-first* day of *May*, A. D. 1885, was the secretary and general manager of the *Kent Canal Company*, a body corporate then and there duly and legally organized and existing under and by virtue of the laws of the said commonwealth and then and there owning and operating a canal from *Scranton* in said county to the town of ——— in said county.

On said day, at the city of *Scranton* in said county and within the jurisdiction of this court, said *John Doe*, secretary and general manager as aforesaid, did purchase from the *Smith Lumber Company* for said canal company *one million* feet of lumber, and did then and there unlawfully and corruptly accept and receive from said lumber company the sum of *two hundred* dollars, lawful money of the United States, as his, the said *John Doe's*, fee and commission for purchasing said lumber for said canal company from the said lumber company. (*Concluding as in Form No. 6134.*)[1]

20. For Receiving Deposits When Bank is Insolvent.[3]

1. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. *Pennsylvania.* — Pepp. & L. Dig. Pa. (1896), p. 1156, § 140. Analogous statutes exist in the following states:

Alabama. — Crim. Code (1886), § 3826.

Rhode Island. — Gen. Laws (1896), c. 283. § 17.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 1804.

3. *Arizona.* — Pen. Code (1887), § 880. Analogous statutes exist in the following states:

Alabama. — Acts (1893), p. 95, § 1.

California. — Deering's Pen. Code (1885), § 562.

Colorado. — Mills' Anno. Stat. (1891), § 222.

Georgia. — Pen. Code (1895), § 207.

Idaho. — Rev. Stat. (1887), § 7119.

Illinois. — Myers' Rev. Stat. (1895), p. 444, par. 25*c*; Starr & C. Anno. Stat. (1896), p. 1271, § 168.

Indiana. — Thornton's Stat. (1897), § 2055; Horner's Stat. (1896), § 6598.

Form No. 7497.

(*Commencing as in Form No. 6663*)[1] that on the *twenty-sixth* day of *December*, 1897, *John Doe* was the duly elected and acting treasurer of the *Daniel Webster Banking Company* of *Solomonville*, *Graham* county, which said company was on said day a corporation organized under the laws of the *Territory* of *Arizona* for the purpose of carrying on the business of banking, and was on said day in said county engaged in said business; that on the day and date and in the county aforesaid *John Doe*, treasurer as aforesaid, did wilfully, knowingly and unlawfully receive from one *Richard Roe* for deposit with said banking company a large sum of money, to wit, *three thousand* dollars lawful money of the United States, and said money was by said *Richard Roe* then and there deposited in the bank of said *Daniel Webster Banking Company*; that at the time said *John Doe* received said money from said *Richard Roe* as aforesaid he, the said *John Doe*, well knew the said banking company was wholly insolvent in that the liabilities of said bank on said day greatly exceeded the assets and the said bank was not on said day able to meet its obligations. Contrary to (*concluding as in Form No. 6663*).[1]

Iowa. — Code (1897), § 1885.
Kansas. — Gen. Stat. (1897), c. 100, § 104.
Kentucky. — Barb. & C. Stat. (1894), § 597.
Louisiana. — Rev. Laws (1897), § 877.
Michigan. — How. Anno. Stat. (Supp. 1890), § 3208*b*3.
Minnesota. — Stat. (1894), § 6763.
Mississippi. — Anno. Stat. (1892), § 1089
Missouri. — Rev. Stat. (1889), § 3581.
Montana. — Pen. Code (1895), § 986.
Nebraska. — Anno. Comp. Stat. (1893), p. 95, § 13; Comp. Stat. (1897), § 637.
New Mexico. — Laws (1893), c. 29, § 1.
New York. — Banks & B. Pen. Code (1882). § 601.
North Dakota. — Rev. Codes (1895), §§ 3251, 7524.
Oklahoma. — Laws (1897), c. 4, § 45.
Pennsylvania. — Pepp. & L. Dig. (1894), p. 297, § 41.
South Carolina. — 1 Rev. Stat. (1893), § 1460.
South Dakota. — Laws (1891), c. 27, § 26.
Tennessee. — Code (1896), § 6840.
Texas. — Laws (1897), c. 100, § 1.
Utah. — Comp. Laws (1888), § 4688.
Vermont. — Stat. (1894), §§ 4119, 4130.
Virginia. — Acts (1894), c. 210, § 1.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7121.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4541.
Wyoming. — Laws (1888), p. 75, § 7.

For forms of indictments for this offense, when committed by owners or officers of unincorporated or private banks, see *ante*, Forms Nos. 7382 to 7385.

1. For the formal parts of criminal complaints, indictments and informations, generally, consult the title CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

Jurisdiction of the Offense. — This offense not having been provided for by federal statute, the state court has jurisdiction of the offense committed by an officer of a national bank. State *v.* Bardwell, 72 Miss. 535.

Insolvency of the Bank Must be Alleged. — An indictment against a cashier of a national bank charging that he did on a certain day receive from a certain person "a certain sum of money on deposit, then and there knowing and having good reason to believe that said bank was then and there insolvent without then and there or at any other time previously informing said *Jas. Foster* of such insolvent condition of said bank," was held to be insufficient for not alleging the actual insolvency of the bank. State *v.* Bardwell, 72 Miss. 535.

Precedents — *Indictment.* — In Carr *v.* State, 104 Ala. 4, defendant was convicted under the following indictment: "The grand jury of said county charges that before the finding of this indictment, *Hinton E. Carr*, who was at the time the president of the *Tuscumbia Banking Company*, a banking firm en-

21. For Refusing to Permit Stockholder to Inspect Books.[1]

gaged in a banking business, received from *Robert T. Abernathy*, for deposit, *three hundred and fifty-five* dollars, lawful money currency of the United States of America, a more particular description of said money being unknown to the grand jury, and the said *Hinton E. Carr* knew at the time said deposit was received, or had good reason to believe, that said banking firm was in a failing or insolvent condition. And the grand jury of said county further charge that, before the finding of this indictment, *Hinton E. Carr*, who was at the time a member of the firm styled the *Tuscumbia Banking Company*, a partnership composed of *Hinton E. Carr* and *Emma Carr*, which firm or partnership was engaged in the banking business, received for deposit from *Robert T. Abernathy three hundred and fifty-five* dollars, lawful money currency of the United States of America, a more particular description of said money being unknown to the grand jury, and the said *Hinton E. Carr* knew at the time said deposit was received, or had good cause to believe, that the said firm or partnership was in a failing or insolvent condition, against the peace," etc. On appeal, it was said of this indictment that it "is drawn under and pursues the language of the act of December 12, 1892, 'to prevent banks, bankers, firms, corporations or oti er persons from receiving deposits of bank notes, specie money or other thing of value, when in a failing or insolvent condition' and, averring that the defendant received from '*Robert T. Abernathy*, for deposit *three hundred and fifty-five* dollars, lawful money, currency of the United States of America, a more particular description of said money being unknown to the grand jury,' etc. It was not open to the demurrers interposed by the defendant, which proceeded on the grounds that no value was alleged, and that the indictment failed to allege a deposit of money or thing of value within the terms of the statute."

Information. — In Nichols *v.* State, 46 Neb. 717, an information for this offense charged "that *Nichols* being the cashier of the *People's State Bank of Litchfield*, a banking corporation organized under the laws of the state, and doing business in said *Sherman* county, on the *18th* day of *February*, 1895, received a money deposit of $*11* from one *Henry Miller*, the said *People's State Bank of Litchfield* being then and there, to the knowledge of said *Nichols*, insolvent," etc. In this case it was held that the statute was passed in order to prevent an insolvent banking association from borrowing money, that is, receiving money on deposit, becoming debtor therefor; but that the enactment should not be so considered as to render an officer of a banking association guilty of a felony for permitting a debtor of the association to pay his debts thereto, even though the association is, at the time, to the officer's knowledge, insolvent.

Warrant of Arrest. — In Baker *v.* State, 54 Wis. 368, the warrant on which the defendant in the original action was arrested contained the following recitals: "That *Robert A. Baker* did, on the *4th* day of *May*, 1881, at the city of *Fond du Lac* in said county, feloniously accept and receive on deposit, from the said *Nicholas Serese*, the sum of $*125* in money, and of that value, and being the property of the said *Nicholas Serese* and *P. Serese*; and that the said *Robert A. Baker* was then and there engaged in a banking and deposit business, at said city and county of *Fond du Lac*, *Wisconsin*, in *Robert A. Baker's* bank; and that the money aforesaid was accepted and received in said *Robert A. Baker's* bank on deposit by the said *Robert A. Baker*; and that he, the said *Robert A. Baker*, at the time when he took said money on deposit in his said bank, knew, or had good reason to know, that said bank and he, the said *Robert A. Baker*, was unsafe and insolvent; that said bank and said *Robert A. Baker* was in fact then and there insolvent; against the peace," etc.

For warrants of arrest, generally, including the formal parts of the same, consult the title WARRANTS OF ARREST.

1. *Oklahoma.* — Stat. (1893), § 2457. Analogous statutes exist in the following states:

Arizona. — Pen. Code (1887), § 883.

California. — Deering's Pen. Code (1885), § 565.

Colorado. — Mills' Anno. Stat. (1891), § 488.

Idaho. — Rev. Stat. (1887), § 7122.

Kansas. — Gen. Stat. (1897), c. 18, §§ 13, 59.

Kentucky. — Barb. & C. Stat. (1894), §§ 546, 550.

Form No. 7498.

(*Commencing as in Form No. 6694*)[1] that heretofore, to wit, on the *ninth* day of *October*, 1894, the *Smith Manufacturing Company* was a corporation organized under the laws of the Territory of *Oklahoma* and with its principal office in the county of *Canadian*. On said day and date *John Doe* was the duly elected and acting secretary of said corporation.

On said day and date and in the county aforesaid there was under the control and possession of said *John Doe*, secretary as aforesaid, a certain book known as a stock-book, which said book contained a list of the stockholders of said *Smith Manufacturing Company* and was then and there the property of said company.

On said day and date one *Richard Roe* was a stockholder in said company and there stood on the books of the said company in the name of said *Richard Roe three* shares of said company's stock, and on said day said *Richard Roe* was the legal owner of said shares.

On said day and date said *Richard Roe* did present himself at the principal office of said company, then situated in the county of *Canadian*, at *ten* o'clock in the morning of said day, said hour being during the business and office hours of said company, and did then and there lawfully demand of said *John Doe*, secretary as aforesaid, opportunity to inspect the said stock-book of said company then in the custody of *John Doe*, as aforesaid. Then and there *John Doe*, with full knowledge that said *Richard Roe* was at said time a stockholder in said company, did wilfully and unlawfully refuse to give to said *Richard Roe* any opportunity to inspect said stock-book, contrary to (*concluding as in Form No. 6676*).[1]

22. For Soliciting Insurance Without License.[2]

Maryland. — Pub. Gen. Laws (1888), p. 304, § 72.

Montana. — Pen. Code (1895), § 989.

Nebraska.—Anno. Comp. Stat. (1891), p. 632, §§ 2, 5.

Nevada. — Gen. Stat. (1885), § 818.

New Mexico. — Comp. Laws (1884), § 224.

New York. — Banks & B. Rev. Stat. (1882), p. 1771, § 25, p. 1420, § 4.

Rhode Island. — Gen. Laws (1896), c. 178, § 21.

South Dakota. — Dak. Pen. Code (1885), § 652.

Utah. — Comp. Laws (1888), § 4691.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4270.

Wyoming — Laws (1888), p 200, § 49.

1. For the formal parts of criminal complaints, indicments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. *Maine.* — Freeman's Stat. (Supp. 1895), p. 308, § 73. Analogous statutes exist in the following states:

Arizona. — Rev. Stat. (1887), §§ 257, 262.

Arkansas. — Sand. & H. Dig. (1894), §§ 4136, 4138.

California. — Deering's Supp. (1893), § 633.

Colorado. — Mills' Anno. Stat. (1891), § 2216.

Connecticut. — Gen. Stat. (1888), §§ 2930, 2931.

Delaware. — Rev. Stat. (1893), p. 62, c. 23, §§ 1, 4.

Florida. — Rev. Stat. (1892), § 336, par. 5.

Georgia. — Pen. Code (1895). § 599.

Idaho. — Rev. Stat. (1887), § 2759*a*.

Iowa. — Code (1897), § 1725.

Kansas. — Gen. Stat. (1897), c. 74, § 123.

Kentucky. — Barb. & C. Stat. (1894), § 633.

Louisiana. —Rev. Laws (1897), § 1878, subs. 2, 4.

Form No. 7499.[1]

(*Commencing as in Form No. 6770*)[2] at *Camden* in said county of *Knox* on the *thirtieth* day of *December*, in the year of our Lord one thousand eight hundred and *eighty-seven*, did solicit applications for insurance to a certain insurance company, called the *Manufacturers' Accident Indemnity Company* of *the United States* [from one *John Doe*. That said *Erold E. Hosmer* then and there solicited said applications from said *John Doe* in the capacity of agent of said insurance company] without having first received license therefor as provided by law [and without at said time being a duly licensed insurance broker and without being at said time an employee of a duly licensed insurance agent or broker, against the peace of said state and contrary to the form of the statute in such case made and provided.

Second count. And the jurors aforesaid, upon their oaths aforesaid, further present that said *Erold E. Hosmer*, at said *Camden*, on the *thirtieth* day of *December*, in the year of our Lord one thousand eight hundred and *eighty-seven*,] did fraudulently assume to be an agent of a certain insurance company called the *Manufacturers' Accident Indemnity Company* of *the United States*, and thus procured [a risk from one *Richard Roe* for said company and did then and there receive from said *Richard Roe* a large sum of money, to wit, *fifty-five* dollars, in payment of the premium on said risk,] against the peace (*concluding as in Form No. 6770*).[2]

Maryland. — Pub. Gen. Laws (1888), p. 334, § 127.
Massachusetts. — Stat. (1894), c. 522, § 98.
Michigan. — Acts (1893), p. 75, § 1.
Minnesota.—Stat. (1894), §§ 3325, 3335.
Mississippi. — Anno. Code (1892), § 2322.
Missouri. — Rev. Stat. (1889), § 5916.
Montana. — Pol. Code (1895), § 4072.
Nebraska.—Anno. Comp. Stat. (1891), p. 532, §§ 24, 26.
Nevada. — Gen. (1885), § 989.
New Hampshire. — Pub. Stat. (1891), c. 168, §§ 9, 12, 18.
New Jersey. — Gen. Stat. (1895), p. 1745, §§ 8, 9.
New Mexico. — Comp. Laws (1884), §§ 1477, 1480.
New York. — Birds. Rev. Stat. (Supp. 1893), p. 4218, § 50.
North Carolina. — Code (1883), § 3061.
North Dakota. — Rev. Codes (1895), § 3124.
Oklahoma. — Stat. (1893), § 3046.
Oregon. — Hills' Anno. Laws (1892), § 3581.
Pennsylvania. — Pepp. & L. Dig. (1896), p. 1233, §§ 344, 345.
Rhode Island. — Gen. Laws (1896), c. 182, § 18.
South Carolina. — Crim. Stat. (1893), § 491.
South Dakota. — Laws (1890), c. 51, § 36.
Tennessee. — Code (1896), § 3315, 3337.
Texas. — Sayles' Civ. Stat. (1889), §§ 2943, 2943*a*, subs. 2.
Utah. — Comp. Laws (1888), § 2466.
Vermont. — Stat. (1894), § 4193.
Virginia. — Acts (1887), c. 271, § 6.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 2817.
West Virginia. — Code (1891), p. 254, § 11.
Wisconsin. — Sanb. &. B. Anno. Stat. (1889), § 1976.
Wyoming. — Rev. Stat. (1887), § 626.

1. Founded on facts in State *v.* Hosmer, 81 Me. 506. The indictment in that case was declared insufficient for reasons set forth in the opinion of the court. The allegations which the court decided were necessary, and for want of which the indictment was considered defective, have been inserted in the form given in the text.

2. For the formal parts of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

Precedent. — In State *v.* Farmer, 49 Wis. 459, the indictment contained eighteen counts, in each of which it is charged that, at the city of *Fond du Lac*,

23. For Taking Fee for Procuring Loan.[1]

Form No. 7500.

(*Commencing as in Form No. 6136*)[2] that, on the *first* day of *August*, 1*888*, *The Smith Savings Bank* was and from thence to the taking of this inquisition has been, and now is, a corporation created by act of the general assembly of North Carolina, at its regular session held in the year 1*887*, and entitled "An act to incorporate the Smith Savings Bank." On said day and date *John Doe* was the duly elected and acting president of said savings bank. On said day and in the county aforesaid, while acting in behalf of said bank, said *John Doe* did wilfully and unlawfully take and receive the sum of *fifty* dollars, lawful money of the United States, from one *Richard Roe*, as his the said *John Doe's* fee for procuring and obtaining on said day and date from said *The Smith Savings Bank* for said *Richard Roe* a loan for *one* year at *six* per cent. per annum of *five hundred* dollars, lawful money of the United States. Said *fifty* dollars not being paid to said *John Doe* by said *Richard Roe* for the examination of the title of the land upon which said *Richard Roe* gave said savings bank a mortgage as security for said loan, nor was said money paid to said *John Doe* by said *Richard Roe* for services rendered in preparing a conveyance to said savings bank as security for said loan, against the form (*concluding as in Form No. 6136*).[2]

24. For Threatening to Discharge Employee for Being Member of Labor Union.[3]

on the *26th* day of *May*, 1*876*, the defendant did, as the agent of a certain insurance company therein named, "and in behalf of the said company, and for a commission, compensation and consideration received by him for so doing, solicit and effect an insurance in said company, and placed a risk therein for *B. F. Moore* on his building, machinery and stock in the same, known as the *La Belle Wagon Works*, and situated at *Fond du Lac* aforesaid, without first procuring a certificate of authority from the secretary of state of this state so to do, for the said insurance company; and did, on the said day, act and aid in transacting business of insurance of and with the said insurance company in effecting the said insurance above set forth, and in placing the said risk."

Exceptions Should be Negatived.— State *v.* Keen, 34 Me. 500. And this rule applies to the above indictment. State *v.* Hosmer, 81 Me. 506.

1. *North Carolina.* — Laws (1887), c. 412, § 18. Analogous statutes exist in the following states:

Florida. — Rev. Stat. (1892), § 2204.

Indiana. — Thornton's Stat. (1897), § 3006.

Maine. — Rev. Stat. (1883), c. 47, § 105.

Massachusetts. — Pub. Stat. (1882), c. 116, § 22.

New Hampshire. — Pub. Stat. (1891), c. 165, §§ 30, 31.

Rhode Island. — Gen. Laws (1896), c. 178, § 58.

Vermont. — Stat. (1894), §§ 4105, 4130.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), p. 1233, § 15.

2. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

3. *Colorado.* — Laws (1897), c. 50, §§ 1, 2. Analagous statutes exist in the following states:

California. — Deering's Supp. to Codes (1893), p. 1061, § 679.

Illinois. — Myers' Rev. Stat. (1895), p. 540*k*, § 508.

Indiana. — Thornton's Stat. (1897), § 2357.

Massachusetts.—Stat. (1894), c. 508, § 3.

Form No. 7501.

(*Commencing as in Form No. 5972*)[1] that *John Doe* heretofore, to wit, on the *twenty-fourth* day of *December*, 1897, at the city of *Colorado Springs*, in the county and state aforesaid, was the president of the *American Foundry Company*, a corporation organized under the laws of the state of *Colorado*. As such president it was the duty of, and said *John Doe* was on said day authorized by said company to hire and discharge all of the employees of said company.

On said day and date, one *Richard Roe* was in the employ of said company, and said *Richard Roe* was on said day a member of the *Employees' Protective Union*, which said union was on said day in all respects a lawful labor organization.

On said day and in the county and state aforesaid, *John Doe*, president as aforesaid, did wilfully and unlawfully state to said *Richard Roe* that he, the said *John Doe*, would discharge him, the said *Richard Roe*, from the employ of said *American Foundry Company* unless he, the said *Richard Roe*, at once resigned from and left the said *Employees' Protective Union*, contrary to (*concluding as in Form No. 5972*).[1]

25. For Unauthorized Banking.[2]

Form No. 7502.

(*Commencing as in Form No. 6770*)[1] that heretofore, to wit, on the *twenty-third* day of *March*, 1898, at the town of *Augusta*, in the county of *Kennebec*, in the state of *Maine*, *John Doe* was holding an agency

Mississippi. — Anno. Code (1892), § 840.

New Jersey. — Gen. Stat. (1895), p. 1905, §§ 46, 47.

Pennsylvania. — Pepp. & L. Dig. (1897), p. 252, § 21.

1. For the formal parts of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. *Maine*. — Rev. Stat. (1883), c. 47, § 83. Analogous statutes exist in the following states:

Colorado. — Mills' Anno. Stat. (1891), § 528.

Delaware. — Laws (1893), p. 587, c. 71, § 1.

Florida. — Rev. Stat. (1892), § 2173.

Kansas. — Gen. Stat. (1897), c. 18, § 27.

Kentucky. — Barb. & C. Stat. (1894), §§ 600, 602.

Massachusetts. — Stat. (1889), c. 452, §§ 1, 3.

Michigan. — How. Anno. Stat. (1882), § 9340.

Minnesota. — Stat. (1894), § 2583.

Missouri. — Rev. Stat. (1889), § 2764.

Montana. — Pol. Code (1895), § 4061; Pen. Code, § 780.

Nebraska. — Anno. Comp. Stat. (1891), p. 93, §§ 1, 2.

Nevada. — Gen. Stat. (1885), § 1134.

New Hampshire. — Pub. Stat. (1891), c. 163, § 1.

New Jersey. — Gen. Stat. (1895), p. 135, § 70, p. 136, § 77.

New Mexico. — Comp. Laws (1884), § 142.

New York. — Banks & B. Rev. Stat. (1889), p. 1523, § 32, p. 1578, §§ 299, 300.

North Carolina. — Code (1883), § 684.

North Dakota. — Rev. Codes (1895), § 3252.

Oklahoma. — Laws (1897), c. 4, §§ 2, 52.

South Dakota. — Laws (1891), c. 27, § 27.

Tennessee. — Code (1896), § 3220.

Virginia. — Code (1887), § 1181.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2021.

Wyoming. — Laws (1888), p. 197, § 37.

Precedents. — In People *v.* Wells, 8 Mich. 104, the indictment charged, "that *Revillo Wells*, of the city of *Grand Rapids*, on the *second* day of *De-*

for the purpose of receiving, issuing, loaning and putting in circulation as money the bills, notes, orders and other evidences of debt of a certain corporation, not incorporated, in the state of *Maine*, in this, to wit, that on the day and date last aforesaid, at the place last aforesaid, to wit, in the town of *Augusta*, in the county of *Kennebec*, in the state of *Maine*, the said *John Doe* held the agency for the purpose of receiving, issuing, loaning and putting in circulation as money the bills, notes, orders and other evidences of debt of the *Webster Banking Company*, a corporation then not incorporated in the state of *Maine*, but at that time being a corporation legally incorporated and duly organized and existing under and by virtue of the laws of the state of *Ohio* for the purpose of transacting a banking business; against the peace (*concluding as in Form No. 6770*).[1]

26. For Wrongfully Certifying a Check.[2]

Form No. 7503.

(Copied from the record in Potter *v.* U. S., 155 U. S. 438.)[3]

[(*Commencing as in Form No. 6162.*)][1] The jurors for the United States of America within and for the district of *Massachusetts* upon their oath present that *Asa P. Potter*, late of *Boston*, within said district, on the *twenty-third* day of *July*, in the year of our Lord one

cember, in the year of our Lord one thousand eight hundred and *fifty-eight*, at the city of *Grand Rapids*, in the county of *Kent* aforesaid, not being authorized by law to do a regular banking business, and to issue bank bills, did issue a certain draft in the similitude of a bank bill, which said draft was of the tenor following, that is to say:

'[*2*] *Kenosha, Wisconsin,*
Oct. 1st, 1858. [*2*]
Savings and Exchange Bank of Wells,
Grand Rapids, Mich.

Pay to *C. Allen*, or bearer, in current bank notes, *two* dollars on demand.
Wm. A. Wells.

Accepted.
Two. R. Wells, Banker. *Two.*'

against the peace," etc. The defendant was not convicted, the proof showing that he paid out the paper, and it being held that "paying out" was not "issuing" within the meaning of the statute.

In the case of Brown *v.* State, 11 Ohio 276, the indictment contained the following count: "And the jurors aforesaid, on their oaths, do further present, that the said *Wilson A. Brown*, on the *first* day of *March*, in the year eighteen hundred and *forty*, with force and arms, in the county aforesaid, acted as an officer of a bank not incorporated by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Ohio*"; which was considered by the supreme court to be sufficient.

For analogous indictments for making, emitting, passing or circulating change bills see Forms Nos. 5428–5434.

1. For the formal parts of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

2. *Federal Statute.* — U. S. Rev. Stat. Supp. (1891), p. 357, § 13. Analogous statutes exist in the following states:

Kansas. — Gen. Stat. (1897), c. 18, § 60.

Michigan. — How. Anno. Stat. (Supp. 1890), § 3208*b*8.

3. There were originally eighty-eight counts in the indictment. The defendant was convicted on fifteen of the counts. The one set out in the above form was number three and one of those on which the defendant was convicted.

The supreme court held the indictment sufficient, but reversed the judgment of the circuit court, on writ of error, for error of the judge in rejecting and refusing to admit certain evidence.

thousand eight hundred and *ninety-one*, at *Boston* aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the *Maverick National Bank* of *Boston*, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said *Boston*, under and by virtue of the laws of the United States of America; that said *Potter* as such president was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that said *Potter* as such president as aforesaid did then and there, to wit, on said *twenty-third* day of *July*, at *Boston* aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of *twenty-four hundred and fifty* dollars by certain persons, to wit, *Irving A. Evans*, *Austin B. Tobey* and *William S. Bliss*, copartners, then and there doing business under the firm name and style of *Irving A. Evans and Company*, and which said check was then and there of the tenor following, that is to say, (*setting out copy of check*),[1] by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following, that is to say, (*setting out a verbatim copy of the words and figures*);[2] that the said persons, as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid, did not then and there, to wit, at the time said check was so certified by said *Potter*, as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of *twenty-four hundred and fifty* dollars in money, as he, the said *Potter*, then and there well knew, against the peace and dignity of the said United States and contrary to (*concluding as in Form No. 6162*).[3]

27. For Wrongfully Issuing Stock.[4]

1. The check referred to in the indictment was as follows, to wit:

"*Boston, July 23*, 1891. $2450.
No. *54493*.
Maverick National Bank.
Pay to the order of *Hayward & Townsend* $2450, *twenty-four hundred & fifty* dollars.
Irving A. Evans & Co."

Irving A. Evans & Co.

2. The words and figures written across the face of the check referred to in the indictment were as follows, to wit:

"*Maverick National Bank*.
Certified *July 23*, 1891.
Pay only through clearing-house.
A. P. Potter, P."

(Meaning said *Asa P. Potter*, such president as aforesaid.)

"———
Paying Teller."

3. For the formal parts of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

4. *Oregon.* — Laws (1895), p. 112, § 26. Analogous statutes exist in the following states:

Alabama. — Acts (1897), p. 848, § 9.
Colorado. — Laws (1897), c. 23, § 18.
Connecticut. — Laws (1895), p. 535, § 1; p. 536, § 6.
Georgia. — Pen. Code (1895), § 596.
Illinois. — Myers' Rev. Stat. (1895), c. 32, § 83*g*.
Indiana. — Thornton's Stat. (1897), § 4590.
Iowa. — Code (1897), § 1918.
Kentucky. — Barb. & C. (1894), p. 619, § 9.
Minnesota. — Stat. (1894), § 2878.

Form No. 7504.

(*Commencing as in Form No. 4919*)[1] of the crime of, while an officer of a building and loan association incorporated under the laws of the state of *Oregon*, issuing to a person not a resident of the county in which the home office of said association was located or of one of the counties immediately adjacent thereto, stock of said association while such association did not have the certificate of the secretary of state authorizing it to do business, which said crime was committed as follows: Heretofore, to wit, on the *twenty-eighth* day of *May*, 1895, the *Kent Building and Loan Association* was a building and loan association incorporated under the laws of the state of *Oregon*, and the principal place of business and home office of said association was on said day in the county of *Wasco*.

On said day *John Doe* was the duly elected and acting secretary of said association. On said day and date and in the county aforesaid, said *John Doe*, secretary as aforesaid, did knowingly, wilfully and unlawfully issue to one *Richard Roe*, a person not then a resident of said *Wasco* county nor of any county immediately adjacent thereto, *three* shares of stock in said the *Kent Building and Loan Association*, said association, as was well known to said *John Doe*, not on said day and date having the certificate of the secretary of the state of *Oregon* authorizing said association to do business, contrary to (*concluding as in Form No 4919*).[1]

Missouri. — Rev. Stat. (1889), § 2808.
Montana. — Civ. Code (1895), § 820.
Nebraska.—Anno. Comp. Stat. (1893), c. 16, § 148*r*.
North Carolina. — Laws (1893), c. 434, § 2300*h*.
North Dakota. — Rev. Codes (1895), § 3224.
Rhode Island. — Gen. Laws (1896), c. 189, § 9.
South Dakota. — Laws (1893), c. 40, § 36.
Tennessee. — Code (1896), § 2171.
Virginia. — Acts (1894), c. 633, §§ 1, 2.
Washington.—Ballinger's Anno. Code (1897), § 4418.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2014*j*.
Wyoming. — Laws (1891), §§ 2, 86.

1. **For the formal parts** of criminal complaints, indictments and informations, generally, consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

DISBARMENT OF ATTORNEYS.

See the title ATTORNEYS, vol. 1, p. 969.

DISBURSEMENTS.

See the title COSTS, vol. 5, p. 757.

DISCLAIMER.

By John B. Dixon.

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I. In Chancery.[1]

1. **As to disclaimer in chancery** practice, see Story's Eq. Pl., § 839 *et seq.*; Beach's Mod. Eq. Pr. 282; Cooper Eq. Pl. 310; 1 Harr. Ch. Pr. 296.

Must Renounce All Claim.—The disclaimer in chancery must renounce all claim to the subject of the demand made by plaintiff's bill. Accordingly

Form No. 7505.

(2 Harr. Ch. Pr. 401.)[1]

The several Answer and Disclaimer of *Richard Roe*, one of the Defendants to the Bill of Complaint of *John Doe* and *Samuel Short*, Complainants.

This defendant, saving and reserving to himself, now and at all times hereafter, all manner of advantage and benefit of exception that may be had and taken to the many untruths, uncertainties, insufficiencies and imperfections in the said complainants' said bill of complaint contained, for a full and perfect answer thereunto, or to such part thereof as it materially concerns this defendant to make answer unto, he answereth and saith, That he believes that *Leonard A. Ford* did die seised of such estates in ——— and ——— as in the said complainants' said bill are mentioned; and this defendant does believe that the said *Leonard A. Ford* did make such last will and testament in writing, and did thereby create such trusts out of the said ——— estates, and appointed this defendant trustee thereof, in such manner and to such purport and effect, as in the said complainant's said bill for that purpose set forth; and this defendant does believe that the said testator made *Charles Mainjoy, gent.*, executor of his said will; and this defendant does believe that the said *Leonard A. Ford*, soon after making his said will, departed this life, that is to say, on or about the *tenth* day of *May* in the year 18*12*, without revoking or altering his said will, seised of such estates in ——— and ——— as in the said complainants' said bill are set forth: And this defendant further saith, that he was advised that the said trust would be attended with some difficulty, besides expense and loss of time to this defendant; therefore this defendant absolutely refused to intermeddle therewith, or any way concern himself therein: And this defendant denies that he, or any for him, ever entered on the said trust estate, or ever received any of the rents and profits thereof; but this defendant hath been informed and believes the same were received by *Thomas Hart*, of the city of *Leeds*, in the county of *York*, *gent.*, who was employed by the said testator *Leonard A. Ford* in his life-time to receive the rents and profits of the said ——— estate for the said *Leonard A. Ford*, and this defendant doth believe that the said *Thomas Hart* hath received the said rents and profits of the said trust-estate ever since the death of the said testator *Leonard A. Ford*, and still doth continue to receive the same: And this defendant positively denies that the said *Thomas Hart* had any power, authority or direction from this defendant to receive all or any part of the rents and profits of the said trust-estate, or that he ever accounted with this defendant for the same: And this defendant is very desirous and ready to be discharged from his said trust, and to do any act for that

when defendants pleaded that "they are not the heirs-at-law of *Gerard Cowman*, deceased, in said bill mentioned, and they therefore pray,' etc., it was held not to be a disclaimer. Bentley *v.* Cowman, 6 Gill & J. (Md.) 152. See also Worthington *v.* Lee 2 Bland (Md.) 678.

Precedent. — See also substance of disclaimer by trustee in Goodhue *v.* Barnwell, Rice Eq. (S. Car.) 198.

1. **Other Forms.** — Substantially this same form is set out in 2 Rev. Swift's Dig. 784; Barb. Ch. Pr. (1842), 23.

purpose as this honourable court shall direct, this defendant being indemnified in so doing, and having his costs. And this defendant further saith, that as to so much of the said bill as seeks a discovery of this defendant's title to the lands in ——— this defendant saith, that he doth not know that he this defendant to his knowledge or belief ever had, nor did he claim or pretend to have, nor doth he now claim or pretend to have, any right, title or interest of, in or to the said estate in ——— in the said complainants' bill set forth, or any part thereof; and this defendant doth disclaim all right, title and interest to the estate in ——— in the complainants' said bill mentioned, and every part thereof. And this defendant doth deny all manner of unlawful combination and confederacy unjustly charged against him in and by the said complainants' said bill of complaint; without that, that any other matter or thing in the said complainants' said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered unto, confessed or avoided, traversed or denied, is true: All which matters and things this defendant is ready to aver, maintain and prove, as this honourable court shall award; and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

II. In Contested Election.

Form No. 7506.[1]

State of *Kansas*, *Linn* County. } In the Court *for Contested Elections* in and for the said County and State.

John Doe, contestor, against *Richard Roe*, contestee. } Answer.

The contestee, in answer to the statement of the contestor, says that he lays no claim to the office of *County Treasurer* for *Linn* county, and hereby disclaims all right and title thereto.

Richard Roe,
by *John Brown*, his Attorney.

III. In Patent Cases.

1. Before Issue on Interference.

Form No. 7507.

(U. S. Pat. Office Rules of Practice (1897), p. 78.)

John Doe vs. *Richard Roe.* } Before the examiner of interferences.

Subject-matter: *Sewing-machines.*

1. Kan. Gen. Stat. (1897), c. 53, § 17, provides that when any contestee in a contested county election shall offer and file an answer stating that he lays no claim to the office, and shall pay all costs, the contestant shall be declared the holder of the office, and further proceedings stayed.

To the Commissioner of Patents:

Sir: In the matter of the interference above noted, under the provisions of and for the purpose set forth in Rules 35 and 47, I disclaim (*set forth the matter as given in declaration of interference*), as I am not the first inventor thereof, and I herewith transmit an amendment to my application filed *May 1*, 1896 (serial number *587,923*), for the purpose of having the above disclaimer embodied as part of my specification.

Signed at *Leominster*, in the county of *Worcester*, in the state of *Massachusetts*, this *fifteenth* day of *June*, 1898.

Witnesses: *John Doe.*

Samuel Short.

William West.

2. After Issue.

a. Generally.

Form No. 7508.

(U. S. Pat. Office Rules of Practice (1897), p. 78.)

To the Commissioner of Patents:

Your petitioner, *John Doe*, a citizen of the United States, residing at *Leominster* in the county of *Worcester*, and state of *Massachusetts*, represents that in the matter of a certain improvement in *printing-presses*, for which letters patent of the United States No. *353,787* were granted to *Richard Roe* on the *twelfth* day of *June*, 1898, he is (*Here state the exact interest of the disclaimant; if assignee, set out liber and page where assignment is recorded*), and that he has reason to believe that through inadvertence (or *accident* or *mistake*) the specification and claim of said letters patent are too broad, including that of which said patentee was not the first inventor.[1] Your petitioner, therefore, hereby enters this disclaimer to that part of the claim in said specification which is in the following words, to wit:

"I also claim the sleeves A B, having each a friction-cam C, and connected, respectively, by means of chains or cords K L and M N, with an oscillatory lever, to operate substantially as herein shown and described."

Witness: *John Doe.*

Samuel Short.

b. On Reissue.

Form No. 7509.

(Precedent in Union Metallic Cartridge Co. *v.* U. S. Cartridge Co., 112 U. S. 634.)

To the Honorable the Commissioner of Patents:

Whereas reissued letters patent of the United States were, on the *ninth* day of *May*, A. D. 1865, granted to *Ethan Allen*, of *Worcester* in the county of *Worcester*, and State of *Massachusetts*, numbered *1948*;

1. **Claim Too Broad.** — U. S. Rev. Stat. (1878), § 4917, provides that when by inadvertence, accident or mistake, without fraudulent intent, a patentee has claimed more than that of which he was the first inventor, a disclaimer may be filed either by the original patentee or any of his assignees.

and whereas the *Union Metallic Cartridge Company*, of *Bridgeport*, State of *Connecticut*, are now the sole owners of said reissued letters patent; and whereas, *Sarah E. Allen*, of said *Worcester*, as the executrix of the goods and estate of said *Ethan Allen*, is the sole owner of any extended term of said letters patent which may be granted: Now, therefore, the *Union Metallic Cartridge Company* and *Sarah E. Allen*, executrix, as aforesaid, respectfully show to the Honorable Commissioner of Patents, that, through inadvertence, accident, or mistake,[1] the words "or that may be carried against the die D by similar mechanism to F and H," were inserted in the descriptive part of said reissued letters patent No. *1948*, which words were not in the descriptive part of the original letters patent of said *Ethan Allen*; and thereupon your petitioners disclaim the said movable die E (called a bunter) as being of the invention of said *Ethan Allen*, thus leaving the description of said die E the same as shown in the original letters patent and the drawings thereof: And whereas the said reissued letters patent numbered *1948*, in the descriptive part thereof, contain the words "or in an inclined tube," which words are not found in the descriptive part of the original letters patent of said *Ethan Allen*, but said words were introduced into the specification of said reissued letters patent by inadvertence, accident, or mistake, your petitioners disclaim said inclined tube as being of the invention of said *Ethan Allen*. This disclaimer is absolute, and is filed as an additional disclaimer to that filed *February 4*, A. D. 1874, in which certain reservations were made.

Union Metallic Cartridge Co.
M. Hartley, President.
Sarah E. Allen, Executrix.

New York, February 9, 1874.

IV. In Replevin.

Form No. 7510.[2]

John Doe vs. *Richard Roe.* } Court *of Common Pleas, New Haven* County, *September* Term, 1897.

NOTICE.

And now comes the defendant and files with his plea herein a notice that he disclaims all right to all and singular the goods and chattels replevied herein, to wit: *one* bay horse, *one* Goddard buggy and *one* Jersey bull.

James Jones, Attorney for Defendant.

See also Silsby *v.* Foote, 14 How. (U. S.) 218; O'Reilly *v.* Morse, 15 How. (U. S.) 121; Seymour *v.* McCormick, 19 How. (U. S.) 96; Wyeth *v.* Stone, 1 Story (U. S.) 294.

1. See *supra*, note 1, p. 841.

2. Conn. Gen. Stat. (1888), § 1330, provides that the defendant may file with his plea in replevin a notice that he disclaims all right to the property; in which case, if judgment is in his favor, he shall not be entitled to a judgment of return. In Sander *v.* Goldsmith, 41 Conn. 578, it was held that it rested in the discretion of the court to determine when a disclaimer should be filed, and that there was no error in allowing it to be done after a general denial had been filed and the evidence was all in.

V. In Suits Involving Title to Realty.

1. Ejectment.[1]

a. As to Entire Premises.[2]

Form No. 7511.

(Precedent in Wilkins *v.* Tourtellott, 42 Kan. 178.)

[State of *Kansas*, *Wyandotte* County. } ss. In the *District* Court in and for the County and State aforesaid.

George W. Tourtellott and George P. Allcutt, plaintiffs,
against
Charles Wilkins, *Nicholas McAlpine*, *James M. Mason and Annie Mason*, defendants.

Separate Answer of *Annie Mason.*

And now comes the defendant *Annie Mason* and for her separate answer to plaintiffs' petition herein says:][3]

1. That she is not in possession of said premises mentioned in said plaintiffs' petition under any claim in her own right, but only as a member of the family of the said defendant *James M. Mason*, and

1. For statutes relating to disclaimer in ejectment suits, either as to the whole or a part of the premises, see as follows, to wit:

Alabama. — Civ. Code (1886), § 2699.

Colorado. — Mills' Anno. Code (1896), § 268.

Georgia. — 2 Code (1895), § 5003.

Maryland. — Pub. Gen. Laws (1888), art. 75, § 69.

New Jersey. — Gen. Stat. (1895), p. 1284, § 22.

Vermont. — Stat. (1894), § 1489.

Repugnant Pleas. — Pleas of not guilty and of adverse possession are repugnant to, and inconsistent with, a plea or suggestion of disclaimer, and going to trial under the first mentioned pleas operates as a waiver of the plea of disclaimer. Crosby *v.* Pridgen, 76 Ala. 385.

2. Precedents. — In Doe *v.* Butler, 6 Ga. 88, the defendant filed the following pleas:

"And now, at this term, comes the defendant, *James M. Butler*, in his proper person, the force and injury when, etc., and says that he is not guilty of the said trespasses in ejectment, as above laid to his charge, and of this he puts himself upon the country.

And for further plea in this behalf, the said *James M. Butler* says, that at the time of the commencement of the aforesaid action in this behalf, against him, he was not in possession of the said premises, in the said plaintiff's declaration mentioned, or any part thereof, nor did he then or now claim any right, title, interest, property or possession of, in or to the said premises, but that the said premises are the property of, and claimed and held, by one *John Bailey*, of the County of *McIntosh*, in the State of *Georgia*; and further, that the said *James M. Butler* disclaims all right, title, interest, possession, property, claim or demand of, in or to the said within mentioned premises, or any part thereof; and of these several matters, he puts himself upon the country."

In speaking of this plea, the court said that the general issue in ejectment, in *Georgia*, denies the defendant's possession as well as the plaintiff's title, and that it was therefore not necessary that the defendant should have pleaded specially that he was not in the possession of the premises in dispute at the time the suit was commenced, and yet that it was not competent for the plaintiff to demur to the plea.

See also a form in Kansas Pac. R. Co. *v.* McBratney, 10 Kan. 415, 12 Kan. 12.

3. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

under his direction and control, without any voluntary act of her own; that in her own right she sets up no right, claim, or title, or demand to the said premises, save and except that which behooves her and is proper as the wife of the said *James M. Mason*, specially disclaiming any other right, title or interest therein; that whenever the court renders a decree against the said *James M. Mason*, or a judgment herein for possession of said premises, and he departs therefrom, so she will do likewise.

2. That except as above stated, said defendant *Annie Mason* says that she denies each and every allegation in said petition contained.

3. Said defendant further says that she denies that she is a proper party to this suit.

4. Said defendant denies that she is a necessary party thereto, and prays the court that the said action be dismissed as to her, and she recover her costs in this behalf expended of and from the said plaintiffs.

[*Jefferson Brumback*, Attorney for *Annie Mason*.][1]

Form No. 7512.[2]

New Jersey Supreme Court.

John Doe against *Richard Roe.* } In Ejectment.

And the said defendant, by *Jeremiah Mason*, his attorney, comes and disclaims all right, title, interest or possession in or to the lands and premises mentioned and described in the plaintiff's declaration, filed in the above entitled cause.

Jeremiah Mason, Attorney for Defendant.

State of *New Jersey*, *Bergen* County. } ss.

Richard Roe being duly sworn on oath says, that he is the defendant in the above entitled cause, and that at the time of the commencement of said action he was not in possession of the lands and premises mentioned and described in the plaintiff's declaration nor any part thereof, either actual or otherwise, and further says that the disclaimer by him above pleaded is true.

(*Signature and jurat as in Form No. 858.*)

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. *New Jersey.*—Gen. Stat. (1895), p. 1284, § 22. This statute provides that any person made a defendant, who is not in actual possession of the premises at the commencement of the action, may appear at any time before the time for pleading has expired and disclaim all right or title in or to the premises, and thereupon such disclaimer, if allowed by the court or a judge, shall be entered on the record, etc.

Notice of application to plead a disclaimer under this section may be as follows, to wit:

(*Title of court and cause as in Form No. 7512.*)

"To *Joseph Story*, Esq., Attorney for Plaintiff.

You will please take notice that the undersigned will apply to his Honor *John Marshall*, Esq., chief justice, at *the court-house* in the city of *Trenton*, in *Mercer* county, on *Monday*, the *fifth* day of *September next*, at *nine* o'clock in the *fore*noon or as soon thereafter as counsel can be heard for the allowance

b. As to Part of Premises.[1]

Form No. 7513.

(Precedent in Callan *v.* McDaniel, 72 Ala. 98.)[2]

[(*Caption as in Form No. 1316.*)][3]

The defendant says he is not guilty of the matters alleged in plaintiffs' complaint, except as hereinafter stated, to-wit: for further plea, the defendant says, that he is not now, nor was he at the commencement of this suit, in the possession of the lands described in said complaint, except about *twenty-seven* (*27*) acres, to-wit: the house and lot on which he resides, and about *twenty-six* (*26*) acres of bottom lands, which the defendant has cleared and put in cultivation on said lands since the *1st* day of *March*, 1*878*, under and by virtue of a lease in writing made to the defendant by plaintiffs' lessor; the defendant disclaims the possession of any part of said lands mentioned in said complaint, at and before the commencement of this suit, except that part of said lands stated in this plea.

[(*Signature of defendant.*)][3]

Form No. 7514.

(Precedent in Meskimen *v.* Day, 35 Kan. 47.)[4]

[(*Caption as in Form No. 1325.*)][3]

Now comes the defendant, and for answer to the petition of the plaintiffs says, that the plaintiffs have not and had not at the commencement of the action, any legal or equitable estate in, nor are or were they or either of them entitled to the possession of the following bounded and described part of the real estate described in the petition in manner and form as therein set forth, to wit: Beginning at the northeast corner of the southeast quarter of section *thirty-three*, in township *seven* south, of range *eleven* east, and running

of a disclaimer on the part of the defendant, *Richard Roe*, of all right, title or possession in or to the said premises in plaintiff's declaration mentioned, and the entry of said disclaimer in the records, and for judgment for his costs in said action, according to the statute in such case made and provided.

Yours, etc.,
Jeremiah Mason,
Attorney for Defendant.

Dated *August 25*, 1*898*."

The rule allowing disclaimer may be as follows, to wit:

(*Title of court and cause as in Form No. 7512.*)

"The above cause being opened to the chief justice, and it appearing that notice has been given to the attorney of the plaintiff, that application will be made to said chief justice for the allowance of a disclaimer on the part of defendant and for the entry of the same in the records, and for judgment for his costs; and the attorneys of the respective parties being present, and the court having duly considered the matter, it is, on this *fifth* day of *September*, 1*898*, ordered, that said disclaimer be allowed, and entered on the records, and that the said defendant recover his costs, to be taxed against said plaintiff.

On motion of *Jeremiah Mason*,
Attorney for Defendant.

Let this rule be entered on the minutes.

John Marshall, Chief Justice."

1. **Precedent.**—See also a precedent in Buxbaum *v.* McCorley, 99 Ala. 537.

2. This disclaimer was held sufficient under the *Alabama* Code. See also note 1, p. 843, *supra*.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. Consult note 1, p. 843, *supra*.

thence west *ten* rods, thence south *thirty-two* rods, thence west *seventy* rods, thence south *forty-eight* rods, thence east *eighty* rods, and thence north *eighty* rods to the place of beginning, containing *twenty-six* acres of land, more or less, all in *Pottawatomie* county, state of *Kansas*; that the defendant is and was the legal and equitable owner in fee simple of all the real estate above described, and in the possession and entitled to the possession thereof, and that he disclaims all right, title and interest in or to the residue of the real estate described in the petition, and did not and does not keep the plaintiffs out of the possession of the same.

[(*Signature of attorney.*)][1]

Form No. 7515.

(Precedent in Greeley *v.* Thomas, 56 Pa. St. 35.)

[*Oliver Thomas* against *N. B. Greeley*, *Myron Wickwer* and *J. Bemis.* } In the Court *of Common Pleas* of *Erie* County. Of *October* Term, 1867. No. *39.*

And the said defendant *J. Bemis*, as to the part of the premises named in said writ which is embraced in the following description (*Here describe the part claimed*), pleads not guilty.][2]

And for further plea in this behalf, he takes defense for and to the following described lot or piece of land, or so much thereof as is included in the plaintiff's writ, to wit: All that certain piece or parcel of land situated in *Wayne* township, bounded and described as follows, to wit: On the north by claim of *Barnes Greeley* and land deeded by *John Reynolds* to *Ezra York*; on the east by land of *York* and land deeded by *John Reynolds* to *O. F. King* and *D. Jackman*; on the south by Donation Lot No. *2101*; and on the west by Donation Lot No. *2067*, and containing *56* acres of land, more or less, and is part of Donation Lot No. *2100.* Of the above-described piece of land the said defendant *Bemis* claims to be the exclusive owner, and any and all other land included in the plaintiff's writ, he, the said *Bemis*, disclaims having any title in or to, or the possession of the same or any part thereof, and takes defense for the land included in the above description, and claims no other, and this [the said *Bemis* is ready to verify.

Wherefore he prays judgment if the said *Oliver Thomas* ought to have or maintain his aforesaid action thereof against him, etc.

J. Bemis.

J. C. Marshall, Attorney for *J. Bemis.*][2]

Form No. 7516.

(Precedent in Wetmore *v.* Rymer, 169 U. S. 123.)

(*Commencement as in Form No. 5018.*) And now comes the defendant, *David Rymer*, and for plea to plaintiff's declaration says that he

1. The matter to be supplied within [ ] will not be found in the reported case.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

is not in possession of and does not claim and has not entered upon or been in possession of or claimed any part of the lands in said declaration described, except the following described lands, to wit: (*describing lands*); and as to all the lands except those herein described, this defendant here and now disclaims any and all interest, right or title.

And for further plea in this behalf said defendant says that as to the said (*describing lands to which no disclaimer was made*), he is not guilty in manner and form as the plaintiffs in their said declaration have alleged; and of this he puts himself upon the country (*concluding as in Form No. 5018*).

2. Partition.

Form No. 7517.[1]

(*Title of court and cause as in Form No. 1323.*)

The defendant, by way of disclaimer, alleges:

That he disclaims any estate or interest in the real estate described in plaintiff's complaint, and that he is not in possession thereof.[2]

Richard Roe.

3. Suit to Quiet Title.[3]

Form No. 7518.[4]

(*Caption as in Form No. 1324.*)

The defendant says: That he disclaims having any right, title or interest, adverse to the plaintiff, in and to any of the real estate mentioned and described in the plaintiff's petition.

Wherefore he, the said defendant, prays to be dismissed with his costs.

(*Signature of party.*)

Form No. 7519.[5]

Commonwealth of *Massachusetts.*

Supreme Judicial Court.

Henry H. Gurney et als., petitioner,
vs.
Mary Waldron et als., respondent.

1. *Indiana.* — Horner's Stat. (1896), § 1072.

2. **Must be Absolute and Unqualified.** — In De Uprey *v.* De Uprey, 27 Cal. 329, it was held that the disclaimer must be absolute and unqualified and that the defendant improperly disclaimed all interest in the land, except such as he might have under the homestead law.

See also Mignon *v.* Brinson, 74 Tex. 19.

3. For statutes relating to disclaimer in suits to quiet title, see as follows, to wit:

California. — Code Civ. Proc. (1897), § 739.

Colorado. — Mills' Anno. Code (1896), § 256.

Idaho. — Rev. Stat. (1887), § 4539.

Indiana. — Horner's Stat. (1896), § 1072.

Iowa. — Code (1897), § 4225.

Minnesota. — Stat. (1894), § 5819.

Montana. — Code Civ. Proc. (1895), § 1311.

Nevada. — Gen. Stat. (1885), § 3279.

North Dakota. — Rev. Codes (1895), § 5905.

Utah. — Rev. Stat. (1898), § 3512.

Wisconsin. — Stat. (1898), § 3186.

4. *Iowa.* — Code (1897), § 4225. Consult also note 3, p. 847, *supra*.

5. This form is copied from the record

Answer of *Margaret Taffe* by *H. H. Mather* her Guardian *ad litem*

And now comes the said *Margaret Taffe* by *Henry H. Mather* her guardian *ad litem*, after the overruling of the demurrer filed by him, and for answer says that she is seized in fee-simple of an undivided half of a certain parcel of land with the buildings thereon, situate in that part of *Newton* called *West Newton*, bounded and described as follows, viz: Beginning at the easterly corner of the premises on *River* street at land now or late of the heirs of *Eliza Farnum* and running north-westerly by said *River* street *one hundred and forty-six and ninety-five one-hundredths* feet to land claimed to be owned in severalty by *Ann McLaughlin*; then running south-westerly by said land of *Ann McLaughlin one hundred and ninety-six and three-tenths* feet; thence running north-westerly by said *McLaughlin's* land *fifty-five and twenty-five one-hundredths* feet; thence running in the same direction by land claimed to be owned in severalty by *Mary Waldron twelve and seven-tenths* feet; thence running south-westerly in a straight line *one hundred twenty-eight and four-tenths* feet to the northerly corner of land claimed to be owned in severalty by said *Mary Waldron*; thence running south-easterly by said land of *Mary Waldron forty and three-tenths* feet to the land claimed to be owned in severalty by *Bridget Wright*; thence turning and running a little north of east *twenty-eight and five-tenths* feet by said land of *Bridget Wright*; thence running in nearly or quite the same direction by land now or late of *Farnum's* heirs north about *eighty* degrees east *three hundred thirty-three* feet, more or less, to the point of beginning. Said premises being the greater portion of the land described in the petition.

And this respondent further says that *Oscar F. Lucas* is supposed to be the owner of the other undivided half of the premises above described, said *Lucas* and said *Margaret Taffe* being tenants in common of the parcel of land and buildings above described; and she disclaims all right and title adverse to the petitioners, or any of them, in the residue of the premises described in said petition, claiming to own only the undivided half hereinbefore mentioned of the land and buildings hereinbefore described by metes and bounds.

By *H. H. Mather*, Guardian *ad litem* of *Margaret Taffe*.

4. Trespass Quare Clausum Fregit.[1]

Form No. 7520.

(2 Chit. Pl. (3d. Am. ed.) 570; Tillingh. F. 512.)

(*Title of court and cause as in Form No. 2228.*)

And the said *Richard Roe*, by *Jeremiah Mason*, his attorney, comes and defends the force and injury, when, etc., and says, that the said

in Gurney *v.* Waldron, 137 Mass. 376. Consult statutes cited *supra*, note 3, p. 847.

1. For statutes relating to disclaimer in actions of trespass *quare clausum fregit*, see as follows, to wit:

Florida. — Rev. Stat. (1892), § 1071.

Maine. — Rev. Stat. (1883), c. 82, § 24.

Mississippi. — Anno. Code (1892), § 691.

North Carolina. — Code Civ. Proc. (1891), § 577.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 2022, § 1.

John Doe ought not to have or maintain his aforesaid action thereof against him. Because he says that he the said *Richard Roe*, at the said times when the aforesaid force and injury were committed had not, nor claimed to have, nor hath he, nor doth he now claim to have, but disavoweth and disclaimeth to have any title or interest in the said closes in which the aforesaid force and injury were committed, and the said *Richard Roe* further saith that the said cattle in the said declaration mentioned, a little before any of the said times when the aforesaid force and injury were committed had without the knowledge and against the will of him the said *Richard Roe* strayed and escaped into the said closes of the said *John Doe* in which the aforesaid force and injury were committed, and at the said times when the aforesaid force and injury were committed were in the said closes in which the aforesaid force and injury were committed, doing damage there as in the said declaration is mentioned; wherefore he the said *Richard Roe*, as soon as he had knowledge thereof, to wit, at the said several times when the aforesaid force and injury were committed, in order to prevent further damage there to the said *John Doe* and to drive his said cattle out of the said closes, entered the said closes in which the aforesaid force and injury were committed by the most convenient and proper ways there for the purpose of driving the said cattle out of the said closes, and then and there at the said times when the aforesaid force and injury were committed did drive them out of the said closes of the said *John Doe* in which the aforesaid force and injury were committed by the most proper and convenient ways there, as it was lawful for him to do, he doing as little damage on these occasions as he possibly could, and in so doing he the said *Richard Roe* with his feet in walking, necessarily and unavoidably trod down, trampled upon, consumed, and spoiled, a little of the oats of the said *John Doe* there then growing and being. Which are the same trespasses in the said declaration mentioned, and whereof the said *John Doe* hath above thereof complained against him the said *Richard Roe*. And the said *Richard Roe* further saith, that after the committing of the said several trespasses, and before the day of the exhibiting of the bill of the said *John Doe* in this behalf, to wit, on the *tenth* day of *May* aforesaid at the parish of *Leamington* aforesaid, he the said *Richard Roe* tendered and offered to pay to the said *John Doe* the sum of *£10*, of lawful money of Great Britain, in full satisfaction of the said several trespasses in the said declaration mentioned, the said sum of *£10* then and there being sufficient amends for the said trespasses, which said sum of money he the said *John Doe* then and there wholly refused, and still doth refuse to accept of the said *Richard Roe*. And this the said *Richard Roe* is ready to verify, wherefore he prays judgment if the said *John Doe* ought further to have or maintain his aforesaid action thereof against him.

5. Writ of Entry.[1]

1. **How Pleaded.** — Under a writ of entry, disclaimer may be pleaded in abatement, or given in evidence under the general issue, with costs after filing the plea.
Maine. — Rev. Stat. (1883), c. 104, § 6.

a. As to Entire Premises.

Form No. 7521.[1]

Commonwealth of *Massachusetts.*
Supreme Judicial Court.

Worcester, ss. *April* Term, 1872.

Inhabitants of Oakham
v.
Ambrose P. Hall et al.

Plea of *Frank P. Goulding*, assignee of *John Hill.*

And the said *Frank P. Goulding*, assignee of said *John Hill* as aforesaid, comes and defends his right, when, etc.,[2] and says that the said *Inhabitants of Oakham* their aforesaid action thereof against him ought not to have because he says, that he is not, nor was at the time of suing forth the writ aforesaid of the said *Inhabitants of Oakham* nor at any time since, tenant of the said lands and tenements in said writ described with the appurtenances therein mentioned as of freehold, and this he is ready to verify.

And he further defends his right, when, etc.,[2] and says that, as to all and every of the lands and tenements in demandant's writ described with the appurtenances, he has nothing therein, nor claimed to have on the day of suing forth the writ aforesaid of the said *Inhabitants of Oakham*, nor ever after; but to have anything therein wholly disavows and disclaims, and this he is ready to verify.

Wherefore he prays judgment of the said *Inhabitants of Oakham*, their aforesaid action thereof against him ought to have.

F. P. Goulding,
By his Attorneys,
Staples & Goulding.

b. As to Part of Premises.

Form No. 7522.[3]

Commonwealth of *Massachusetts.*

Suffolk, ss. *Superior* Court.

Wm. A. Tappan
v.
Boston Water Power Co. et als.

TENANT'S DISCLAIMER.

And now come the tenants in the foregoing action and disclaim all title and interest in and to so much of the demanded premises as lies easterly of a certain broken line marked "thread of eastern channel," on a plan by *William H. Whitney*, dated *May 6*, 1890, filed herewith, and southerly of the northerly side-line of flats shown on

Massachusetts. — Pub. Stat. (1882), c. 173, § 9.

1. This form is copied from the records in Oakham *v.* Hall, 112 Mass. 535, in which case it was held that judgment should have been given for the tenant.

2. See *ante*, vol. 2, p. 109, note 2.

3. This form is copied from the records in Tappan *v.* Boston Water Power Co., 157 Mass. 24.

said plan extending from the line of the demandant's upland or marsh to said thread of eastern channel at a right angle to the latter; this partial disclaimer, however, being made without prejudice to the tenant's rights in the remainder of said demanded premises.

Boston Water Power Co. &
Geo. F. Richardson & *G. T. W. Braman*,
Trustees for said Company.

By their Attorney,
Henry D. Hyde.

DISCONTINUANCE, DISMISSAL AND NONSUIT.

By W. R. Buckminster.

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CROSS-REFERENCES.

For Forms relating to Dismissal of Appeals, see the title APPEALS, vol. 4, p. 890.

For Forms relating to Dismissal for Failure to Furnish Security for Costs, see the title COSTS, vol. 5, p. 775.

For Forms relating to Dismissal of Criminal Prosecutions, see the title QUASHING.

For matters of Procedure, generally, consult the title DISMISSAL, DISCONTINUANCE AND NONSUIT, 6 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 823.

I. DISCONTINUANCE.

1. Voluntary.

a. By Plaintiff as of Right.

(1) IN GENERAL.[1]

Form No. 7523.[2]

United States *District* Court,
Eastern District of *Virginia.*

General No. *313.*
John Doe, plaintiff,
against
Richard Roe, defendant.
} Discontinuance.

The above entitled suit is hereby discontinued, at the plaintiff's costs, without docket fee, and an order may be entered accordingly.

May 10, 1898. *Thompson & Chaney*, Plaintiff's Attorneys.

(2) BY ENTRY OF ORDER AND NOTICE.[3]

1. For statutes relating to the voluntary discontinuance of a suit by plaintiff see as follows, to wit:

Rhode Island. — Gen. Laws (1896), c. 236, § 1; c. 247, § 11.

Vermont. — Stat. (1894), § 1403.

Virginia. — Code (1887), § 3396.

But when a demand is filed in set-off, the action cannot be discontinued without consent of defendant.

Maine. — Rev. Stat. (1883), c. 82, § 66.

Massachusetts. — Pub. Stat. (1882), c. 168, § 21.

Rhode Island. — Gen. Laws (1896), c. 243, § 4.

In Ejectment. — Plaintiff may at any time discontinue an action as to any or all of the defendants upon payment of his or their costs.

Mississippi. — Anno. Code (1892), § 1650.

New Jersey. — Gen. Stat. (1895), p. 1284, § 20.

Or where only part of the premises are defended for.

New Jersey. — Gen. Stat. (1895), p. 1284, § 19.

2. See *supra*, note 1.

3. In *Michigan*, the plaintiff may at any time, upon notice to the defendant or his attorney, and on payment of the costs, discontinue his suit by order filed or entered in the cause, except where a set-off is asserted by the defendant. Mich. Rev. Rules Pr. (1896), No. 27.

(*a*) *Order.*

Form No. 7524.

(Precedent in Slocomb *v.* Thatcher, 20 Mich. 53.)[1]

Samuel Slocomb v. *Erastus Thatcher.* } [*December 17*, 1868.
H. H. Hoyt, Attorney.][2]

On payment of costs and on motion of *H. H. Hoyt*, attorney for the plaintiff, ordered that this cause be and the same is hereby discontinued.

H. H. Hoyt, Plaintiff's Attorney.

(*b*) *Notice.*

Form No. 7525.

(Precedent in Slocomb *v.* Thatcher, 20 Mich. 53.)[3]

The *Circuit* Court for the County of *Saginaw.*

Samuel Slocomb v. *Erastus Thatcher.* }

Sir: Please to take notice that an order has been entered in the above entitled cause in the common rule book of this Court by the above named plaintiff discontinuing the same with the costs to the [defendant].[4] Yours, etc.

H. H. Hoyt, Plaintiff's Attorney.

Dated *December 22*, 1868.

To *E. Thatcher*, Defendant, *in person.*

(3) Of Trustee in Trustee Process.

Form No. 7526.[5]

State of *New Hampshire.*

Merrimack, ss.

Supreme Court, *October* Term, 1898.

John Doe vs. *Richard Roe*, Pr. Deft.

Samuel Short, *Leonard A. Ford*, } Trustees.

In the above entitled action *Samuel Short* and *Leonard A. Ford*, the above named trustees, are hereby discharged without costs.

October 10, 1898. *Jeremiah Mason*, Plff's Attorney.

1. It was held in this case that the entry of this rule in the common rule book, together with a notice of the rule to the defendant as set out *infra*, Form No. 7525, accompanied by an offer to pay costs when taxed, it not appearing that the costs had been taxed, is sufficient to justify a verdict for the plaintiff in a suit brought upon the same cause of action, and in which the issue was joined upon a plea of another action pending.

See *supra*, note 1, p. 854.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. See *supra*, note 1, p. 854.

4. In the precedent the word plaintiff was used by mistake instead of defendant, but this was held not to vitiate the notice, as costs rested on the plaintiff as of course. See How. Anno. Stat. Mich. (1882), § 8967.

5. In *New Hampshire*, the plaintiff may at any time give notice in writing

(4) In Vacation.[1]

Form No. 7527.

(Precedent in Veazie *v.* Wadleigh, 11 Pet. (U. S.) 59.)[2]

[(*Title of court and cause as in Form No. 7523.*)][3]

I hereby notify you that the action of trespass, which is now pending in said court, to await the decision of certain questions carried up to the *supreme* court, is discontinued by me; and that the same disposition will be made of the case in the *supreme* court at *Washington*, as soon as it meets at *Washington*. You will therefore please to file this in the case, and notify the counsel for the defendants of the same, and that their legal costs in the said *circuit* court may be immediately made up, and the same will be paid.

[(*Signature and date as in Form No. 7523.*)][3]

b. By Leave of Court.[4]

(1) Motion.

Form No. 7528.[5]

In the *District* Court of the *First* Judicial District of the Territory of *Arizona*, in and for *Pima* County.

John Doe, plaintiff, against *Richard Den and Richard Roe*, defendants.	No. *313*.

And now on this *thirteenth* day of *January*, 1*898*, comes the plaintiff into court, by his attorney, and prays leave to discontinue against the defendant *Richard Den* upon the ground that said *Richard Den* claims nothing in the premises; and the plaintiff says that neither one of the defendants will be prejudiced thereby.

Jeremiah Mason, Attorney for Plaintiff.

(2) Order.[6]

to the trustee that an action is discontinued against him, and no further proceedings shall be had except that the trustee shall recover his costs, if any, to that time. N. H. Pub. Stat. (1891), c. 245, § 15.

1. The plaintiff may enter a discontinuance on the docket in vacation, in any suit wherein the defendant has not answered, on the payment of all costs that have accrued thereon.

Arizona. — Rev. Stat. (1887), § 728.

Connecticut. — Gen. Stat. (1888), § 989.

The entry of the word "done" in the docket by the clerk is not a sufficient docket entry to show a discontinuance of the cause of action. Ustick *v.* Jones, 1 Root (Conn.) 439.

2. A discontinuance of this cause was allowed, on motion, in the supreme court of the United States.

See also *supra*, note 1, p. 854.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. In *Arizona*, it is provided that the court may permit the plaintiff to discontinue the suit as to one or more of several defendants who have been served with process, or who may have answered, when such discontinuance would not operate to the prejudice of the other defendants. Ariz. Rev. Stat. (1887), § 730.

5. See *supra*, note 1, p. 854.

6. For the formal parts of an order in a particular jurisdiction consult the title Orders.

Form No. 7529.[1]

(*Caption as in Form No. 7528.*)

And it appearing to the satisfaction of the court that said *Richard Den* is an unnecessary party to this action and that a discontinuance by the plaintiff against him will not operate to prejudice any right or interest of the defendant *Richard Roe* in the premises, it is thereupon considered and ordered that the plaintiff have leave to discontinue against said *Richard Den*, and that said plaintiff be and is hereby ordered, as a condition of such leave to discontinue, to pay to the said *Richard Den* all his costs in and about this action made and expended.

c. By Consent of Parties.[2]

Form No. 7530.

(Robinson's Va. F., p. 96.)

John Doe
against
Richard Roe.

This day came the parties by their attorneys, and the plaintiff, not caring to prosecute this suit farther, consents that the same may be discontinued, provided there be no judgment against him for damages or costs;[3] and the defendant agreeing thereto, the said suit is discontinued accordingly.

2. Involuntary.[4]

Form No. 7531.

(Precedent in Trapnall *v.* Craig, 19 Ark. 244.)[5]

1. See *supra*, note 1, p. 854.

2. **Stipulation.** — In Fox *v.* Kitton, 19 Ill. 519, the stipulation for discontinuance of cross actions was as follows, to wit:

"State of *Michigan.*

The *Circuit* Court for the County of *St. Clair. In Chancery.*

Charles G. Kitton
vs.
Watson A. Fox and
Horatio N. Farnham.

It is hereby stipulated that the above suit shall be, and the same is hereby discontinued without costs.

Charles G. Kitton.

May 22d, 1855.

Horatio N. Farnham
vs.
Charles G. Kitton.

It is hereby stipulated that the above suit may be discontinued without costs.

Charles G. Kitton.

May 22d, 1855."

3. **Damages Only Relinquished.** — If only the damages be relinquished, omit here the words "or costs," and after the words "the said suit is discontinued accordingly," add these words: "and it is ordered that the plaintiff pay unto the defendant his costs."

4. An involuntary discontinuance may also be ordered in the following cases, to wit:

For failure to furnish defendant with copy of declaration. Mass. Stat. (1894), c. 405.

Against plaintiff failing to declare. How. Anno. Stat. Mich. (1882), § 7313.

Under certain circumstances, when suit is brought by nonresident plaintiff. Bright. Pur. Dig. Pa. (1894), p. 677, § 1. The constitutionality of this statute, however, is doubted. Brews. (Pa.) Pr., § 3743.

5. It was held in this case, that, upon filing the prayer of oyer of the letters of administration, it became the duty of the plaintiff to respond thereto as to any other pleading, and that the court could properly discontinue the action for failure of plaintiff so to respond.

[*Martha F. Trapnall, as administratrix with the will annexed, of Frederick W. Trapnall, deceased*, plaintiff,
against
John A. Craig, defendant.][1]

Now on this day come the parties, by their attorneys, and the plaintiff grants oyer of the writing sued on herein, by filing a copy, and exhibiting the original; and the plaintiff failing to grant oyer of letters of administration, on motion of attorney for defendant, judgment of discontinuance is granted herein. It is therefore considered by the Court that this cause be discontinued, and that the defendant do have and recover of and from the said plaintiff all of his costs in and about this suit laid out and expended.

II. DISMISSAL.

1. Voluntary.

a. By Plaintiff as of Right.[2]

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. In many states it is provided by statute that an action may be dismissed by the plaintiff himself, at any time before trial, upon payment of costs. See the following statutes, to wit:

Arkansas. — Sand. & H. Dig. (1894), § 5791.

California. — Code Civ. Proc. (1897), § 581.

Colorado. — Mills' Anno. Code (1896), § 166.

Georgia. — 2 Code (1895), §§ 4970, 5044.

Idaho. — Rev. Stat. (1887), § 4354.

Illinois. — Starr & C. Anno. Stat. (1896), c. 22, par. 36; c. 57, par. 17; c. 79, par. 43.

Indiana. — Horner's Stat. (1896), § 333.

Iowa. — Code (1897), § 3764.

Kansas. — Gen. Stat. (1897), c. 95, § 393.

Kentucky.—Bullitt's Civ. Code (1895), §§ 363, 367, 371.

Minnesota. — Stat. (1894), § 5408

Montana. — Code Civ. Proc. (1895), § 1004.

Nebraska. — Comp. Stat. (1897), §§ 6008, 6522.

Nevada. — Gen. Stat. (1885), § 3173.

Ohio. — Bates' Anno. Stat. (1897), §§ 5314, 6576.

Oklahoma. — Stat. (1893), § 4288.

Tennessee. — Code (1896), §§ 4689, 4691, 6084.

Utah. — Rev. Stat. (1898), § 3181.

Washington.—Ballinger's Anno. Codes & Stat. (1897), § 5085.

Wyoming. — Rev. Stat. (1887), § 2661.

Nonsuit. — A judgment of nonsuit may be entered under the same circumstances under the statutes of *California, Colorado, Idaho, Montana, Nevada, Tennessee, Utah* and *Washington.*

Precedent. — In Norwegian Plow Co. *v.* Bollman, 47 Neb. 186, the judgment was as follows, to wit:

"*The Norwegian Plow Company*
v.
Reuben Bollman et al.

Now on this *17th* day of *December*, 1892, this cause came on to be heard on the motion of the plaintiff for judgment of dismissal upon the issues presented by the pleadings herein filed, and the court being fully advised in the premises sustains said motion, and said cause is dismissed at plaintiff's costs."

In Anderson *v.* Pennie, 32 Cal. 265, the following notice to the justice was sufficient to dismiss the cause:

"In the *Justice's* Court of the *Third* Township in and for the *city and* county of *San Francisco*:

James G. Gould v. *F. C. Anderson.* — Entry of judgment on discontinuance.

James C. Pennie, Esq., Justice of the Peace, *Third* Township, in and for the *city and* county of *San Francisco* — Sir: Please enter judgment of discontinu-

(1) In General.

(*a*) *By Indorsement on Writ or Declaration.*[1]

Form No. 7532.

(Precedent in Bryant's Case, 24 N. H. 151.)[2]

This suit is dropped and withdrawn, because the within named *Alexander Pollard* claims nothing in the premises by virtue of the deed for which the within described note was given.

July 31st, 1848. *Alexander* × *Pollard*, *by James J. Page.*

J. S. Bryant, plaintiff's attorney.

(*b*) *By Entry in Clerk's Register.*

aa. Entry.

Form No. 7533.[3]

John Doe, plaintiff, against *Richard Roe*, defendant.

The plaintiff herein by his attorney comes and dismisses the above entitled action at his own costs.[4]

Jeremiah Mason, Attorney[5] for Plaintiff.

bb. Judgment.

Form No. 7534.[6]

John Doe, plaintiff, against *Richard Roe*, defendant.

ance and satisfaction in the above entitled case.

Yours respectfully,
Buchan & Wade,
Attorneys for Plaintiff.

San Francisco, March 16th, 1867."

1. Insufficient Form. — An entry upon the declaration in the clerk's office made by the plaintiff's attorney in vacation in these words, "I hereby discharge and dismiss the bail process and bail, sued out in the within suit, and taken at the commencement of said suit, *April 12th*, 1858. *James W. Greene*, Plff's Att'y. Test: *A. T. Shackleford*," is insufficient to dismiss the suit, but amounts merely to a dismissal of the bail process. Walker *v.* Scott, 29 Ga. 392.

2. This entry in the nature of a dismissal as of right was placed upon the writ in the case of Rollis *v.* Pollard, referred to in the case from which the precedent is taken.

Consult also statutes cited *supra*, note 2, p. 858.

3. Consult statutes cited *supra*, note 2, p. 858. Under some statutes this entry is sufficient without the subsequent judgment.

4. Tender of Costs. — There need be no recital of a tender of costs in the plaintiff's entry of a dismissal or nonsuit before the cause comes to trial, for such tender is unnecessary to validate the nonsuit. Hancock Ditch Co. *v.* Bradford, 13 Cal. 637.

5. Consent of Attorney. — A written stipulation by the plaintiff that the action be dismissed is not sufficient unless it bears the consent of the plaintiff's attorney. Board of Com'rs *v.* Younger, 29 Cal. 147.

6. *Colorado.* — Mills' Anno. Code (1896), § 166.

See also *supra*, note 2, p. 858.

This day comes the said plaintiff by his attorney, and thereupon on his motion,

It is ordered by the court that this cause be and the same hereby is dismissed at the costs of said plaintiff, to be taxed (or *but without prejudice to his right to bring a new action in this behalf*).

(2) Of Homestead Proceedings.

Form No. 7535.

(Precedent in Heald *v.* Donnell, 121 Mo. 423.)[1]

State of *Missouri*, } ss.
County of *Jackson*. }

Probate court at *Independence*, *May* term, 1885, *May 13*, 1885.

In the matter of proceedings to set aside homestead of *Elizabeth Heald* (formerly *Twyman*), the widow of *William H. Twyman*, deceased. *574*.

Now on this day comes *Elizabeth Heald*, formerly *Elizabeth Twyman*, into court by her attorney, *Charles S. Crysler*, and dismisses the proceedings herein to set aside homestead to her as the widow of *W. H. Twyman*, deceased, at the cost of *M. S. C. Donnell*, she having heretofore sold her interest in the lands embraced in the reports of commissioners to set aside homestead to *M. S. C. Donnell*.

(3) Of Proceedings in Invitum in Insolvency.

Form No. 7536.[2]

Suffolk, ss. Court *of Insolvency*.

In the case of Herbert Alden, insolvent debtor. } No. *4146*.

Come now the petitioners by their attorney and say that the technical act of insolvency committed by said *Herbert Alden* has been satisfactorily explained and adjusted and your petitioners do not care to proceed further against said *Herbert Alden*, wherefore they pray to dismiss their petition herein.

By their attorney,
Albert M. Spring.

(4) In Vacation.[3]

1. See *supra*, note 2, p. 858.
2. See *supra*, note 2, p. 858.
3. For statutes relating to voluntary dismissal by plaintiff in vacation see as follows, to wit:

Alabama. — Civ. Code (1886), §§ 2741, 3446.

Arkansas. — Sand. & H. Dig. (1894), § 5792.

Georgia. — 2 Code (1895), § 4970.

Indiana. — Horner's Stat. (1896), § 334.

Mississippi. — Anno. Code (1892), § 741.

Nebraska. — Comp. Stat. (1897), § 6009.

Ohio. — Bates' Anno. Stat. (1897), § 5314.

Wyoming. — Rev. Stat. (1887), § 2661.

Consult also statutes cited *supra*, note 2, p. 858.

(*a*) *Dismissal.*

Form No. 7537.

(Precedent in St. John *v.* Hardwick, 17 Ind. 181.)[1]

Stephen Hardwick v. *James St. John.* } No. *8.* — Action on note; now pending in the *Hendricks Circuit* Court.

The above named plaintiff hereby dismisses the above entitled suit, now pending in said Court, at his own costs, and directs the clerk of that Court to enter this order of dismissal upon the order book of the said court according to the statute of such case made and provided.

January 29, 1859.

Stephen Hardwick, Plaintiff.

(*b*) *Entry.*

Form No. 7538.

(Precedent in Ryan *v.* Burkam, 42 Ind. 510.)[2]

C. B. Burkam v. *Wm. D. Burkam.* } In vacation, *Dec. 28th*, 1867. No. *2058.*

The plaintiff by his attorney comes and dismisses the above entitled cause and files his dismissal in these words, to wit:

Charles B. Burkam v. *Wm. D. Burkam.* } No. *2058.*

The plaintiff by counsel comes and dismisses this cause at his own costs.

[*George A. Johnson.*
Attorney for Plaintiff.][3]

(*c*) *Notice.*

Form No. 7539.[4]

(*Title of court and cause.*)

To Mr. *Richard Roe*, Defendant.

You are hereby notified that the plaintiff has dismissed the above entitled cause by a written dismissal thereof, filed in the office of the clerk of the *Posey Circuit* Court.

Dated this *tenth* day of *May*, 1898.

Jeremiah Mason, Plaintiff's Attorney.

1. *Indiana.* — Horner's Stat. (1896), § 334. See also *supra*, note 3, p. 860.
2. *Indiana.* — Horner's Stat. (1896), § 334. See also *supra*, note 3, p. 860.
3. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.
4. As to when notice to defendant is necessary and the effect thereof consult statutes cited *supra*, note 3, p. 860.

(*d*) *Judgment.*

Form No. 7540.[1]

John Doe against *Richard Roe.* } Judgment.

It appearing to the court that the plaintiff has, since the last term of this court, filed in the clerk's office his written dismissal thereof, it is considered and adjudged that said cause be and the same hereby is dismissed, and that the defendant recover of the plaintiff his costs and charges in this cause laid out and expended.

b. By Consent of Parties.[2]

(1) In General.

Form No. 7541.

(Precedent in Pelton *v.* Mott, 11 Vt. 148.)[3]

[(*Title of cause.*)][4]

And said answers being duly filed in said cause, and the interrogatories upon the part of the orator and defendants being settled, and the testimony of the parties having been taken, filed and published, agreeably to the directions, orders and rules of said court, the said cause came on to be heard and stood for a hearing on the merits before said court of chancery at their term begun and holden at *North Hero*, within and for the county of *Grand Isle*, on the *third Tuesday* of *January*, 1837, at which term *Stephen S. Brown*, solicitor

1. Consult statutes cited *supra*, note 3, p. 860.

2. An action may be dismissed by either party upon the written consent of the other in the following states, to wit:

California. — Code Civ. Proc. (1897), § 581.

Colorado. — Mills' Anno. Code (1896), § 166.

Idaho. — Rev. Stat. (1887), § 4354.

Minnesota. — Stat. (1894), § 5408.

Montana. — Code Civ. Proc. (1895), § 1004.

Nevada. — Gen. Stat. (1885), § 3173.

Utah. — Rev. Stat. (1898), § 3181.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5085.

In all but *Minnesota* and *Oklahoma*, judgment of nonsuit may be entered under the same circumstances.

See also Hill's Anno. Laws Oregon (1892), § 246.

Stipulation for Dismissal of Writ of Error. — In Colman *v.* West Virginia Oil, etc., Co., 25 W. Va. 148, the stipulation was as follows:

"In the *Supreme* Court *of Appeals* of *West Virginia*:

Charles D. Colman, plaintiff below and defendant in error, v. *The West Virginia Oil and Oil Land Co.*, defendant below and plaintiff in error. } On writ of error to the *circuit* court of *Ritchie.*

It is hereby stipulated and agreed on the part and behalf of the parties in the above entitled cause that the writ of error issued and pending therein be dismissed agreed; and that an order to that effect be entered at the first sitting of this court, and this court is hereby requested to grant and cause to be entered such order.

West Virginia Oil & Oil Land Co.
By *Charles Penny*, *Vice-President and Acting President and Chief Executive Officer thereof.*
Charles D. Colman.
Parkersburg, W. Va., February 29, 1884."

3. See *supra*, note 2.

4. The matter to be supplied within [ ] will not be found in the reported case.

for the orator, appeared and declined a hearing of said cause, and consented and agreed that said cause be dismissed upon the merits, and said court did thereupon order, adjudge and decree, and it is ordered, adjudged and decreed, by said court, that said bill be dismissed upon the merits, but without cost to either party.

Dated at *North Hero* this *18th January*, 1*837*.

Stephen Royce,
Samuel S. Phelps,
Isaac F. Redfield,
Chancellors.

(2) As to One of Several Defendants.

Form No. 7542.

(Precedent in Norton *v.* Lawrence, 39 Kan. 459.)[1]

[(*Title of court and cause as in Form No. 5917.*)][2]

And now on this *6th* day of *April*, 1*886*, this cause being called, comes the plaintiff *George Bolch* and moves the court to dismiss this cause as to the defendant *P. J. Norton*, as per stipulation[3] on file herein, and the court, being fully advised in the premises, sustains said motion. It is therefore considered, ordered and adjudged by the court that this action be and the same hereby is dismissed as to the defendant *P. J. Norton.* It is further ordered and adjudged by the court, that said defendant *P. J. Norton* pay all costs made in said cause since the judgment heretofore rendered against *Jacob Hornberger* on the *8th* day of *December*, 1*885*, taxed at $*4.30*; and hereof let execution issue.

(3) With Acknowledgment of Satisfaction of Damages.

Form No. 7543.

(Precedent in Chicago, etc., R. Co. *v.* Dunning, 18 Ill. 495.)[4]

J. D. Dunning
v.
Chicago & Aurora R. R. Co.

It is agreed by the parties to this suit that the same be dismissed at the defendant's costs, to be taxed by the court, the plaintiff having received full satisfaction for all damages in said suit. *May 14*, 1*855*.

W. B. Plato, Attorney for Defendant.

1. See *supra*, note 2, p. 862.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. **The stipulation** was as follows:

"It is hereby agreed and stipulated by and between the plaintiff, *George Bolch*, and the defendant, *P. J. Norton*, that the above-entitled suit shall be dismissed as to the said *P. J. Norton*, and that the said *P. J. Norton* shall pay all costs in said suit made since the judgment against the said *Jacob Hornberger*, this *Jan. 26*, 1*886*.

George Bolch, Plff.
P. J. Norton, Deft."

4. See *supra*, note 2, p. 862.

(4) With Record of Compromise.

Form No. 7544.

(Precedent in *In re* Mouillerat, 14 Mont. 246.)[1]

Wednesday, September 2d, A. D. 1*885.*

The United States
vs.
Frank Mouillerat et al.

And now comes the plaintiff, by *William H. De Witt*, Esq., United States attorney, whereupon the plaintiffs dismissed their suit herein, the same having been compromised, and *eight hundred* dollars paid by the defendants.

It is therefore considered by the court that the defendants go hence without day, and recover against the plaintiffs their costs incurred herein, taxed at $———.

2. Involuntary.

a. Because of Abandonment by Plaintiff.[2]

Form No. 7545.[3]

John Doe, plaintiff,
against
Richard Roe, defendant.

On this *twelfth* day of *January*, 1*898*, this case came on for trial; the plaintiff appeared and the defendant appeared and the plaintiff abandoned his case and refused to proceed to trial; whereupon it is ordered and adjudged that this case be dismissed and that the defendant recover of the plaintiff his costs in and about this action made and expended.

b. Because Action has Failed as to All Resident Defendants.

Form No. 7546.[4]

(*Title of court and cause as in Form No. 5916*).

And now, on this *tenth* day of *February*, 1*898*, this cause coming on for hearing before the court, on the motion of the defendant *Richard Roe* to dismiss the same for the reason that heretofore, on the *eighth*

1. See *supra*, note 2, p. 862.

2. An action may be dismissed by the court, when, upon the trial and before the final submission of the case, the plaintiff abandons it.

California. — Code Civ. Proc. (1897), § 581.

Colorado. — Mills' Anno Code (1896), § 166.

Idaho. — Rev. Stat. (1887), § 4354.

Minnesota. — Stat. (1894), § 5408.

Montana. — Code Civ. Proc. (1895), § 1004.

Nevada. — Gen. Stat. (1885), § 3173.

Utah. — Rev. Stat. (1898), § 3181.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5085. See also Hills' Anno. Laws Oregon (1892), § 246.

In all these states except *Minnesota*, judgment of nonsuit may be entered under like circumstances.

3. *Colorado.*—Mills' Anno. Code (1896), § 166. See also statutes cited *supra*, note 2.

4. *Iowa.* — Code (1897), § 3502. This statute provides that where an action is brought against several defendants,

day of *January*, 1*898*, this action was by order of the court dismissed as to the defendants *Samuel Short* and *William West*, who were all the defendants in this cause, resident in the county of *Harrison*, and because the defendant *Richard Roe* is a nonresident of the county of *Harrison*.

It is ordered and adjudged by the court that this action be and the same is hereby dismissed as to the defendant *Richard Roe*, and that the defendant *Richard Roe* have and recover of the plaintiff his costs herein expended, and taxed at ——— dollars.

c. Because Action Brought Before Wrong Justice.

Form No. 7547.[1]

John Doe
against
Richard Roe.

On this *seventeenth* day of *January*, 1*898*, this case came on to be heard; the plaintiff appeared and the defendant appeared and the plaintiff offered to prove his case; and it appearing to the court that the cause of action did not arise within this township but within the township of *Macron*, and that this suit was improperly brought before me; it is therefore ordered by me that the defendant go hence without day and recover of the plaintiff his costs in and about this action made and expended.

d. Because Other Proceedings are Pending.[2]

some of whom are residents and others nonresidents of the county, and the action is dismissed as to the residents, or judgment is rendered in their favor, or there is failure to obtain judgment against such residents, such nonresidents may, upon motion, have said cause dismissed, with reasonable compensation for trouble and expense for attending at the wrong county.

1. *Alabama.* — Civ. Code (1886), § 3303. This statute reads that "unless otherwise provided, no person can be sued out of the precinct of his residence, or of that in which the debt was created, or the cause of action arose; and if suit is brought contrary to the provisions of this section, it must, on motion, be dismissed by the justice." See also a similar statute in *Ohio* (Bates' Anno. Stat. (1897), § 6576).

2. **In Matter of Title.** — In Pettit *v.* Black, 13 Neb. 142, a motion to dismiss is set out, which, omitting the formal parts, is as follows, to wit: "And now comes the said *Eliza Pettit*, one of the above named defendants, and says that she is now and ever since the year 18*58* has been in the actual, open, and notorious possession of the premises in plaintiff's complaint filed herein. That she is now, and ever since the day last named above mentioned, has had the legal and equitable title to the *undivided one-third* of said premises; that her said title is of record in the records of said county; that her said title and interest are now in full force and operation, and she at no time has parted with her said interest and title, nor has the same been determined against her by the decision of any court; that her claim to said premises, and her said title to the same are now pending in the district court of this county in a suit wherein she is plaintiff, and *Robert W. Black*, this plaintiff, and others are defendants; that said suit was pending and commenced long before the commencement of this action. Wherefore she says this court has not jurisdiction to try and determine this matter, and she prays this suit be dismissed."

(1) At Law.

Form No. 7548.[1]

At a Court of Chancery held for the *Seventh* District, composed of the county of *Dale*, in the State of *Alabama*, at *the court-house* thereof, in the town of *Ramapo*, on the *first Monday* of *January*, being the *third* day of said month, in the year of our Lord one thousand eight hundred and *ninety-eight*; present, the Honorable *John Marshall*, Chancellor of the *Seventh* Chancery Division of said State.

John Doe, plaintiff,
against
Richard Roe, defendant.

And now, upon motion of the defendant, after inspection of the records, and after hearing *Joseph Story*, of counsel for the defendant, and *Jeremiah Mason*, counsel for the plaintiff, and it appearing that there is now pending in the *Circuit* Court for the county of *Dale* a suit at law for one and the same cause of action as the bill filed herein, after due deliberation it is thereupon considered and ordered that unless the plaintiff shall, within *thirty* days, elect to dismiss and actually dismiss his said suit at law, his bill herein at the end of said *thirty* days shall stand dismissed.

John Marshall, Chancellor.

(2) In Probate Matters.

Form No. 7549.

(Precedent in Baldwin's Appeal, 112 Pa. St. 3.)

[(*Title of court and cause.*)][2]

And now *December 17th*, 1885, this matter came on for hearing and was argued by counsel. And now, *December 21st*, 1885, after consideration thereof, it appearing to the court that an appeal from the decree entered *June 12th*, 1885, revoking the letters granted to *H. C. Frick*, had been taken prior to the presentation of the petition of *George E. Baldwin*, for a rule to show cause why said decree should not be revoked and set aside, etc., etc., and it further appearing to the court that a certiorari had been filed in said matter prior to the hearing on the rule granted to the said *George E. Baldwin*, it is ordered, adjudged and decreed, that said petition and all proceedings had thereon be dismissed at the costs of said petitioner.

1. *Alabama.*—Chancery Rules No. 113 (Ala. Civ. Code (1886), p. 833). This rule provides that where a suit at law and a bill in chancery are instituted for the same claim, the opposite party, on suggestion supported by affidavit, may move the court, in term time, or the chancellor, in vacation, to inspect the records; and if it appear that the two suits are for one and the same cause of action, it shall be ordered that the plaintiff or claimant elect in which he will proceed, and that he dismiss the other.

This form is adapted from Chapman *v.* Lee, 64 Ala. 483.

2. The matter to be supplied within [ ] will not be found in the reported case.

e. For Defect in Service.

(1) Failure to Serve.

(*a*) *In General.*

Form No. 7550.

(Precedent in Downing *v.* W. J. Gow, etc., Invest. Co., 53 Kan. 246.)

[(*Title of court and cause as in Form No. 5916.*)][1]

Now come the defendants, by *Wm. Lawson*, their attorney, appearing specially and for the purpose of a motion only and to challenge the jurisdiction of the court, and move the court to dismiss said action for the following reasons, to wit: First, that no summons has been issued in said action, as provided by law. A copy of the pretended summons issued in said action is attached hereto marked "Exhibit *A*," and made a part hereof. Second, that no service of summons has been had in said action as now fully appears by the affidavits filed herewith, marked "Exhibits *B* and *C*," respectively, and hereby made a part hereof.

Wm. Lawson, Attorney for *W. J. Gow & Bros.*

Form No. 7551.

(Precedent in Kinne *v.* Plumb, 1 Tyler (Vt.) 20.)

Kinne, appellant, v. *Plumb*, appellee. } *Chittenden* County, *Supreme* Court *of Judicature*, *January* term, A. D. 1801.

The said *Samuel Plumb* moves the Court here to dismiss the said action from the docket of the Court, for that it appears from the files, that said action was irregularly commenced before the *County* Court, in that the same declaration was, by an order of the said *County* Court, and without the consent of the said *Samuel Plumb*, filed in Court against him the said *Samuel Plumb*, without any service or notice whatever; and that the said *County* Court ordered the said *Samuel's* attorney to appear and plead in said action, or to suffer a default thereon; whereby the said *Samuel* was compelled to appear and answer to said action to prevent judgment by default being rendered against him. And so the said *Samuel* says the *County* Court had no jurisdiction of said action. Wherefore the said *Samuel* prays a rule may be granted upon *W. C. Harrington*, Esquire, attorney to the said *Daniel Kinne*, to show cause why the said action should not be dismissed, and that he may have his costs.[2] By

Keyes and Miller.

(*b*) *One of Several Defendants.*[3]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. The demand for costs is unavailing, because there is in such case no original process upon which costs can be predicated. The order of dismissal was granted, but no order made for costs.

3. For statutes relating to dismissal where some defendants are not served see as follows, to wit.

New York. — Birds. Rev. Stat. (1896), p. 2286, § 70.

Form No. 7552.

(Precedent in Wright *v.* Boynton, 37 N. H. 10.)

Essex, ss.: *C. C. P.*, *December* term, 1857.

Wright
v.
Hayward & al.

And now *Spaulding Boynton*, named defendant in this action, comes into court specially, to move the Hon. Court here, that the action as to him be dismissed, because he says he is not, and has never been, an inhabitant of *Massachusetts*, and that no personal service, within the jurisdiction of said *commonwealth*, has been made upon him, and there has been no actual and effectual attachment of his property, and for no other purpose.

By *Otis P. Lord*, his atty. for that purpose only.

Form No. 7553.

(Precedent in Society, etc., *v.* Ballard, 4 Vt. 119.)

Franklin County Court.
September term, 1830.

And now the said *Arden H. Ballard*, in court by his attornies, comes and moves this honorable court, that said cause may be dismissed as to the said *Arden H. Ballard*, because he says, that said writ has never in any manner been served upon the said *Arden H.* as will appear by said officer's return on said writ. Wherefore the said *Arden H.* prays that said suit, as to him, be dismissed, and for his costs.

[By *Smalley & Adams*, his Attorneys.][1]

(*c*) *Where Defendant has No Property Within Jurisdiction of Court.*

Form No. 7554.[2]

Suffolk, ss. *Superior* Court.

The National Telephone Manufacturing Company
v.
John E. Du Bois and Edward D. Van Tassel.

Motion to Dismiss.

And now comes the defendant *John E. Du Bois*, in the above entitled cause, having appeared especially for the purpose only of dismissing this action, and not admitting but distinctly denying the jurisdiction of the court over him in said matter, this defendant not having been served with process in said cause, and no property of the defendant being in the custody of the court and he not having admitted the jurisdiction or waived the want of jurisdiction.

Wherefore he prays that said bill be dismissed, and for his costs.

By his attorneys,
Johnson & Underwood,
Specially.

Ohio. — Bates' Anno. Stat. (1897), § 5313.
South Dakota. — Dak. Comp. Laws (1887), § 5096.
Wisconsin. — Stat. (1898), § 2883.
Wyoming. — Rev. Stat. (1887), § 2660.

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. This form is copied from the origi-

(2) Service Out of Jurisdiction.

Form No. 7555.

(Precedent in Hyde *v.* Harkness, 1 Idaho 536.)[1]

[(*Title of court and cause as in Form No. 5914.*)][2]

The said defendant, by *L. P. Higbee*, and *Johnson and Hyndman*, his attorneys, specially appearing for the purpose of this motion, and for none other, makes this, his special appearance, in the above entitled action, and thereupon moves the court to dismiss the suit herein, for that the service in said cause was not made by an officer or in any place required by law in this: that the said writ and copy of complaint were served on this defendant by one *Morgan*, sheriff of *Oneida* county, outside of and beyond the limits of his bailiwick, viz., at the residence of this defendant, located and situated *on the United States reservation*, known as the *Bannock* or *Fort Hall reservation*, within the exclusive jurisdiction of the *United States* government, and without the boundaries and jurisdiction of said *Oneida* county.

L. P. Higbee and
Johnson & Hyndman,
Attorneys for defendant for the purpose of this motion only.

(3) Service by Unauthorized Person.

Form No. 7556.

(Precedent in Howard *v.* Walker, 39 Vt. 164.)

[(*Title of court and cause.*)][2]

And now the defendants come and move said cause to be dismissed, because said writ purports to have been served by *S. B. Darling*, an authorized person, and by no other person or officer, and it does not appear that said *Darling* was in any way authorized to serve said writ, and defendants have never accepted service of the same. Therefore they pray that said suit and said writ be dismissed and for their costs.

[(*Signature of attorney.*)][2]

f. For Defect in Process.

(1) In General.

Form No. 7557.

(Precedent in Hall *v.* Brown, 2 Tyler (Vt.) 64.)

William Hall, appellee,
v.
Richard Brown, appellant.
} *Supreme* Court.

nal papers in National Telephone Mfg. Co. *v.* Du Bois, 165 Mass. 117.

1. It was held in this case that the district court had jurisdiction over Indian reservations in any organized county provided there be no treaty to the contrary with the Indians thereof. In this case, there being no such treaty with the Bannock Indians, an order dismissing the plaintiff's complaint was reversed.

2. The matter to be supplied within [ ] will not be found in the reported case.

The defendant here moves the Honorable Court, that said cause be no longer prosecuted against him, because he says, that the magistrate or magistrates, signing the original writ in said action, did not, at the time of the exhibition of said complaint, make a minute in writing, under their official signature, on the complaint of the plaintiff, of the true day, month, and year when the same was exhibited to or signed by said magistrate or magistrates, agreeably to the statute in such case made and provided: wherefore the defendant prays here to be dismissed, with his costs. By

D. Fay.

(2) Process Altered.

Form No. 7558.

(Precedent in Bray *v.* Libby, 71 Me. 277.)

[(*Title of court and cause.*)][1]

And now comes the said *George W. Libby*, and shows to the court here, that plaintiff's pretended writ in said action is void and of no effect, and is no writ because he says that the same was originally sued out of said court on the *third* day of *December*, A. D. 1877, under the seal of said court, and bore date on said *third* day of *December*, A. D. 1877, and was returnable to said court on the *first Tuesday* of *January*, A. D. 1878, and was on the *fifth* day of *December*, A. D. 1877, duly served on this defendant by a duly qualified officer to whom the same was directed, to wit: by *Gardner M. Parker*, a deputy sheriff for said county by the said *Parker*, deputy sheriff as aforesaid, attaching thereon a chip as the property of said defendant, and giving to him in hand a summons for his appearance at court, as by said writ commanded, who made due return on said writ under his hand as deputy sheriff as aforesaid, bearing date on said *fifth* day of *December*, A. D. 1877, that he had by virtue of said writ attached a chip as the property of said defendant, and given him a summons in hand for his appearance at court. And after said writ was so sued out, dated, made returnable, served, and the return aforesaid by the officer aforesaid made thereon, signed by said officer in his official capacity, the said writ was not returned to this court on said *first Tuesday* of *January*, A. D. 1878, nor at any time during said term of said court holden on said *first Tuesday* of *January*, 1878, but was without consent or permission of this defendant, and without any order of this honorable court materially altered, and changed, that is to say: the date thereof was changed from the *third* day of *December*, A. D. 1877, to the *thirty-first* day of *December*, A. D. 1877; the return day was changed from the *first Tuesday* of *January*, A. D. 1878, to the *first Tuesday* of *February*, A. D. 1878; the return aforesaid of the officer aforesaid thereon, was erased; and thereafter, that is to say: after the alterations and changes aforesaid, on the *thirty-first* day of *December*, A. D. 1877, a pretended attachment was made thereon, and a return thereof made by *William H. Dresser*, sheriff of said county, and a further pretended service was made on said pretended writ, on

1. The matter to be supplied within [ ] will not be found in the reported case.

the *nineteenth* day of *January*, A. D. 1878, by *E. R. Brown*, a deputy sheriff for said county, who made return thereon in his capacity as such deputy sheriff, that by virtue of the said writ, he had, on that *nineteenth* day of *January*, A. D. 1878, made service on said defendant, by giving him in hand a summons for him to appear and answer at court, all of which this defendant is ready to verify. Wherefore this defendant says that he ought not to be held to answer to said action, and he moves the court here to dismiss the same and for his costs.

George W. Libby.

(*Verification.*)

g. For Failure of Plaintiff to Appear at Trial.

(1) In General.[1]

Form No. 7559.[2]

John Doe
against
Richard Roe.

This day comes the defendant, but the plaintiff being three times called in open court comes not but makes default; and now, on motion of the defendant *Richard Roe*,

It is considered and adjudged by the court that this cause be and the same hereby is dismissed, and that the defendant recover of the plaintiff his costs and charges in this cause laid out and expended.

(2) In Justice's Court.[3]

1. An action may be dismissed by the court for nonappearance of plaintiff at the trial.

Arkansas. — Sand. & H. Dig. (1894), § 5791.

California. — Code Civ. Proc. (1897), § 581.

Colorado. — Mills' Anno. Code (1896), § 166.

Idaho. — Rev. Stat. (1887), § 4354.

Indiana. — Horner's Stat. (1896), § 333.

Iowa. — Code (1897), § 3764.

Kansas. — Gen. Stat. (1897), c. 95, § 393.

Kentucky. — Bullitt's Civ. Code (1895), § 371.

Minnesota. — Stat. (1894), § 5408.

Montana. — Code Civ. Proc. (1895), § 1004.

Nebraska. — Comp. Stat. (1897), § 6008.

Nevada.—Gen. Stat. (1885), § 3173.

Ohio. — Bates' Anno. Stat. (1897), § 5314.

Oklahoma. — Stat. (1893), § 4288.

Utah. — Rev. Stat. (1898), § 3181.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5085.

Wyoming. — Rev. Stat. (1887), § 2661.

Judgment of nonsuit may be entered under the same circumstances in *California*, *Colorado*, *Idaho*, *Mississippi*, *Nevada*, *Utah* and *Washington*.

2. See *supra*, note 1.

3. If the defendant appears, and the plaintiff fails to appear, within the time specified in the summons, or on the day to which the same is or may be adjourned, the justice, on motion of the defendant, may dismiss the suit.

Arizona. — Rev. Stat. (1887), § 1423.

Iowa. — Code (1897), § 4508.

Minnesota. — Stat. (1894), § 4976.

Nebraska. — Comp. Stat. (1897), § 6522.

Ohio. — Bates' Anno. Stat. (1897), § 6576.

South Dakota. — Dak. Comp. Laws (1887), § 6103.

Form No. 7560.

(Sand. & H. Dig. Ark. (1894), p. 1649.)

Hy De Prieste, plaintiff,
against
H. J. Galpin, defendant.

On this *twenty-fifth* day of *May*, 1894, the return day of the summons, the defendant came, and after waiting *three* hours, the plaintiff having failed to appear in person or by attorney, it is therefore considered and adjudged by me that the defendant go hence without day, and recover of said plaintiff all his costs by him in this suit expended.

h. For Failure to File Declaration, Complaint or Bill.

MOTION.

Form No. 7561.[1]

Suffolk, ss. *Superior* Court.

John Doe
against
Richard Roe.

Motion to Dismiss.

And now comes the defendant in the above entitled action, by his attorney, and moves the court to dismiss this action at the plaintiff's costs because he says that this action was begun by a writ of summons, with no declaration therein, issued out of the *Superior* Court of *Suffolk*, and returnable and returned to the *Superior* Court of *Suffolk* on the *first Monday* of *January*, 1898, and that upon said return day the plaintiff failed to file his declaration herein as required by law.

By his attorney,
Joseph Story.

ORDER.

Form No. 7562.[2]

(*Caption as in Form No. 7561.*)

Ordered that unless the plaintiff shall within *five* days file his declaration in this action said action be and stand dismissed, and that a copy of this order be served within *two* days upon the plaintiff's attorney.

John Marshall, Judge.

i. For Failure to Obey Order of Court.[3]

1. *Massachusetts.* — Stat. (1885), c.384, § 6.

Analogous statutes will be found in the following states, to wit:

Colorado. — Mills' Anno. Code (1896), § 32.

Iowa. — Code (1897), § 3515.

New York. — Birds. Rev. Stat. (1896), p. 2270, § 8.

West Virginia. — Code (1891), c. 125, § 6.

2. See *supra*, note 1.

3. An action may be dismissed by the court for disobedience by plaintiff of an order concerning the proceedings in the action.

Arkansas. — Sand. & H. Dig. (1894), § 5791.

Form No. 7563.

(Precedent in Clutz *v.* Carter, 12 Neb. 114.)

[(*Title of court and cause as in Form No. 5923.*)][1]

Come now the said defendants and move the court nere to dismiss this said action and show the court the following ground therefor. That said plaintiff has no petition on file as required by a previous order of the court.

James Laird,
B. F. Smith and
A. H. Bowen,
Attorneys for defendants.

j. For Failure to Proceed in Action.

Form No. 7564.[2]

At a *Special* Term of the *Supreme* Court held at *the Court-house* in the *Village* of *Riverhead* in the County of *Suffolk* on the *tenth* day of *May*, 1*898*.

Present: The Honorable *John Marshall*, Justice.

John Doe, plaintiff,
against
Richard Roe, defendant.

On reading and filing the affidavit of *Leonard A. Ford*, verified on the *first* day of *May*, 1*898*, from which it appears that the above named plaintiff has unreasonably neglected to proceed in the above entitled action against the above named defendant (or *against the defendants Samuel Short and William West*), and it appearing that due service of notice of this motion has been served upon *Joseph Story*, the attorney for the plaintiff; now, on motion of *Jeremiah Mason*, Esq., of counsel for the defendant (or *for the defendants Samuel Short and William West*), and after hearing *Joseph Story*, Esq., for the plaintiff (or *and no one appearing to oppose*),

It is hereby ordered that the complaint in this action be dismissed (or *dismissed as against the defendants Samuel Short and William West*), and that said defendant (or *said defendants Samuel Short and William West*) have judgment against the plaintiff herein for costs of this action.

And it is further ordered that the plaintiff pay to the defendant (or *to the defendants Samuel Short and William West*) *ten* dollars, costs of this motion.

Enter: *J. M.*, J. *S.* C.

Indiana. — Horner's Stat. (1896), § 333.
Iowa. — Code (1897), §§ 3611, 3764.
Kansas. — Gen. Stat. (1897), c. 95, § 393.
Kentucky.—Bullitt's Civ. Code (1895), § 371.
Nebraska.—Comp. Stat. (1897), § 6008.
Ohio. — Bates' Anno. Stat. (1897), § 5314.
Oklahoma. — Stat. (1893), § 4288.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5085.
Wyoming. — Rev. Stat. (1887), § 2661.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *New York.* — Birds. Rev. Stat. (1896), p. 2286, § 71. This statute provides that where the plaintiff unreasonably neglects to proceed in the action against the defendant, or one or more

k. For Failure to Make Case to Go to Jury.[1]

Form No. 7565.[2]

(*Title of court and cause as in Form No. 5914*).

And now comes the defendant, by *Jeremiah Mason*, his attorney, and moves the court that the plaintiff's complaint herein be dismissed for the following reasons:

(1) Upon the ground that the plaintiffs have failed to prove that the defendants, or either of them, at the time of the commencement of this action, or at any time since, have been or now are in the possession of the premises in controversy herein, or any part thereof.

(2) That the plaintiffs have failed to prove that defendants, or either of them, at the time of the commencement of this action, or at any other time, or at all, have withheld the possession of the ground in controversy, or any part thereof, from the plaintiffs.

(3) That the plaintiffs have shown by their evidence that the plaintiffs were at the time of the commencement of this action, and ever since have been and now are, in possession of the premises in controversy herein.

(4) That the plaintiffs have failed to show that the location of the Lalande claim was made upon vacant and unoccupied public land.

Jeremiah Mason, Defendant's Attorney.

l. For Failure to Revive.

Form No. 7566.

(Precedent in Houghton *v.* Lannon, 1 Kan. App. 511.)[3]

defendants, against whom a separate judgment may be taken, the court may, in its discretion, upon the application of the defendant or defendants, or any of them against whom he so neglects to proceed, dismiss the complaint as against the moving party or parties and render judgment accordingly.

Similar statutes exist as follows, to wit:

Arkansas. — Sand. & H. Dig. (1894), § 5791.

Indiana.—Horner's Stat. (1896), § 333.

Iowa. — Code (1897), § 3764.

Kansas. — Gen. Stat. (1897), c. 95, § 393.

Kentucky.— Bullitt's Civ. Code (1895), § 371.

Minnesota. — Stat. (1894), § 5408.

Nebraska.—Comp. Stat. (1897), § 6008.

Ohio. — Bates' Anno. Stat. (1897), § 5314.

Oklahoma. — Stat. (1893), § 4288.

South Dakota. — Comp. Laws (1887), § 5096, subs. 4.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5085.

Wisconsin. — Stat. (1898), § 2883.

Wyoming. — Rev. Stat. (1887), § 2661.

1. An action may be dismissed or a judgment of nonsuit entered by the court upon motion by the defendant, when, upon the trial, plaintiff fails to prove a sufficient case to go to the jury.

California. — Code Civ. Proc. (1897), § 581.

Colorado. — Mills' Anno. Codes (1896), § 166.

Idaho. — Rev. Stat. (1887), § 4354.

Montana. — Code Civ. Proc. (1895), § 1004.

Nevada. — Gen. Stat. (1885), § 3173.

Utah. — Rev. Stat. (1898), § 3181.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5085.

2. This motion is based upon the facts of the case of Lalande *v.* McDonald, 2 Idaho 283. And see Kimbro *v.* Virginia, etc., R. Co., 56 Ga. 185.

Consult also the statutes cited *supra*, note 1.

3. The action may be dismissed at the costs of the plaintiff by the court when it appears to the court by affidavit that either party to the action has been dead for a period so

State of *Kansas.*

In the *appellate* court, *southern* department, *central* division. Appeal from *district* court, *Cowley* county.

No. *7405.*

W. S. Houghton, plaintiff in error, v. *R. G. Lannon and Allen V. Wilson, partners doing business under the firm name and style of Lannon & Wilson*, defendants in error.

Motion to Dismiss Appeal.

Now comes the defendant in error, *Allen V. Wilson*, by *Oliver M. Wilson*, his attorney of record, and moves the court to dismiss the appeal in the above entitled cause upon the grounds: (1) That said *W. S. Houghton*, plaintiff in error, departed this life in *December*, 1*893*, and since the proceedings, order and judgment herein were had and said appeal taken; that more than *one* year has elapsed since the death of said plaintiff in error, and that said action has not been revived within *one* year from the time an order therefor might have been first made; (2) that one *C. S. Houghton* was made executor of the estate of said *W. S. Houghton*, deceased, plaintiff in error, and has not revived said action in behalf of said estate within *one* year from the time the order to revive said action might have been first made. Wherefore, defendant in error, *Allen V. Wilson*, prays that said appeal and all proceedings therein be dismissed, and that he receive his costs.

Allen V. Wilson, defendant in error,
by *Oliver M. Wilson.*

m. For Variance Between Complaint and Summons.

NOTICE OF MOTION.

Form No. 7567.

(Precedent in Champlin *v.* Deitz, 37 How. Pr. (N. Y. Supreme Ct.) 220.)

In the *Supreme* Court of *Chenango* County.

Christopher C. Champlin
agt.
William Deitz.
} Notice of Motion.

Sir: — Please to take notice that upon the summons and complaint in this action, or copies thereof, and upon the affidavit of *William Deitz*, a copy whereof will be hereafter served on you, a motion will be made at the next special term of this court, appointed to be held at *the court house*, in the *village* of *Norwich*, in and for the county of *Chenango*, on the *third Monday* in *February*, 1*869*, at the opening of the court on that day or as soon thereafter as counsel can be heard, for an order, that the plaintiff's complaint herein be dismissed with costs, upon the ground of the following irregularity, viz.:

long that the action cannot be revived in the names of his representatives or successors without consent of both parties, or where the party sues or is sued as a personal representative.

Kansas. — Gen. Stat. (1897), c. 95, § 394.

Ohio. — Bates' Anno. Stat. (1897), § 5160.

Wisconsin. — Stat. (1898), § 2811.

The form given in the text refers to a case on appeal, but the form is applicable to a case at any stage.

1st. That the complaint disagrees with the summons herein.

2d. That the summons is for relief, under subdivision *two* of section *one hundred and twenty-nine* of the *N. Y.* Code, and that the complaint is for money under subdivision *one* of the same section.

3d. That the complaint disagrees with the summons in this, to wit: that the summons is for *relief*, and the complaint for *money* — or for such other and further order and relief in the premises as shall be equitable and just.

Dated this *14th January*, 1*869*. Yours, etc.,

D. L. Atkyns, attorney for defendant.

To *Charles A. Fuller*, Esq., attorney for plaintiff.

ORDER.

Form No. 7568.

(Precedent in Champlin *v.* Deitz, 37 How. Pr. (N. Y. Supreme Ct.) 221.)

At a *special* term of the *supreme* court, held in and for the county of *Chenango*, at *the court house* in the *village* of *Norwich*, on the *15* of *February*, 1*869*.

Present: — Hon. *Ransom Balcom*, Justice.

Christopher C. Champlin, agt. *William Deitz*.

On reading and filing affidavit of *William Deitz*, the defendant herein, and notice of motion, that the complaint herein be dismissed with costs, for the reason that it disagrees with the summons, and after hearing Mr. *Atkyns* for the motion, and *E. H. Prindle* of counsel for the plaintiff in opposition thereto:

Ordered that the said motion be, and the same is hereby granted with *ten* dollars costs.

And it is further ordered that on the payment of the said costs the plaintiff may within *ten* days after service of a copy of this order, amend his summons herein, and that if such amendment is made the defendant may have *ten* days after the service of a copy thereof, in which to answer the complaint herein.

R. B., J. *S.* C.

n. For Want of Jurisdiction.

(1) Of Amount in Controversy.

Form No. 7569.[1]

(N. Car. Code (1883), p. 363.

Before *Abraham Kent*, Esq., Justice of the Peace.

John Doe against *Richard Roe*.

1. For similar statutory provisions see as follows, to wit: *Alabama.* — Civ. Code (1886), § 2739. *Iowa.* — Code (1897), § 4524.

It appearing that the sum demanded by the plaintiff in this action exceeds *two hundred* dollars, it is ordered that the action be dismissed, and judgment is rendered against *John Doe*, plaintiff, for the sum of *three* dollars, costs.

(2) Of Principal Defendant.

(*a*) *Motion.*

Form No. 7570.[1]

(*Title of court and cause as in Form No. 7554.*)

Motion to Dismiss, by the Defendant *Van Tassel.*

And now comes the defendant *Edward D. Van Tassel*, and moves that this court should dismiss said bill of complaint against him, for want of jurisdiction of said court over the subject matter therein contained, and over this defendant, and because there is no jurisdiction over the defendant *John E. Du Bois*, the principal defendant named in said bill of complaint.

By his attorneys,
Johnson & Underwood.

(*b*) *Order.*

Form No. 7571.

(*Caption.*)

And thereupon, it appearing to the court from the bill on file in this cause that the defendant *John E. Du Bois* is the principal defendant and that no decree ought to be made which does not bind said *John E Du Bois* or his property within the jurisdiction of this court, and that there is no jurisdiction over the person or any property of the said *John E. Du Bois* in this court, it is decreed and ordered that the said bill be dismissed, but without costs.

o. For Want of Proper Parties.[2]

Form No. 7572.

(Precedent in Jansen *v.* Mundt, 20 Neb. 322.)[3]

Jansen & Co.
vs.
Herman Mundt.

Now comes the said defendant, *Herman Mundt*, by his attorney,

1. This form is copied from the original papers in National Telephone Mfg. Co. *v.* Du Bois, 165 Mass. 117.

2. An action may be dismissed by the court for want of necessary parties.
Arkansas. — Sand. & H. Dig. (1894), § 5791.
Indiana.—Horner's Stat. (1896), § 333.
Kansas. — Gen. Stat. (1897), c. 95, § 393.
Kentucky. — Bullitt's Civ. Code (1895), §§ 28, 371.
Iowa. — Code (1897), § 3764.
Nebraska. — Comp. Stat. (1897), § 6008.
Ohio. — Bates' Anno. Stat. (1897), §§ 5013, 5314.
Oklahoma. — Stat. (1893), § 4288.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5085.
Wyoming. — Rev. Stat. (1887), § 2661.
In *Washington*, judgment of nonsuit may be entered for the same cause.

3. This motion was denied in the principal case because the court ruled that there were proper parties plaintiff.

for the purpose of this motion only, and moves the court to dismiss the aforesaid action for want of jurisdiction, and states the following reasons therefor: 1. For want of proper parties plaintiff. 2. Because the facts stated in said affidavit on which said attachment was issued are not true.[1]

Herman Mundt,
By *J. S. Bennett*, his Attorney.

Form No. 7573.

(Precedent in Wilcher *v.* Outz, 67 Ga. 402.)[2]

Dougherty Superior Court, *April* Term, 1880.
Monday, April 5th, 1880.

Wright, Brady et al., vs. *B. B. Outz et al.* } Bill, etc., *Dougherty Superior* Court.

It is ordered that parties plaintiffs be made by the next term of this court, and, in default thereof, that this case be dismissed.

Done in open court, all parties present.

G. J. Wright, J. S. C. A. C.

III. NONSUIT.[3]

1. Voluntary.

a. Upon Plaintiff's Offer as of Right.[4]

(1) IN OPEN COURT.

(*a*) *Generally.*

Form No. 7574.

(Precedent in Tate *v.* McCrary, 21 Ala. 499.)[5]

[(*Title of cause as in Form No. 7575.*)][6]

This day came the parties by their attorneys, and the plaintiffs voluntarily suffer a non-suit. It is therefore considered by the court, that the defendant go hence, [and recover of the plaintiffs their costs in this behalf expended.][6]

1. The third and fourth grounds upon which dismissal was asked are not set out.

2. By reference to the report, it appears that the sole plaintiff had died pending suit and no substitution had been made.

3. Throughout this section, Forms Nos. 7532 to 7573 and the annotations thereto should be consulted freely, as under many statutes an action may be dismissed or a judgment of nonsuit entered for the same reasons.

4. For statutes relating to voluntary nonsuit see as follows, to wit:

Arizona. — Rev. Stat. (1887), § 764.

Florida. — Rev. Stat. (1892), § 1084.

Illinois. — Starr & C. Anno. Stat. (1896), c. 110, par. 50.

Michigan. — How. Anno. Stat. (1882), § 6938.

Mississippi. — Anno. Code (1892), § 741.

New York. — Birds. Rev. Stat. (1896), p. 1804, § 157.

Oregon. — Hill's Anno. Laws (1892), § 246.

Texas. — Rev. Stat. (1895), art. 1301.

5. See *supra*, note 4.

6. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

(*b*) *With Order for Costs Against Security.*

Form No. 7575.

(Precedent in Sauls *v.* Carmichael, 37 Ala. 88.)[1]

R. T. Sauls
vs.
Carmichael & Allen.

April 27, 1*859*, came the parties, by their attorneys; and the plaintiff makes known to the court that he will take a nonsuit. It is therefore considered by the court, that the plaintiff be nonsuited, and that the defendants be discharged; and *James M. Pruitt* having acknowledged himself security for costs in this behalf, it is further adjudged, that defendants recover of said plaintiff, *Sauls*, and also of said *Pruitt* as his security, the costs in this behalf expended.

(2) Upon Notice Where Suit Begun Without Plaintiff's Consent.

(*a*) *With Disclaimer of Title to Land.*

Form No. 7576.

(Precedent in Caverly *v.* Jones, 23 N. H. 574.)

Strafford, ss. — Court *of Common Pleas*,
January Term, 1*851*.

To the honorable justices of said court: We, the undersigned, finding ourselves named as plaintiffs in the action of *Richard Caverly and others* against *Peletiah Jones*, *Benjamin Durgin* and *Stevens Durgin*, now pending in said court, respectfully represent, that said action was commenced and our names used as plaintiffs, without our consent, knowledge or authority; and we object to the prosecution of said action in our names, and do hereby forbid the attorneys of said plaintiffs further prosecuting the same; that we have no doubt that the said *Peletiah Jones*, at the time the alleged trespasses were committed, was the lawful owner of the land upon which said supposed trespasses were committed; that we make no claim, and never have made any claim, to the land described in the plaintiffs' writ, and are fully satisfied that our ancestor, *Stephen Pendergast*, or his executors, sold and conveyed said land to *William Laskey*, under whom the said *Jones* claims title thereto; we therefore become nonsuit in said action, and pray the court so to order, and to protect us in the premises.

Daniel Meserve.
John P. Meserve.
J. D. Meserve.

1. See *supra*, note 4, p. 878.

(*b*) *With Admission of Defendant's Right to Enter.*

Form No. 7577.

(Precedent in Brown *v.* Wentworth, 46 N. H. 490.)

Supreme Judicial Court.
April Term, 1866.

Carroll, ss.

To the Honorable Justices of said Court:

We, the undersigned, finding ourselves named in the action of *Jacob F. Brown*, *Loammi Hardy*, *Leander D. Sinclair*, *Asa Beacham*, and *Luther D. Sawyer*, against *Daniel Wentworth* and *Kirk B. Neal*, now pending in said court, respectfully represent that said action was commenced, and our names used as plaintiffs without our consent, knowledge or authority, and we object to the prosecution of said action in our names, and do hereby forbid the attorneys of said plaintiffs further prosecuting the same. That we have no doubt that the said defendants, at the time the alleged trespass was committed, had a legal right to *dig out*, *cut*, *and sever the said lead pipe of the plaintiffs*, and to perform the acts alleged in said declaration, the said *pipe* being upon the land of the defendants. We, therefore, become nonsuit in said action, and pray the court so to order, and to protect us in the premises.

L. D. Sinclair,
L. D. Sawyer,
Laommi Hardy,
Asa Beacham.

(*c*) *Without Prejudice.*

Form No. 7578.

(Precedent in Wilson *v.* Mower, 5 Mass. 407.)

In the action *Abraham Lincoln*, *Ephraim Mower* and *James Wilson*, plaintiffs, against *Samuel Cotting*, defendant, my name having been inserted in the writ without my knowledge or consent, I hereby agree to become nonsuit.

Dec. 10th, 1806. *James Wilson.*

b. Upon Consent.

(1) In General.

Form No. 7579.

(Precedent in Davis *v.* Thomas, 5 Tex. 389.)[1]

Ordered, therefore, that the same be dismissed from the docket, and that the plaintiff, *Iredel D. Thomas*, pay all lawful costs, on this

1. This order was a docket entry based on an agreement in the following words, to wit:

"Now come the parties, by their attorneys, and it is agreed, that this cause be dismissed at the costs of the plaintiff, for all lawful costs incurred herein; and that all costs not strictly necessary be at the cost of the defendant."

behalf to be taxed; and that all the costs unnecessarily incurred by the defendant be taxed to said defendant, *Samuel S. Davis*, administrator, etc.[1]

(2) After Ruling Adverse to Plaintiff.

Form No. 7580.

(Precedent in Wilcox *v.* McKenzie, 75 Ga. 73.)

[(*Title of court and cause as in Form No. 7573.*)][2]

Upon the introduction of the evidence offered by plaintiff in the above case, defendant's counsel having moved for a non-suit in said case, and it being admitted by plaintiff's counsel that the motion should be granted, if the court should hold that plaintiff was not entitled to recover without showing malice and want of probable cause, the court so holding, it is ordered that said motion be sustained and a non-suit granted.

[(*Signature as in Form No. 7573.*)][3]

2. Involuntary.

a. In Justice's Court Because No Evidence was Offered.

Form No. 7581.

(Precedent in Norton *v.* Petrie, 59 Conn. 200.)

[(*Caption and commencement.*)][3]

This action was duly brought to said court and by legal adjournments comes to this day for trial. The plaintiff appeared and the defendant appeared, and the parties joined in an issue or plea of general issue, as on file, and also in an issue of special answer, as on file, and no testimony being offered, this court is of opinion and entered judgment of non-suit, and further that the defendant recover his costs taxed at *one* dollar.

b. For Failure to Appear.[4]

1. The precedent continued, "and further ordered that execution issue," but this part of the order was stricken out on appeal.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. For the formal parts of a judgment in any particular jurisdiction consult the title Judgments and Decrees.

4. For statutes relating to nonsuit for failure of plaintiff to appear at time of trial or adjournment see as follows, to wit:

Connecticut. — Gen. Stat. (1888), § 988.

Maine. — Rev. Stat. (1883), c. 83, § 12.

Michigan. — How. Anno. Stat. (1882), § 6938.

New York. — Birds. Rev. Stat. (1896), p. 1804, § 157.

Vermont. — Stat. (1894), § 1286.

Analogous statutes relating to nonsuit for failure to plead according to law see as follows, to wit:

Connecticut. — Gen. Stat. (1888), § 999.

North Carolina. — Code Civ. Proc. (1891), §§ 238, 282.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1605, §§ 1, 4.

Virginia. — Code (1887), § 3240.

Form No. 7582.[1]

Kennebec, ss. *Superior* Court.

John Doe
against
Richard Roe.

In this case, the plaintiff failing to appear for trial, the clerk is directed to enter upon the docket: "Plaintiff nonsuited for non-appearance at trial; judgment to be entered accordingly."

John Marshall, J. *Sup.* Ct.

c. For Failure to Answer Interrogatories

Form No. 7583.[2]

Commonwealth of *Massachusetts.*

Suffolk, ss. *Superior* Court,
January Sitting, 1*898.*

John Doe
against } Motion to dismiss.
Richard Roe.

And now comes the defendant by his attorney and moves the court to enter a nonsuit to the plaintiff in the above entitled action, upon the ground that the plaintiff was commanded, by an order made herein on the *tenth* day of *January*, 1*898*, to file answers to all the defendant's interrogatories herein on file, within *ten* days, and in default thereof that he be nonsuited, and upon the ground that the plaintiff has failed to comply with said order, and has failed to answer all or any of the said interrogatories.

By his attorney,
Marshall P. Thompson.

d. For Failure to Produce Books or Papers.

Form No. 7584.[3]

John Doe
against } *Circuit* Court, *De Soto* County.
Richard Roe.

De Soto, ss.

And now comes the defendant by his attorney and moves the honorable court to dismiss the action of *John Doe* herein brought against him, and that said *John Doe* become herein nonsuit, upon the ground that said *John Doe* was required by order made herein on the *fourth* day of *January*, 1*898*, to produce and have here in court his *ledger* and *shop* books, within *ten* days, and in default thereof that his said action be dismissed, and upon the ground that he has not complied with said order.

Jeremiah Mason, Defendant's Attorney.

1. See *supra*, note 4, p. 881.
2. *Massachusetts.* — Pub. Stat. (1882), c. 167, § 59.
See also similar statutes as follows:
Alabama. — Civ. Code (1886), § 2820.
Michigan. — How. Anno. Stat. (1882), § 6416.
Ohio. — Bates' Anno. Stat. (1897), § 5101.
3. *Florida.* — Rev. Stat. (1892), § 1115.

e. Upon Opening Statement of Counsel.[1]

Form No. 7585.

(Precedent in Nicholl *v.* Littlefield, 60 Cal. 239).

[(*Title of court and cause.*)][2]

This cause came on regularly before the Court for trial on the *twenty-fourth* day of *February*, A. D. 1*880*. *J. B. Mhoon*, Esq., appearing for the plaintiff and *B. S. Brooks*, Esq., appearing for the defendant, whereupon counsel for plaintiff opened his case and stated to the Court the facts which he intended and expected to be able to prove; thereupon the counsel for defendant moved the Court to nonsuit the plaintiff, and render judgment in favor of defendant upon the ground that the said facts were not sufficient to constitute a cause of action or to entitle the plaintiff to any judgment against the defendant under the pleadings.

Said motion was thereupon argued and submitted to the Court for consideration, and due deliberation having been had thereon the said motion was granted.

See also the statutes following, to wit:

Ohio. — Bates' Anno. Stat. (1897), § 5289.

Vermont. — Stat. (1894), § 1410.

1. The practice in *California*, of nonsuiting the plaintiff upon the opening statement of counsel is sustained by Harris *v.* McGregor, 29 Cal. 124; Raimond *v.* Eldridge, 43 Cal. 506, and in several manuscript cases cited in the abstract of the respondent's brief. Nicholl *v.* Littlefield, 60 Cal. 238. But it is discouraged in Emmerson *v.* Weeks, 58 Cal. 382.

A nonsuit may also be granted where the plaintiff fails to make a *prima facie* case, or if, admitting all the facts proved and all reasonable deductions from them, the plaintiff ought not to recover.

Georgia. — 2 Code (1895), § 5347.

Oregon. — Hill's Anno. Laws (1892), § 246.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1605, § 8.

2. The matter to be supplied within [ ] will not be found in the reported case.

DISCOVERY AND INSPECTION.

By W. R. Buckminster.

I. Discovery by Bill, 885.

1. *Of Facts and Documents in Aid of Plea to Jurisdiction*, 887.
2. *Of the Stockholders of a Corporation*, 889.
3. *Of Ownership of Money*, 893.
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II. Discovery by Interrogatories, 896.

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2. *The Interrogatories*, 897.
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   b. *To a Corporation*, 898.
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      (1) *At Trial*, 908.
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CROSS-REFERENCES.

For Forms in Proceedings for Contempt for Failure to Produce Documents or Answer Interrogatories, see the title CONTEMPT, vol. 5, p. 226.

For Forms connected with Dismissal or Nonsuit for Failure to Produce Documents or Answer Interrogatories, see the title DISCONTINUANCE, DISMISSAL AND NONSUIT, ante, p. 852.

For Forms relating to Subpœna Duces Tecum, see the title SUBPŒNA. See also the GENERAL INDEX to this work.

I. DISCOVERY BY BILL.[1]

1. Scope of Section. — All bills in equity that seek for answers to matters alleged may, in one sense, be said to be bills for discovery, although they seek for relief based on such facts. But there is a distinct bill in chancery practice known as a bill of discovery. It is that and nothing else. It seeks only for the discovery of facts resting in the knowledge of the other party, or of deeds and writings or other things in his custody or possession, but seeking no relief in that bill in consequence of the discovery. Dinsmore *v.* Crossman, 53 Me. 441. In this section, only the pure bill of discovery is treated. Such bills are now largely superseded by the statutory provisions for interrogatories, and for the production and inspection of documents. See *infra*, note 1, p. 896; note 2, p. 906.

Discovery Abolished. — In many states the action for discovery is expressly abolished by statute.

Nevada. — Gen. Stat. (1885), § 3625.

New York. — Code Civ. Proc., § 1914 (Birds. Rev. Stat. (1896), p. 875, § 8).

North Carolina. — Code (1883), § 579.

North Dakota. — Rev. Codes (1895), § 5645

South Carolina. — 2 Rev. Stat. (1893), § 390.

South Dakota. — Dak. Comp. Laws (1887), § 5252.

Wisconsin. — Stat. (1898), § 4096.

In the following states the action for discovery has been abolished, except for the discovery of persons jointly liable:

Arkansas. — Sand. & H. Dig. (1894), §§ 5611, 5612.

Iowa. — Code (1897), § 3441.

Kentucky. — Bullitt's Civ. Code (1895), § 685.

For a form drawn under these statutes see *infra*, Form No. 7589.

Although not expressly abolished by statute, the bill has been held no longer to lie in the following states, to wit:

Connecticut. — Since Pub. Acts (1889), c. 22, it is doubtful if a bill purely for discovery, or basing its right to equity jurisdiction on discovery, can ever be maintained. Welles *v.* Rhodes, 59 Conn. 504.

Maine. — The courts cannot entertain bills for discovery which do not pray for relief and seek a discovery only in aid of an action at law. Warren *v.* Baker, 43 Me. 570.

Michigan. — A bill purely for discovery in aid of an action or defense at law does not now lie. Riopelle *v.* Doellner, 26 Mich. 102; Shelden *v.* Walbridge, 44 Mich. 251. And see McCreery *v.* Cobb, 93 Mich. 463.

Missouri. — Bills of discovery are abolished. Bond *v.* Worley, 26 Mo. 253.

Nebraska. — The provision for discovery by statute, at law, is held to oust the jurisdiction of equity in the matter of a bill purely for discovery. Lamaster *v.* Scofield, 5 Neb. 148.

Texas. — In this state the deposition of the adverse party is taken, as that of any other witness. Tex. Rev. Stat. (1895), art. 2292. A bill for discovery is not known. Cronin *v.* Gay, 20 Tex. 460; Love *v.* Keowne, 58 Tex. 191.

United States. — It is doubtful if a bill for discovery in aid of another suit will now lie. U. S. *v.* McLaughlin, 24 Fed. Rep. 823. And in Preston *v.* Smith, 26 Fed. Rep. 884, Brewer, J., says that bills of discovery have fallen into a condition of innocuous desuetude.

Discovery Retained. — In the following states the action for discovery is expressly retained by statute, to wit:

Georgia. — 2 Code (1895), § 3946.

Massachusetts. — Pub. Stat. (1882), c. 151, § 2, cl. 14, c. 198, § 16; Stat. (1883), c. 223, § 10. But in Post *v.* Toledo, etc., R. Co., 144 Mass. 341 (*infra*, Form No. 7587), holding that a bill of discovery may still be maintained in aid of a suit at law to be brought in another state, a dictum questions whether it will lie in a case in the state where statutory interrogatories can be used.

New Hampshire. — Pub. Stat. (1891), c. 205, § 1.

Ohio. — Bates' Anno. Stat. (1897), § 5293. But in Chapman *v.* Lee, 45 Ohio St. 356, such bills are declared to be practically obsolete.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 775, § 2, par. III.

Virginia. — Code (1887), § 3372.

Wyoming. — Rev. Stat. (1887), § 2641.

In the following states the action for discovery is held still to lie, in spite of statutory provisions providing a substitute therefor, to wit:

Alabama. — Wood *v.* Hudson, 96 Ala. 469; Virginia, etc., Min., etc., Co. *v.* Hale, 93 Ala. 542; Handley *v.* Heflin, 84 Ala. 600; Shackelford *v.* Bankhead, 72 Ala. 476; Continental L. Ins. Co. *v.* Webb, 54 Ala. 688; Mallory *v.* Matlock, 10 Ala. 595.

Illinois. — Grimes *v.* Hilliary, 38 Ill. App. 246; Kendallville Refrigerator Co. *v.* Davis, 40 Ill. App. 616.

Maryland. — Union Pass. R. Co. *v.* Baltimore, 71 Md. 238. See also Md. Pub. Gen. Laws (1888), art. 75, § 94.

Mississippi. — Millsaps *v.* Pfeiffer, 44 Miss. 805. See also Buckner *v.* Ferguson, 44 Miss. 677; Meridian First Nat. Bank *v.* Phillips, 71 Miss. 51.

New Jersey. — Shotwell *v.* Smith, 20 N. J. Eq. 79; Howell *v.* Ashmore, 9 N. J. Eq. 82.

Tennessee. — Elliston *v.* Hughes, 1 Head (Tenn.) 225.

West Virginia. — Russell *v.* Dickeschied, 24 W. Va. 61.

Allegation that Discovery is Indispensable — *Generally.* — In a bill framed purely for discovery it is, perhaps, not necessary to allege that the facts sought to be discovered are otherwise incapable of proof, for a discovery may be had of mere cumulative evidence. Story Eq. Pl., § 324; Salmon *v.* Clagett, 3 Bland (Md.) 125; Stacy *v.* Pearson, 3 Rich. Eq. (S. Car.) 148; Peck *v.* Ashley, 12 Met. (Mass.) 478; Turner *v.* Dickerson, 9 N. J. Eq. 140; McFarland *v.* Hunter, 8 Leigh (Va.) 493; Russell *v.* Dickeschied, 24 W. Va. 61. But if the bill is for discovery and relief, and seeks to withdraw a matter of pure legal cognizance from the courts of law, the discovery must be alleged to be indispensable to the proof of the complainant's case. Continental L. Ins. Co. *v.* Webb, 54 Ala. 688. And this is so where the bill for discovery seeks to delay the suit at law by an injunction, or seeks any other relief. Turner *v.* Dickerson, 9 N. J. Eq. 140.

In Brown *v.* Swann, 10 Pet. (U. S.) 497, it is said that "the rule to be applied to a bill seeking a discovery from an interested party, is, that the complainant shall charge in this bill, that the facts are known to the defendant, and ought to be disclosed by him, and that the complainant is unable to prove them by other testimony."

Insufficient Allegations. — An averment in regard to certain material facts that the complainants have no other "means of knowing them" is not a sufficient averment that these facts cannot be proved in any other manner than by the answer of the defendants. Shackelford *v.* Bankhead, 72 Ala. 476.

1. Of Facts and Documents in Aid of Plea to Jurisdiction.[1]

Form No. 7586.

(Equity Draftsman, p. 394.)

To the Right Honorable *Richard Scarlett*, Esq., Lord Mayor of the City of *London*, and the Worshipful his Brethren the Aldermen of the same city.

Humbly complaining showeth unto your lordship and worships your orator *John Doe*, of said city, that *Richard Roe*, *Richard Den* and *John Fen*, all of said city, merchants and copartners, have lately commenced an action against your orator in this honorable court, and have declared in such action *in concessit solvere*, and your orator hath pleaded thereto that the cause of such action, if any, accrued out of the jurisdiction of this court, to which the plaintiffs in the said action have replied that the cause of such action accrued within the jurisdiction.[2] And your orator further showeth that he never had any dealings and transactions whatsoever with the said *Richard Roe*, *Richard Den* and *John Fen* within the city of *London* or within the jurisdiction of this court, and he hath applied to them to state the particulars of the demand upon which the said action is commenced and the nature and origin thereof. But now so it is may it please your lordship and worships that the said *Richard Roe*, *Richard Den* and *John Fen* refuse to state a full, true and particular account of the particulars and amount of the demand in respect whereof the said action is commenced, together with the times or time when, and the manner in which and the place where the several transactions took place from which such demand arose, and who were all the persons concerned therein. And the said defendants sometimes pretend that the said demand arose from some bills or bill of exchange which were or was drawn, accepted or indorsed by your orator or on his behalf, but they refuse to set forth the dates and contents of such bills or bill, and when and where and by whom and on whom the same were or was drawn, and by whom the same were or was accepted and indorsed, and what considerations or consideration were or was paid or given to your orator for drawing, accepting or indorsing the

In a bill by a defendant in aid of his defense in an action at law, the allegation of necessity for discovery was: "Your orators further show unto your honor, that they are unable to make the necessary proof of facts at law in reference to the said lot of corn, and the purpose to which it was sent to be applied, and are compelled to seek relief in equity." The court held that these words did not set forth with sufficient certainty the necessity of discovery, saying, "If these allegations had been that 'they were unable to prove the facts aforesaid; and were unable to prove, that the purpose aforesaid was the purpose for which the corn was sent,' the allegations would have been sufficiently certain." Powell *v.* Chamberlain, 22 Ga. 123.

1. Precedent. — For a form of a bill for discovery of title in aid of defense in an action of ejectment see Curt. Eq. Prec. 110.

2. Must Show Nature of Defense. — Where the bill is for discovery in aid of a defense, it must state some particular matter which the complainant has a right to seek a discovery of as material to his defense. and without which he cannot proceed to trial, and must state the defense. Newkerk *v.* Willett, 2 Cai. Cas. (N. Y.) 296; Lucas *v.* Darien Bank, 2 Stew. (Ala.) 280.

See also *supra*, note 1, p. 885.

said bills or bill, and when, where and by whom and in what manner such consideration was paid or given, and when and where and in what manner the said defendants first became the holders of such bills or bill, and what consideration was paid or given by them for the same, and when and in what manner and to whom such consideration was so paid or given by the said defendants, and in what manner they make out a demand against your orator upon the said bills or bill arising within the jurisdiction of this court. And your orator charges that the said defendants have in their custody or power divers books of account, letters and copies of letters and other papers and writings which relate to their said demand upon which the said action has been commenced, but they refuse to set forth an accurate list and description of all such books of account, letters, copies of letters, papers and writings, and to produce the same to your orator and his agents; and your orator without a discovery of the several matters aforesaid will be unable to defend himself in such action. To the end, therefore, that the said defendants *Richard Roe*, *Richard Den* and *John Fen* may upon their several and respective corporal oaths, to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they and every of them distinctly interrogated thereto, and more especially, Whether they the said *Richard Roe*, *Richard Den* and *John Fen* have not commenced an action against your orator in this court; And whether they have not declared in such action *in concessit solvere*, or how otherwise; And whether your orator hath not pleaded thereto that the cause of such action, if any, accrued out of the jurisdiction of this court or to that effect; And whether the plaintiffs in said action have not replied that the cause of such action accrued within the jurisdiction or how otherwise; And whether your orator ever had any and what dealings and transactions with them the said *Richard Roe*, *Richard Den* and *John Fen*, or any and which of them, within the city of *London* or within the jurisdiction of this court and where in particular, and that the said defendants may state a full, true and particular account of all the particulars and amount of the demand in respect whereof the said action is commenced, together with the times or time when and the manner in which and the place or places where the several transactions took place from which such demand arose and who were all the persons concerned therein; And whether the said demand arose from any and what bills or bill of exchange which were or was drawn, accepted or indorsed by your orator or on his behalf, and that they may set forth the dates or date and contents of all such bills or of such bill, and when and where and by whom and on whom the same were or was drawn, and by whom the same were or was accepted and indorsed, and what considerations or consideration were or was paid or given to your orator for drawing, accepting or indorsing the said bills or bill, and when and where and by whom and in what manner such consideration was paid or given by them for the same, and when and where and in what manner such consideration and every part thereof was so paid or given by

the said defendants, and in what manner they make out a demand against your orator upon the said bills or bill arising within the jurisdiction of this court; And that the said defendants may answer and set forth in manner aforesaid whether they have not now, or had not, and when last in their custody or power, some and what books or book of account and some and what letters and copies of letters and other papers and writings which relate to their said demand upon which the said action has been commenced, and that the said defendants may set forth an accurate list and description of all and singular such books of account, letters, copies of letters, papers and writings, and that they may produce the same with liberty for your orator, his solicitors or agents, to inspect the same and take copies thereof as they shall be advised.

And that the said defendants may answer the premises; and may make a full and true discovery of the several matters aforesaid, and that your orator may have the benefit thereof in the trial of the said action. May it please your lordship and worships out of your accustomed goodness to cause the said *Richard Roe*, *Richard Den* and *John Fen* to be warned of the filing of this your orator's bill, and further to grant unto your orator his Majesty's most gracious writ of subpœna to be directed to the said *Richard Roe*, *Richard Den* and *John Fen*, thereby commanding them at a certain day and under a certain pain therein to be limited personally to be and appear before your lordship and worships in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises.

And your orator shall ever pray, etc.

2. Of the Stockholders of a Corporation.

Form No. 7587.[1]

To the honorable the judges of *Supreme Judicial* Court of *Massachusetts* within and for the county of *Suffolk*:

Post & Co., a corporation organized under the laws of the state of *Ohio*, and having its usual place of business in the city of *Cincinnati* in said state, brings this its bill against the *Toledo, Cincinnati & St. Louis Railroad Company*, a corporation organized under the laws of said state of *Ohio*, and having a usual place of business in *Boston* in said county of *Suffolk*, and against *Elijah B. Phillips*, *Willard White*, *Herbert Steward*, *Oliver Ames*, *Henry D. Hyde*, *George Ripley*, *William D. Forbes*, *W. D. Hobbs*, *Pliny Nickerson*, and *Charles W. Pierce*, all of said *Boston*; and thereupon your orator complains and says:

That heretofore your orator brought an action at law in the *Superior* Court of the city of *Cincinnati*, a court of record established

1. This form is copied from the record in Post *v.* Toledo, etc., R. Co., 144 Mass. 341, in which case it was held that there is no doubt that such a bill is within the jurisdiction of the court, under Mass. Pub. Stat. (1882), c. 151, § 2, cl. 14, c. 198, § 16; Stat. (1883), c. 223, § 10. It was suggested, however, that the statutory provisions whereby parties are made competent witnesses and are permitted in suits at law to obtain from each other discovery of facts and documents by filing interrogatories might affect the exercise of this equity jurisdiction in reference to suits brought in the *Massachusetts* courts.

by the laws of the state of *Ohio*, against the said *Toledo, Cincinnati & St. Louis Railroad Company*; and at the *November* term *last past* of said court, to wit, in the month of *November*, 1*883*, your orator recovered judgment against said railroad company in the sum of *eighty-five hundred and four and sixty-eight hundredths* dollars (*$8504.68*), with interest thereon from the *fifth* day of *November*, 1*883*, and costs of suit, as will appear by a duly authenticated copy of the record of said court, which your orator will produce whenever and wherever this honorable court shall direct.

That said judgment still remains in full force and effect, and execution has been issued thereon and returned unsatisfied, no property of said railroad being found to be applied thereon.

That said railroad company is in fact wholly insolvent, and your orator can find no property which can be taken to satisfy your orator's judgment.

And your orator further saith that by the constitution and laws of the state of *Ohio*, namely, by article *XIII*, section *3*, of that constitution, and by sections *3258* and *3259* of the *Revised Statutes* of said state, now in force, it is provided that the stockholders of a corporation shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation, and that the term stockholders shall apply not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although the stock appears on the books in the name of another.

And your orator says that it intends to begin an action against the stockholders of said railroad company to enforce the payment of the said judgment in accordance with the provisions of the *Ohio* laws as before stated.

That in order to bring such an action it is material[1] for your orator to know the names and residences of the stockholders of said railroad company and the amount of stock held by each. But your orator says that, though it has made diligent inquiry, it is unable to discover the names of such stockholders.

1. Must Show Discovery is Material.— A bill for discovery must not only allege that there are facts which the plaintiff or complainant cannot prove without discovery, but must make it appear that these facts are material in making out a right to relief. 2 Story Eq. Jur., § 74; Lucas *v.* Darien Bank, 2 Stew. (Ala.) 280; Horton *v.* Moseley, 17 Ala. 794; Perrine *v.* Carlisle, 19 Ala. 686; Crothers *v.* Lee, 29 Ala. 338.

In Dickinson *v.* Lewis. 34 Ala. 638, the allegation was as follows, to wit:

"Your orator further showeth that he has no adequate means of establishing at law, or otherwise, the various items of expense involved in the original cost and manufacture of all the goods so furnished him as aforesaid by the defendants, up to the time of said settlement; that the same is almost exclusively within their knowledge, and embraced in their books of original entry; and that it is indispensable to the maintenance of his claim that they should make a full and particular discovery of each and every one of said items, under oath, distinctly discriminating such as are embraced in the percentage objected to from the remainder, and that all the said books should be produced."

In spite of the allegation that the facts sought to be discovered were material, it was held that no case for discovery was made, because specific facts were not set out showing how such facts were material.

And your orator further saith that by the laws of the state of *Ohio* the defendant corporation, and all persons liable as stockholders therein, are necessary parties to any proceeding to enforce the liability of stockholders under the constitution and statutes of *Ohio* above referred to, and your orator intends to join the defendant corporation, and the stockholders when discovered, as parties defendant in such proceedings in *Ohio*; but there is no officer of the defendant corporation, or person or book or paper, within the jurisdiction or control of any of the courts of *Ohio* from whom, or from which, the information sought by this bill, or any part thereof, can in fact be obtained.[1]

And your orator further saith that it is informed and believes that the said *Elijah B. Phillips* is the president, the said *Willard White* the vice-president, the said *Herbert Steward* the secretary and treasurer, and the said *Ames*, *Hyde*, *Ripley*, *Forbes*, *Hobbs*, *Nickerson* and *Pierce* are directors of the said railroad company, and that as such officers they are able to give your orator the discovery which he needs concerning the stockholders of the said railroad company. That all of said officers reside in *Boston*, within the jurisdiction of this court; that the said railroad company has its only office for the transfer of stock in said *Boston*; that all the books for the transfer of stock and all books which show the shareholders in said railroad company are in said *Boston*, and are in the possession or under the control of the aforesaid officers, or some of them; that a majority of the board of directors of said railroad company reside in said *Boston*; and that all the directors and all the other principal officers of said railroad company reside outside the state of *Ohio*, and, as far as your orator can discover, there is not within the state of *Ohio* any officer of said railroad company, or any person or book or document, from which your orator can learn the names of such shareholders in said state of *Ohio*.

And your orator further saith that it has applied to the said *White*, vice-president as aforesaid, and to the said *Hyde*, director as aforesaid, and has requested them to inform your orator who such shareholders are, but both of said officers have refused to give your orator any information, and your orator is unable without the aid of this court to discover the names of such stockholders.

And your orator further saith that it is informed and believes that the said defendants *Ames*, *Hyde*, *Ripley*, *Forbes*, *Hobbs*, *Nickerson* and *Pierce*, or some of them, are in fact the equitable owners of a large amount of said stock, although such stock appears on the books of said railroad company in the name of another, or so appears as not to show the equitable ownership of said parties; and that the said *Ames*, *Hyde*, *Ripley*, *Forbes*, *Hobbs*, *Nickerson* and *Pierce* are aware that some of said stock is also held for other persons who are the equitable owners thereof, though not so appearing upon the books of said railroad company, and your orator is unable, unless discovery is obtained from said defendants, to learn who are in fact the equitable owners of the said stock.

1. This paragraph was inserted by amendment upon consent, after the filing of the bill.

In consideration whereof, and forasmuch as your orator is remediless in the premises by the strict rules of the common law and cannot obtain discovery except in a court of equity, to the end therefore that all the aforesaid defendants may upon their several and respective oaths full, true, direct and perfect answer make to all and singular the matters aforesaid, and especially that the said defendants may disclose, —

First — The names and residences of all the stockholders of said railroad company, who were such on the *fifth* day of *November*, 1*883*, the amount of stock held by each, and how long each had held the same;

Second — The names and residences of all shareholders who have become such since the *fifth* day of *November*, 1*883*, with dates of transfer and amounts of stock;

Third — A full and complete statement of the shareholders of said company from the beginning down to the present time, with names, residences, dates of all transfers, names of transferee and amount of stock in each case;

Fourth — The names and residences of any persons, known to any of said defendants, who were on the *fifth* day of *November*, 1*883*, equitable owners of any of such stock, and the amount so owned, with the names of the persons in whose names such stock was then held upon the books of said railroad company;

Fifth — The names and residences of any persons who have been at any time, from the organization of said company down to the present time, equitable owners of such stock, and the amount so owned, when and how long owned, and the names of the persons in whose names such stock stood upon the books of the corporation, and when and to whom such equitable ownership was transferred, if at all;

Sixth — Whether the "*Delphos Trust*," so called, in any manner concerned an equitable ownership of said stock; and if so, state who was the trustee, who were the persons equitably interested in such stock, what was the amount of such equitable interest, when did it begin and when cease, if it has ceased, and generally disclose fully any equitable ownership of such stock resulting from said trust, and the extent and duration thereof, with the names and residences of all equitable owners;

And that the said defendants and each of them may make a full disclosure and discovery of all and every the matters and things aforesaid;

May it please your honors to grant unto your orator a writ of subpœna directed unto the said defendants, commanding each of them at a certain day to appear before this honorable court and make answer in the premises.

And your orator shall ever pray, etc.

Post & Company,
By *Myers & Warner,*
Solicitors and of Counsel.

3. Of Ownership of Money.

Form No. 7588.

(Precedent in Russell *v.* Dickeschied, 24 W. Va. 63.)[1]

[To the Honorable *John Marshall*, judge of the *circuit* court of *Ohio* county.

The bill of complaint of *Henry M. Russell, as administrator of the estate of Guenther Schuchardt, deceased*, against *Othilie Dickeschied*, filed in the *circuit* court of *Ohio* county.

And thereupon your orator complains and says: That on the *fifth* day of *October*, 1*883*, said *Othilie Dickeschied* brought against the *Exchange Bank of Wheeling*, in the *circuit* court of *Ohio* county, her action of detinue to recover the sum of *seven thousand four hundred and ninety-six* dollars and *seventy-five* cents of silver coin of the United States contained in *fourteen* linen bags, which had been left with said *Exchange Bank of Wheeling* for safe keeping on the *third* day of *March*, 1*883*, by one *Wenael Dickeschied*, who afterward stated said coin to be the property of the said *Othilie Dickeschied.*

That your orator was, on the *tenth* day of *April*, 1*883*, by the *County* Court of *Ohio* county, duly appointed administrator of the estate of *Guenther Schuchardt* of said county, deceased, who died intestate on the *nineteenth* day of *March*, 1*883*, a sudden, violent and unexpected death, at a time when he was in his usual health, having no reasonable cause to fear or expect immediate death, and that your orator duly qualified as such administrator on the *thirtieth* day of *April*, 1*883*.

That your orator claims that said bags of coin were the property of his said intestate, and that as such administrator your orator is entitled to receive them.

Your orator further shows that the said *Exchange Bank of Wheeling* appeared to the said action of detinue and filed an affidavit of its cashier, stating that it had the said bags of coin in its possession and keeping; that it made no claim to them, and that the same were left with it by *Wenael Dickeschied* on the *third* day of *March*, 1*883*, for safe keeping, and that said *Wenael Dickeschied* subsequently stated them to be the property of *Othilie Dickeschied*, and that the property was claimed by your orator as administrator of *Guenther Schuchardt*, deceased; that the said *Exchange Bank of Wheeling* did not collude with your orator as such administrator, but was ready to deliver the said property to the owner thereof, as the court might direct; and on motion of the said *Exchange Bank of Wheeling* your orator was made a defendant in the said action of detinue and was required to state the nature of his claim to the coin, to maintain or relinquish the same.

And your orator avers that as such administrator he appeared as required, claimed the coin as the property of his intestate and denied

1. This bill was presented to a judge of the circuit court, who refused to award the injunction prayed for. The same was then presented to a judge of the supreme court of appeals, who awarded the injunction, and the bill was filed in the circuit court, which then dissolved the injunction. On appeal, this was held to be error.

that the said *Othilie Dickeschied* had any title thereto; that thereupon the court, on motion of said *Othilie Dickeschied*, directed an issue to be tried to ascertain whether the said coin or any part thereof was, at the time said action of detinue was instituted, the property of the said administrator, under which issue your orator was made plaintiff and said *Othilie Dickeschied* defendant; and that said issue is still pending and undetermined.][1]

Your orator further shows, upon information and belief, that for many years before and until the time of his death, the said *Guenther Schuchardt*, deceased, resided in a house belonging to him in the said city of *Wheeling*, a portion of which was used by him as a drug store and the remainder of which was used and occupied by him as a dwelling; that for years before his death, the said *Guenther Schuchardt* had been in the habit of accumulating and hoarding coin; that some time before his death, the said *Guenther Schuchardt* concealed beneath the earth in a secret portion of the cellar of his said house, the silver money which is in controversy in the said action, and which at the time it was so concealed was the money and property of the said *Guenther Schuchardt* and of him alone; that the said last mentioned silver money remained in the said house until after the death of the said *Guenther Schuchardt*, and that it remained concealed under the earth in the said cellar as aforesaid, either until after the death of the said *Guenther Schuchardt*, deceased, or until the day before his death.

Your orator further shows, likewise, on information and belief, that on the *19th* day of *March*, A. D. 18*83*, the said *Guenther Schuchardt*, deceased, met with a sudden, violent and unexpected death, and that until the last named day the said *Guenther Schuchardt* was in his usual health and in no fear or expectation of, and having no reasonable or probable cause to fear or expect immediate or proximate death.

Your orator further shows, upon information and belief, that the said *Othilie Dickeschied* claims to be the owner of the said silver money now in controversy in said action.

Your orator further shows that in the view of the facts of which he has information and belief, he is advised and says that the said last mentioned silver money was the property of the said *Guenther Schuchardt* at the time of his decease, and is now the property of your orator.

Your orator is advised and says that it is material[2] for him, in order that he may properly maintain his side of the issue in said action, that he should have the discovery hereinafter prayed with reference to certain of the matters in this bill set forth.

In tender consideration whereof, and forasmuch as your orator is remediless in the premises save by the aid of a court of equity, your orator prays that the said *Othilie Dickeschied* may be made defendant

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. It was held in this case not necessary in a pure bill of discovery to aver that the discovery is absolutely necessary or indispensable for the maintenance or defense of plaintiff's claim. It is sufficient to state and show that it is material evidence for him, although it be merely cumulative. See also *supra*, note 1, p. 885.

to this bill and may be required to make full, true, direct and perfect answers to every of the following interrogatories — that is to say:

1st. Whether for many years before and until his death, the said *Guenther Schuchardt*, deceased, resided in the said city of *Wheeling*, in a house belonging to him, a portion of which was used by him for a drug store and the remainder of which was used and occupied by him as a dwelling?

2d. Whether for years before his death, the said *Guenther Schuchardt* had been in the habit of accumulating and hoarding coin?

3d. Whether some time before his death the said *Guenther Schuchardt* concealed beneath the earth, in a secret portion of the cellar of his said house, the silver money which is in controversy in the said action?

4th. Whether at the time it was so concealed as aforesaid, the said last mentioned money was the money and property of the said *Guenther Schuchardt*, now deceased, and of him alone?

5th. Whether the said last mentioned silver money remained in the said house until after the death of the said *Guenther Schuchardt*?

6th. Whether the last mentioned money remained concealed under the earth in the said cellar as aforesaid, either until after the death of the said *Guenther Schuchardt*, deceased, or until the day before his death?

7th. Whether on the *19th* day of *March*, A. D. 1*883*, the said *Guenther Schuchardt* met with a sudden, violent and unexpected death?

8th. Whether until the day last named, the said *Guenther Schuchardt* was in his usual health and had no fear or expectation of and having no reasonable or probable cause to fear or expect immediate or proximate death?

Your orator also prays that a temporary injunction, until the further order of your honorable court, to be made upon full, true and perfect answers being filed to this bill, may be granted, restraining the said *Othilie Dickeschied*, her attorneys, agents and servants, from further prosecuting the said action at law brought by her as aforesaid against the *Exchange Bank of Wheeling*, and in which your orator has been made a party as aforesaid. And your orator will ever pray, etc.

[(*Signature and verification as in Form No. 4283.*)][1]

4. Of Persons Jointly Liable.[2]

Form No. 7589.

Pulaski Circuit Court.

John Doe, plaintiff, against *Richard Roe*, defendant.	Complaint in Equity.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Arkansas.* — Sand. & H. Dig. (1894), §§ 5612, 5613.

Iowa. — Code (1897), § 3441.

Kentucky.—Bullitt's Civ. Code (1895), § 685.

Discovery is abolished in the above states, except for this specific purpose.

The plaintiff, *John Doe*, states that on the *fifth* day of *January*, 1*898*, he entered into a contract with the defendant *Richard Roe* and other persons to the plaintiff unknown, associated as copartners under the style of "*The Circus Company*," whereby the plaintiff agreed to publish for said company a magazine called "*The Circus*," and such persons as such company agreed to pay the plaintiff therefor within *twenty* days of each publication; and that said persons have failed to perform said contract upon their part, although the plaintiff has up to this time performed and is willing to perform said contract upon his part.

That said persons to the plaintiff unknown, associated with the defendant *Richard Roe*, as aforesaid, under the style of "*The Circus Company*," are jointly and severally liable with defendant *Richard Roe* upon said breach of said contract.

That your orator intends to bring an action for said breach of said contract against all the persons so liable as aforesaid; that the defendant *Richard Roe* is the only one of said persons so liable whose name or residence is known to the plaintiff; that the plaintiff has used due diligence, without success, to discover the names and residences of any or all of the other persons so liable as aforesaid; that he is informed and believes that other persons are associated with the defendant as aforesaid; and that he is informed and believes that the defendant *Richard Roe*, the sole person known to him so liable as aforesaid, has not sufficient property, either joint or separate, to satisfy his claim and expectation of recovery in the suit above mentioned.

Wherefore the plaintiff prays that the said defendant may full, true and perfect answer make as to the joint liability above charged, and especially to state:

Whether any persons are associated with him under the name of "*The Circus Company*."

If so, what is the name and residence of each, and what is their relation to him and to one another in said "*The Circus Company*."

(*Signature and verification as in Form No. 5909.*)

II. DISCOVERY BY INTERROGATORIES.[1]

1. Scope of Section. — Discovery by interrogatories is treated only so far as it is distinct from depositions. For forms in those states in which the deposition of the adverse party is taken like that of any other witness see the title DEPOSITIONS, *ante*, p. 487.

Interrogatories are allowed by statute in the following states:

Alabama. — Civ. Code (1886), § 2816 *et seq.*

Arkansas. — Sand. & H. Dig. (1894), §§ 5778–5790.

Connecticut. — Laws (1889), c. 22, § 1.

Georgia. — 2 Code (1895), § 3954 *et seq.*

Indiana. — Horner's Stat. (1896), § 359.

Iowa. — Code (1897), §§ 3604–3611.

Kentucky. — Bullitt's Civ. Code (1895), §§ 150, 151, 716, 717.

Louisiana. — Gar. Rev. Code (1894), §§ 347–350.

Maryland. — Pub. Gen. Laws (1889), art. 75, § 94.

Massachusetts. — Pub. Stat. (1882), c. 167, §§ 49–60.

Mississippi. — Anno. Code (1892), § 1761.

New Jersey. — Gen. Stat. (1895), p. 2592, § 341.

Tennessee. — Code (1896), §§ 5684–5687.

Virginia. — Code (1887), § 3370.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 6009 *et seq.*

1. Motion or Petition.[1]

Form No. 7590.[2]

John Doe vs. *Richard Roe.* } *Superior* Court, *Hartford* County, *January* Term, 1898.

MOTION FOR DISCLOSURE.

The *defendant* moves the court to require[3] the *plaintiff* to disclose the facts in answer to the following interrogatories upon the ground that the true answers to said interrogatories lie within the exclusive knowledge of the *plaintiff*, and that the *plaintiff's* answers thereto will be material evidence in support of the *answer* herein made by said *defendant*. Said interrogatories are as follows: (*Here insert and number interrogatories.*)

Joseph Story, Attorney for *Defendant*.

Hartford, ss. Before me personally appeared *Richard Roe*, who, being duly sworn, deposes and says that he is the *defendant* in the above entitled action, and that he verily believes all the matters set forth in the above motion and interrogatories to be true as stated.

(SEAL) *Abraham Kent*, Notary Public.

2. The Interrogatories.[4]

In *Minnesota*, the use of interrogatories is unauthorized, and if they be filed an order to the adverse party to answer is error. Lenthold *v.* Fairchild, 35 Minn. 99.

1. For the formal parts of a motion or petition in a particular jurisdiction consult the titles MOTIONS; PETITIONS.

2. *Connecticut.* — Laws (1889), c. 22, §§ 1, 2.

See also similar statutes as follows, to wit:

Maryland. — Pub. Gen. Laws (1888), art. 75, § 94.

Tennessee. — Code (1896), § 5685.

Demurrer to Motion. — In Downie *v.* Nettleton, 61 Conn. 593, a demurrer to a motion for disclosure was sustained on the following grounds, to wit: "1. It does not appear that the matters for which a disclosure is asked are material to the defense of the suit.

2. It does not appear that the relief prayed for cannot be obtained in the pending suit.

3. It appears that the interrogatories are merely of a fishing character.

4. The motion is not filed by the defendant nor is the affidavit thereto made by the defendant.

5. The matters as to which a disclosure is sought apply only to the support of the case of the plaintiff."

3. Upon failure to comply with an order for disclosure or production, the party "shall be nonsuited or defaulted" according as he is plaintiff or defendant. Conn. Laws (1889), c. 22, § 5.

For forms in such cases see the titles DISCONTINUANCE, DISMISSAL AND NONSUIT; JUDGMENTS AND DECREES.

4. Requisites of Interrogatories — *Generally.* — It is not a compliance with the statute to insert interrogatories in the body of the petition, nor need they be answered if founded on no material allegation therein. Burnett *v.* Garnett, 18 B. Mon. (Ky.) 68; Ford *v.* Thompson, 1 Metc. (Ky.) 580.

See also *supra*, note 1, p. 896.

Address. — Interrogatories must be addressed to the plaintiff by name. Addressing them to no particular person is insufficient. Thus, where the address is to "——, president, and ——, cashier, of the plaintiff, whose names are to the defendant unknown, and who are material witnesses for the defendant," it is insufficient. Hatcher *v.* Mechanicsburg First Nat. Bank, 79 Ga. 538.

Interrogatories in an action of contract are as properly addressed to one as to all the defendants. Stetson *v.* Wolcott, 15 Gray (Mass.) 545. But whether interrogatories filed by a plaintiff addressed "to all other parties,"

a. To an Individual.

Form No. 7591.

(Precedent in Goodwin *v.* Wood, 5 Ala. 152.)[1]

John Wood, assignee of Alexander Watson, use of Andrew Wooley, v. *Young Goodwin.*	*Assumpsit*, on a note in the *County* Court of *Talladega* County, *July* term, 1842.

Interrogatories to be propounded to *Andrew Wooley*, for whose use this suit is brought, the answers to which will be read in evidence on the trial of this cause.

Int. 1. (*Here follow the interrogatories, numbered seriatim.*) (*Affidavit attached.*)[2]

b. To a Corporation.

Form No. 7592.[3]

John Doe, plaintiff, against *The Ola Time Humbug Company*, defendant.	Interrogatories propounded by the plaintiff to the defendant corporation, to be answered by such of defendant's officers, agents or servants as are cognizant of the facts.

Int. 1. (*Concluding as in Form No. 7591.*)

c. To a Corporation Officer.

Form No. 7593.[4]

John Doe against *United Order of Pilgrim Fathers.*[5]	*Suffolk Superior* Court. No. *5928.*

plaintiff and defendant, are bad in form, *quære.* Stevens *v.* Flannagan, 131 Ind. 122.

Materiality. — Where interrogatories are not, on the face of the pleadings, material, they should be stated and shown to be asked with reference to one of the material matters in issue, or an exception thereto will be sustained. McFarland *v.* Muscatine, 98 Iowa 199.

1. By the early custom in *Alabama*, the party propounding interrogatories was required to set out particularly what he expected to prove by the answers, just as in a bill for discovery, so that the party interrogated might admit such facts, if he thought proper. A failure so to specify was held to render insufficient the form given in the text. (See also Gar. Rev. Code La. (1894), §§ 347, 348.) But later the practice grew up of allowing a party to propound interrogatories without any statement of the matter expected to be proven and about which interrogation is made. Saltmarsh *v.* Bower, 22 Ala. 221.

2. For forms of affidavits required to be annexed to the interrogatories see *infra*, Forms Nos. 7594 to 7597.

3. *Alabama.* — Civ. Code (1896), § 1853.

Indiana. — Horner's Stat. (1896), § 359.

Iowa. — Code (1897), § 3609.

New Jersey. — Gen. Stat. (1895), p. 2592, § 341.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 6010.

4. *Massachusetts.* — Pub. Stat. (1882), c. 167, § 53.

Georgia. — 2 Code (1895), § 3954.

In *Georgia*, it was held that the statute in force before the enactment of section 3954 of the code did not authorize the exhibition of interrogatories to a corporation. Hatcher *v.* Mechanicsburg First Nat. Bank, 79 Ga. 538.

5. Municipal Corporations. — The provision for interrogatories to officers of

Interrogatories propounded by the *plaintiff* to *Richard White, Supreme Medical Examiner* of the *defendant* corporation, to be answered by him[1] under oath.

Int. 1. (*Concluding as in Form No. 7591.*)

3. The Affidavit.[2]

a. In General.

Form No. 7594.[3]

State of *Alabama*, }
Dale County. }

Before me, *Norton Porter*, a notary public within and for the county and state aforesaid, personally appeared *John Doe*, who being duly sworn, doth depose and say, that the answers of the defendant, *Richard Roe*, to the foregoing interrogatories by deponent filed, will be material testimony for deponent in the above entitled cause.

(*Signature and jurat as in Form No. 810.*)

Form No. 7595.[4]

State of *Arkansas*, }
County of *Chicot*. }

John Doe, being duly sworn, upon oath says: that he is the plaintiff in the above entitled action who files the foregoing interrogatories; that he verily believes that the subjects of his said interrogatories are

corporations does not apply to municipal corporations. Linehan *v.* Cambridge, 109 Mass. 212.

1. Personal Knowledge of Officer. — Where interrogatories are filed to an officer of a corporation defendant, not inquiring for official information but for a disclosure of his own personal knowledge and admissions, they are not authorized by the statute and should not be ordered to be answered. Hancock *v.* Franklin Ins. Co., 107 Mass. 113.

2. For the formal parts of an affidavit in a particular jurisdiction consult the title AFFIDAVITS, vol. 1, p. 548.

3. *Alabama.* — Civ. Code (1886), § 2816. This section requires that the interrogatories shall be accompanied with an affidavit that the answers thereto will be material testimony for deponent in the cause.

Necessity for. — The absence of this affidavit justifies the court in refusing to compel the adverse party to answer, and on appeal it cannot be considered whether or not the answers will be material. Bivens *v.* Brown, 37 Ala. 422.

Who May Make. — The affidavit may be made by the attorney of the party. Young *v.* McLemore, 3 Ala. 295.

Sufficient Form. — The affidavit in Goodwin *v.* Wood, 5 Ala. 152, was held sufficient when in the following form, to wit: "Personally came before me, *Alex. J. Cotton*, clerk of the *county* court of *Talladega* county, *Young Goodwin*, defendant in the above cause, who makes oath that answers to the above interrogatories will be material evidence on the trial of the cause above stated."

In *Louisiana*, to enable the defendant to obtain the answer of the plaintiff to interrogatories he must subjoin an affidavit of their materiality, and that in his opinion the answer of plaintiff would assist him in making his defense. Gar. Rev. Code La. (1894), § 350.

4. *Arkansas.*—Sand. & H. Dig. (1894), § 5789.

Iowa. — Code (1897), § 3610.

Under these statutes, the affidavit is not absolutely necessary, but should be employed in order that the claim, defense, or part thereof, as alleged in the affidavit, may be deemed admitted after a reasonable time allowed for answer, and judgment given accordingly.

all[1] in the personal knowledge of *Richard Roe*, the opposite party herein interrogated, and that his answers thereto, if truly made from such knowledge, will sustain said plaintiff's claim in its full extent in the above entitled action.

(*Signature and jurat as in Form No. 813.*)

Form No. 7596.[2]

Middlesex, ss. *June 18*, 1898.

Then personally appeared *Richard Roe* and made oath that he has reason to believe that he will derive some material benefit in the above entitled action from the discovery which he seeks from the foregoing interrogatories, if the said discovery shall be fairly made, and that the discovery is not sought for the purpose of delay. Before me,

Abraham Kent, Justice of the Peace.

b. For Continuance.

Form No. 7597.[3]

(*Title of court and cause as in Form No. 5915.*)

State of *Indiana*, } ss.
Posey County. }

John Doe, being duly sworn, says he is the *plaintiff* in the above entitled cause; that he expects to elicit facts by the answers to the interrogatories filed by him herein, to be answered by the *defendant*, material to this *plaintiff* on the trial of the cause; that he believes said facts to be true; that he cannot prove the same by any witness, and that he files said interrogatories, not for delay merely, but to obtain substantial justice at the trial.

(*Signature and jurat as in Form No. 827.*)

4. Notice to Opposite Party.

Form No. 7598.[4]

Boston, *May 10*, 1898.

You are hereby notified that I have this day filed in the office of the clerk of the *Superior* Court, holden in *Boston*, in the county of

1. As to Part of Claim or Defense.— Under the statutes of *Arkansas* and *Iowa*, the same averment may be made as to any specific part of the claim or defense. But in such case the particular portion of the defense or claim which will be sustained by the answers must be stated, as otherwise a failure to answer will not entitle the propounder of the interrogatories to have the same admitted by reason of the failure of the opposite party to answer. Thus in Hogaboom *v.* Price, 53 Iowa 703, the affidavit was insufficient when in the following form, to wit: "That I believe the subject of some of the interrogatories annexed to my answer in the above cause are within the personal knowledge of the plaintiff, and that his answer thereto, if truly made, will sustain a part of the defense in said cause."

2. *Massachusetts.* — Pub. Stat. (1882), c. 167, § 50.

3. *Indiana.* — Horner's Stat. (1896), § 359. See also similar statutes as follows, to wit:

Iowa. — Code (1897), § 3607.

Kentucky. —Bullitt's Civ. Code (1895), § 145.

4. *Massachusetts.* — Pub. Stat. (1882), c. 167, § 51.

Consult also statutes cited *supra*, note 1, p. 896.

Suffolk, for civil business, interrogatories to the plaintiff in the action of *John Doe* against *Richard Roe* (No. *418*) now pending in said court.

The provisions of section 51, c. 167, of the Public Statutes require that answer to such interrogatories be filed within *ten* days after notice.

Yours respectfully,
Oliver Ellsworth, Attorney for
Richard Roe.

To *Jeremiah Mason*, Esq., Attorney for
John Doe.

5. Summons.

Form No. 7599.[1]

The Commonwealth of *Virginia*,

To the Sheriff of *Albermarle* County, greeting:

We command you that you summon *John Doe* to answer upon oath the annexed interrogatories to him propounded by *Richard Roe* and to make return of his answers[2] thereto to the *Circuit* Court for the county of *Albermarle*, at the clerk's office of our said court, before the *first* day of our *January* rules, *next*.[3]

And have then there this writ.

Witness *Jared Sparks*, the clerk of our said court, at *the court-house*, this *fourth* day of *December*, in the year of our Lord eighteen hundred and *ninety-seven*, and of our foundation the one hundred and *ninth*.

Teste: *Jared Sparks*, C. C.

(*Annex copy of interrogatories.*)

6. Rule to Answer.[4]

Form No. 7600.[5]

John Doe
against
Richard Roe.

Come the parties, and the *plaintiff* files his interrogatories to be answered by the *defendant* under oath, and the *defendant* is ruled to answer the same on or before the *10th* day of the present (or *next*) term of this court.[6]

1. *Virginia.* — Code (1887), § 3370. No motion is necessary. The summons is issued as of right.

2. In *Virginia*, if the court orders improper interrogatories to be answered, the party interrogated may answer and afterward object to the admisison of the answers at the trial. Poindexter *v.* Davis, 6 Gratt. (Va.) 481.

3. The answers may be made returnable within any period not exceeding sixty days. Va. Code (1887), § 3370.

4. **Precedent.** — In *Ex p.* McLendon, 33 Ala. 276, the following order was entered, to wit: "*Spring* term, 1857. Continued for want of plaintiff's answers to interrogatories, and if not answered within *one hundred and twenty* days, plaintiff's suit stands dismissed; and on the further condition, that plaintiff pay all costs in *one hundred and twenty* days, or his suit to stand dismissed."

5. Consult statutes cited *supra*, note 1, p. 896.

6. **Time Limit.** — A rule requiring answers to interrogatories must prescribe a time within which such an-

7. Answer.

a. In General.

Form No. 7601.[1]

John Doe, plaintiff, against *Richard Roe*, defendant. } In the *Circuit* Court for the County of *Dale*. No. *827*.

Answers of the *plaintiff*, *John Doe*, to the interrogatories to him propounded by the *defendant*, *Richard Roe*.

Int. 1. (*Here set out answers, numbering them seriatim to correspond with interrogatories.*)[2]

John Doe.[3]

(*Verification.*)[4]

b. That Answer to Interrogatories Would Tend to Criminate.

Form No. 7602.[5]

John Doe against *Richard Roe.* } *Suffolk Superior* Court. No. *5982*.

Answer of *defendant Richard Roe* to *plaintiff's* interrogatories.

The *defendant* declines to answer the *plaintiff's* interrogatories, numbered *one*, *two*, and *three*, upon the ground that a true, direct an-

swers must be filed, in order to base thereon an attachment for disobedience or a dismissal of the suit. Rielay *v.* Whitcher, 18 Ind. 458. Or to obtain a continuance. Meredith *v.* Lackey, 14 Ind. 529. See also Hogaboom *v.* Price, 53 Iowa 703; Garvin *v.* Cannon, 53 Iowa 716.

It is proper for the court to enter a rule that an answer to an interrogatory be filed before noon of the succeeding day; and for failure to comply, to strike out the defendant's pleading at that time, although four days remain before the day set for trial. Fitch *v.* Citizens Nat. Bank, 97 Ind. 211.

In *Louisiana*, an order to answer the interrogatories "on the day of trial" is unauthorized. The day of trial is uncertain and the day for answer must be specific. Spears *v.* Nugent, 2 La. Ann. 11.

1. Consult, generally, statutes cited *supra*, note 1, p. 896.

2. **Scope of Answer.** — The answer must be strictly responsive to the interrogatories. N. J. Gen. Stat. (1895), p. 2592, § 341. But any matter relative to the issue in the cause, though not relevant to the particular issue raised by the interrogatory, may be incorporated in the answer. Mass. Pub. Stat. (1882), c. 167, § 54; Baxter *v.* Massasoit Ins. Co., 13 Allen (Mass.) 320. And a party is not limited to a categorical answer to the interrogatory propounded. He may give such explanations and state such circumstances as are necessary to a full and fair understanding of the matters upon which he is interrogated. Railsback *v.* Koons, 18 Ind. 274.

3. **Signature.** — Answers to interrogatories signed only by the party's attorney are insufficient. Harding *v.* Noyes, 125 Mass. 572. See also Gollobitsch *v.* Rainbow, 84 Iowa 567.

4. **Verification.** — The answers to the interrogatories must be verified by the affidavit of the party answering. Gollobitsch *v.* Rainbow, 84 Iowa 567; Averill *v.* Boyles, 52 Iowa 672; Harding *v.* Noyes, 125 Mass. 572. Accordingly in Averill *v.* Boyles, 52 Iowa 672, it was held that the answers should have been suppressed as incompetent where the jurat of the notary alone was attached to the answers in the words following, to wit: "Subscribed and sworn to before me this *7th* day of *January*, A. D. 1879. Witness my hand and notarial seal. *Mason P. Mills*, Notary Public."

5. *Massachusetts.* — Pub. Stat. (1882), c. 167, § 56.

swer to each or any of them would tend to criminate[1] himself, because (*if the fact is not apparent from the pleadings and interrogatories, state reasons*).

Richard Roe.

Suffolk, ss: Personally appeared before me *Richard Roe*, and made oath that the foregoing answer, by him subscribed, is true.

Abraham Kent, J. P.

8. Extension of Time to Answer.

a. Motion.[2]

Form No. 7603.[3]

John Doe against *Richard Roe.* } *Suffolk Superior* Court. No. *5829.*

The *plaintiff* moves, upon the annexed affidavit, that his time to answer the *defendant's* interrogatories be extended *ninety* days from the entry of order to such effect.

By his attorney,
Jeremiah Mason.

b. Affidavit.[4]

Form No. 7604.[5]

John Doe against *Richard Roe.* } *Suffolk Superior* Court. No. *5829.*

Suffolk, ss. *Jeremiah Mason*, being duly sworn, deposes and says that he is the attorney for the *plaintiff* in the above action, that said *plaintiff* is absent from the state of *Massachusetts* and is on the continent of *Europe*, and that it will be impossible for said *plaintiff* to receive and answer the *defendant's* interrogatories within the time limited by statute. He further says that said case cannot come to trial within the space of *six* months, and that within *three* months he expects he can procure and cause to be filed said *plaintiff's* answers to *defendant's* said interrogatories, and that further time for answer is desired by reason of necessity, as aforesaid, and not for delay.

Jeremiah Mason.

Sworn to and subscribed before me,
Abraham Kent, Justice of the Peace.

c. Order.[6]

1. A party who desires to avoid answer upon the ground that he would criminate himself must state the fact under oath, like an answer to the interrogatories. Hobbs *v.* Stone, 5 Allen (Mass.) 109.

2. For the formal parts of a motion in a particular jurisdiction consult the title MOTIONS.

3. *Massachusetts.* — Pub. Stat. (1882), c. 167, § 51.

4. For the formal parts of an affidavit in a particular jurisdiction consult the title AFFIDAVITS, vol. 1, p. 548.

5. See *supra*, note 3.

6. For the formal parts of an order in a particular jurisdiction consult the title ORDERS.

Form No. 7605.[1]

John Doe
against
Richard Roe.

Upon *plaintiff's* motion, supported by filed affidavit, and upon cause shown, ordered, that the time for *plaintiff* to answer *defendant's* interrogatories be extended until *sixty* days from the entry of this order.

9. Expunging or Striking Out Interrogatories.[2]

a. Motion.[3]

Form No. 7606.[4]

John Doe
against
Richard Roe.
Suffolk Superior Court.
No. *8429.*

The *plaintiff* moves that *defendant's* interrogatories, herein filed, numbered *six* and *seven*, namely (*set out the objectionable interrogatories*) be ordered to be expunged, and that the *plaintiff* be not required to answer the same, upon the ground that said interrogatories specified do not seek a discovery of facts material to the *defense* of said action, but require a disclosure of the means and method by which *plaintiff* expects to prove his case.

John Doe, by his attorney,
Jeremiah Mason.

b. Order.[5]

Form No. 7607.[6]

John Doe
against
Richard Roe.
In the *Circuit* Court of the State of *New Jersey* in and for *Bergen* County.

Upon *plaintiff's* motion, and due notice thereof to *defendant*, after

1. This order is preceded by an order to show cause, to same effect as motion.

2. **Irrelevant Interrogatories.** — Irrelevant interrogatories may be stricken out upon motion. Stevens *v.* Flannagan, 131 Ind. 122. But if the party fail to move to reject the interrogatories and answers, the answer can be read in evidence over his objection. Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280; Combs *v.* Union Trust Co., 146 Ind. 688.

In *Iowa*, the proper mode of objecting to immaterial interrogatories is to file an exception thereto. McFarland *v.* Muscatine, 98 Iowa 199.

Late Interrogatories. — Interrogatories filed with a supplemental answer, three years after suit and three days before trial, without affidavit, and without excuse for delay, are properly stricken out with the supplemental answer. Courtright *v.* Deeds, 37 Iowa 503.

And where, although the petition has been on file some months, the defendant annexed interrogatories to his answer only when the case was called for trial, the plaintiff being absent, it is proper for the court to sustain a motion to strike the interrogatories from the files. Jones *v.* Berryhill, 25 Iowa 289.

Filed for Delay. — Interrogatories will be stricken out on motion when propounded for purposes of delay. Stanbrough *v.* Garrett, 1 Rob. (La.) 13.

3. For the formal parts of a motion in a particular jurisdiction consult the title MOTIONS.

4. *Massachusetts.* — Pub. Stat. (1882), c. 167, § 56.

5. For the formal parts of an order in a particular jurisdiction consult the title ORDERS.

6. *New Jersey.* — Gen. Stat. (1895), p. 2592, § 341.

hearing, it appearing to the court that interrogatories numbered *five* and *six*, served by *defendant* upon the *plaintiff* herein, are unauthorized and ought not to be proposed:

Ordered: that said interrogatories be stricken out and that the *plaintiff* be not required to answer the same; and further that the *plaintiff* be allowed *fifteen* days from the date of this order in which to answer the remaining interrogatories of the *defendant*.

April 28, 1898. *John Marshall*, J. C. C.

10. Rejection of Answers, and Fuller Answers.[1]

a. Motion.[2]

Form No. 7608.[3]

Wiley Dorman, plaintiff,
against
John Palmer and Charles Swinney, defendants.

And now, on this *eighteenth* day of *June*, 1854, come the *defendants* into court by their attorneys and move to reject the *plaintiff's* answers to the interrogatories herein filed by the *defendant Charles Swinney* on the ground that they are evasive, irresponsive, and contain improper matter, and for objections appearing on the face of said answers, and to require *plaintiff* to answer over again.

Richards & Falkner,
Defendants' Attorneys.

b. Order.[4]

Form No. 7609.

(*Title of cause as in Form No. 7608.*)

It appearing to the satisfaction of the court from inspection of the pleadings, interrogatories, and answers on file, that the *plaintiff's* answers to *defendant's* interrogatories are all evasive and irresponsive

1. **Time to Suppress Answers.** — A party filing interrogatories has the right to move to suppress the answers before the commencement of the trial, and the court has no authority to refuse to sustain or overrule the motion at such time and await the development of facts in the course of the trial. McCargo *v.* Crutcher, 27 Ala. 171.

Interrogatories Vague. — Where interrogatories are vague, if the adverse party, instead of moving to strike out the interrogatories or to have them made more certain, submits to answer, the court will not require the answers to be made more definite than is fairly responsive to the interrogatories as propounded. Deming *v.* Patterson, 10 Ind. 251; Ohio, etc., R. Co. *v.* Wrape, 4 Ind. App. 100.

Discovery Partly Unauthorized. — A general order for a further and fuller answer is worthless as a basis for a future motion for default or nonsuit, where the interrogatory contains some proper matter and some matter upon which discovery is not authorized. Wetherbee *v.* Winchester, 128 Mass. 293.

2. For the formal parts of a motion in a particular jurisdiction consult the title MOTIONS.

3. This motion is based on the facts in the case of Swinney *v.* Dorman, 25 Ala. 433, in which case it was held that a broad motion to suppress all the answers should not be made, nor allowed, when some of the answers are complete and correct.

4. For the formal parts of an order in a particular jurisdiction consult the title ORDERS.

to said interrogatories and do not disclose the matters therein sought, now upon *defendant's* motion, it is ordered that *plaintiff's* said answers be rejected and adjudged no answers, and that said *plaintiff* be required to make and file full, true, direct and perfect answers to said interrogatories within *twenty* days.

11. Affidavit for Leave to File Additional Interrogatories.

Form No. 7610.[1]

John Doe vs. *Richard Roe.* } *Suffolk Superior* Court. No. *10829.*

Suffolk, ss. *Joseph Story*, being duly sworn, says that he is attorney for the defendant in the above entitled action, that to the defendant's interrogatories herein originally filed the plaintiff has replied new matter which is a surprise to the defendant, viz. (*specify the answers*), that deponent believes that said defendant cannot safely proceed to trial without obtaining the plaintiff's answers to the annexed interrogatories, and that by said answers deponent expects to prove (*state facts to be elicited*).

Joseph Story.

Subscribed and sworn to before me, the *twenty-sixth* day of *June*, 1*898*.

Abraham Kent, Justice of the Peace.

III. PRODUCTION AND INSPECTION OF DOCUMENTS.[2]

1. If, after the original interrogatories have been answered, the party files a supplemental interrogatory without leave of court, the adverse party, although he has due notice, will not be defaulted or nonsuited for failure to answer Wetherbee *v.* Winchester, 128 Mass. 293.

The right to file additional interrogatories, after a party has once exercised his right under the statute, is within the discretion of the court. Hancock *v* Franklin Ins. Co., 107 Mass. 113.

2. Production and inspection of documents may be enforced by courts of law in the following states:

Alabama. — Civ. Code (1896), §§ 1859, 1860.

Arizona. — Rev. Stat. (1887), § 1861.

Arkansas. — Sand. & H. Dig. (1894), §§ 2896–2902.

California. — Code Civ. Proc. (1897), § 1000.

Connecticut. — Laws (1889), c. 22, §§ 1–6.

Delaware. — Rev. Stat. (1893), p. 799, § 13; Laws (1895), c. 121.

Georgia. — 2 Code (1895), §§ 5248–5251.

Illinois. — Starr & C. Anno. Stat. (1896), c. 51, par. 9.

Indiana. — Horner's Stat. (1896), § 479 *et seq.*

Iowa. — Code (1897), §§ 4654–4667.

Kansas. — Gen. Stat. (1897), c. 95, §§ 380, 381.

Louisiana. — Gar. Rev. Code (1894), §§ 140, 143, 473.

Maryland. — Pub. Gen. Laws (1889), art. 75, §§ 94, 95.

Massachusetts. — Pub. Stat. (1882), c. 167, §§ 49–60.

Minnesota. — Stat. (1894), § 5750.

Mississippi. — Anno. Code (1892), § 927.

Missouri. — Rev. Stat. (1889), §§ 2177–2181.

Montana. — Code Civ. Proc. (1895), § 1810.

Nebraska. — Comp. Stat. (1897), §§ 5968, 5973, 5974.

Nevada. — Gen. Stat. (1885), § 3448.

New Jersey. — Gen. Stat. (1895), p. 2559, § 157.

New Mexico. — Comp. Laws (1897), § 2685, subs. 120.

New York. — Birds. Rev. Stat. (1896), p. 874, § 1 *et seq.*

North Carolina. — Code (1883), § 578.
North Dakota. — Rev. Codes (1895), § 5644.
Ohio. — Bates' Anno. Stat. (1892), §§ 5289, 5290.
Oklahoma. — Stat. (1893), §§ 4258, 4259.
Oregon. — Hill's Anno. Laws (1892), § 521.
Pennsylvania. — Bright. Pur. Dig. (1894), p. 813, § 1.
Rhode Island. — Gen. Laws (1896), c. 244, § 47.
South Carolina. — 2 Rev. Stat. (1893), § 389.
Tennessee. — Code (1896), §§ 5684–5687.
Utah. — Rev. Stat. (1898), §§ 2984, 2985, 2988, 3401, 3474, 3721.
Virginia. — Code (1887), § 3371.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 6047.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4183.
Wyoming. — Rev. Stat. (1887), §§ 2637, 2638.

In *Connecticut*, discovery of a document is compelled by a motion exactly like the motion for interrogatories. Conn. Laws (1889), c. 22, § 1. See *supra*, Form No. 7590.

In *Kentucky*, there is no code provision for enforcing production of documents, in the hands of the adverse party, for purpose of inspection. Certain writings, upon which the actions are founded, are required to be filed with the petition. Bullitt's Civ. Code Ky. (1895), § 120. And other writings, which either party intends to use in evidence, may be filed by him, with his pleading, as an exhibit. Bullitt's Civ. Code Ky. (1895), § 128. But a party is not confined in his evidence to such documents as he has filed with his pleading. Such documents are merely admitted as genuine unless specially denied in the pleadings of the adverse party. Haney *v.* Tempest, 3 Metc. (Ky.) 96; Barret *v.* Coburn, 3 Metc. (Ky.) 511; Wells *v.* Lewis, 4 Metc. (Ky.) 269; Gentry *v.* Doolin, 1 Bush (Ky.) 1.

Where a document is one necessary to be filed, the adverse party, if it be not filed with the petition, may obtain a rule requiring it to be filed, and upon failure to comply with the rule may have the action dismissed. Preston *v.* Roberts, 12 Bush (Ky.) 570.

But where the documents are such that they need not be referred to in the petition, and are not so referred to, a rule to file them will not be granted except upon affidavit showing that the filing of the papers is necessary to the substantial ends of justice. Ruggles *v.* Moore, 18 B. Mon. (Ky.) 821. Otherwise resort must be had to a subpœna duces tecum to the adverse party. Bullitt's Civ. Code Ky. (1895), §§ 582, 606, subs. 10. Subpœna duces tecum is also used in *West Virginia.* Code (1891), c. 130, § 43.

In *Massachusetts*, production of copies of documents is obtained by interrogatories. Mass. Pub. Stat. (1882), c. 167, §§ 49–60.

In *New Jersey*, before the passage of any statute relating to production of documents, courts of law often granted orders for inspection of documents referred to by the pleadings or brought into the case by use as evidence. Such orders were limited to examination in open court or before an officer of the court. Hilyard *v.* Harrison Tp., 37 N. J. L. 170.

Instruments of Record. — The court will order an inspection and copy, or permission to take a copy, of public county records, when they are in the custody of the defendant and he refuses for four days the proper written demand by the plaintiff. State *v.* Allen, 5 Kan. 214.

But where copies are sought, by written demand, of public records, such as records of deeds, open to the equal inspection of both parties, the court will not make such order; nor should certified copies of recorded deeds be excluded upon the ground that the plaintiff had required the defendant or his attorneys "to deliver a copy of any deed, instrument, or other writing whereon the defense in the action was founded, or which they intended to offer in evidence at the trial of the cause." Hammerslough *v.* Hackett, 30 Kan. 57.

In a later case, however, where the plaintiffs held under a tax deed, a dictum occurs to the effect that under this code provision the defendants could have obtained a copy or had the tax deed excluded. Board of Regents *v.* Linscott, 30 Kan. 240.

The provision for inspection and copy does not apply to public documents the originals of which are accessible to either party. Spielman *v.* Flynn, 19 Neb. 342.

The rule was the same in chancery. People *v.* Vail, 2 Cow. (N. Y.) 623; Meakings *v.* Cromwell, 1 Sandf. (N. Y.) 698.

1. Notice to Produce.

a. Original.

(1) At Trial.

Form No. 7611.[1]

In the *Superior* Court of the County of *San Mateo* State of *California.*

John Doe, plaintiff,
against
Richard Roe, defendant.

To *John Doe*, *plaintiff* in said cause:

You are hereby notified and required to produce at the trial of the above entitled cause, a certain letter written by defendant to plaintiff, dated *January 4*, 1*898*, wherein and whereby defendant ordered from plaintiff certain goods, presumably those by the complaint herein intended; and you are further notified that in case of your failure to produce said letter, defendant will offer secondary evidence of its contents.[2]

Dated the *seventh* day of *June*, 1*898.*

Joseph Story, *Defendant's* Attorney.

(2) For Inspection and Copy.

Form No. 7612.[3]

John Doe, plaintiff,
against
Richard Roe, defendant.
} In *District* Court for *Webster* County.

Please take notice that *Richard Roe*, defendant in the above action, requires you to accord him permission and opportunity to take a copy of a certain document now in your possession or under your control, said document being (*describe with sufficient particularity to enable the other party to distinguish it*).[4]

Richard Roe,
by *Jeremiah Mason*, his Attorney.

1. *California.*—Code Civ. Proc. (1897), § 1938.

Consult also note 2, p. 906.

2. A notice to produce a document given at trial is not sufficient to let in secondary evidence, unless it can be intended that the document is in the adverse party's hands, and unless it is shown that it can be produced without delaying the trial. Brown *v.* Isbell, 11 Ala. 1009.

But where the document is shown to be in the possession of the party, in court, one day's notice is held sufficient. Hemphill *v.* Townsend, 7 Ala. 853. See also Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.) 296.

And even when the party resides outside the state a notice given several days before the sitting of the court at which trial is to be had is sufficient. Jefford *v.* Ringold, 6 Ala. 544.

3. *Nebraska.*—Comp. Stat. (1897), § 5968.

Consult also list of statutes cited *supra*, note 2, p. 906.

4. **Description.**—Where a notice requires the production of "all of plaintiff's books of account" and contains "no demand for any particular book,

To *John Doe*,[1] Esq.

b. A Copy.

Form No. 7613.[2]

John Doe against *Richard Roe.* } In the *Superior* Court for *Monroe* County, *February* Term, 1*898*. No. *1829*.

You are hereby required to deliver to the *defendant* herein, or his attorney, a copy of a certain document (*describe*),[3] and you are notified that upon your failure to furnish such copy the *defendant* will apply to the court to refuse to admit such document as evidence in your behalf.

Joseph Story, *Defendant's* Attorney.

To *John Doe*, plaintiff in above cause.

Dated *February 1*, 1*898*.

2. Notice of Motion.[4]

Form No. 7614.[5]

(*Title of court and cause as in Form No. 7611.*)

To *Jeremiah Mason*, attorney for *plaintiff* in above entitled action:

Please take notice that the *defendant* herein, on the *twenty-first* day of *June*, 1*898*, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, at the court room of said court in the county court-house of said county in the city of *Los Angeles*, will make a motion to order *plaintiff* to give to *defendant* an inspection and copy (or *permission to take a copy*) of a certain letter written by *defendant*

nor any statement that any book was expected to show anything that would impeach the note" sued upon, the court need not compel production. Bennett *v.* Reef, 16 Colo. 431.

Where the notice was to produce "the stock-book, cash-book, the original book or books of entry, the journal and ledger, showing the account of *W. S. Mappin* with said company, and any and all books showing the relation of *W. S. Mappin* to said company; also the minutes of said corporation, showing the election of president, vice-president, directors, and other officers of said company, and the salary of each," as said books contained evidence material to the cause in behalf of the plaintiff and he desired the use of them as evidence on the trial, — production being refused,— it was held that a peremptory order for production of the books would not be made because the notice was too vague and general and called for the production of books beyond those shown to be pertinent to the case. It was said that no books should have been required except those showing dealings between the company (a garnishee) and the defendant debtor. Hamby Mountain Gold Mines *v.* Findley, 85 Ga. 431.

1. Notice Served on Attorney.—Whether a notice to produce documents served upon the attorney for the adverse party is sufficient, *quære*. Blalock *v.* Miland, 87 Ga. 573.

2. *Ohio.* — Bates' Anno. Stat. (1897), § 5292.

Oklahoma. — Stat. (1893), § 4259.

Wyoming. — Rev. Stat. (1887), § 2638.

Consult also the statutes cited *supra*, note 2, p. 906.

3. A written demand upon the defendant for "copies of all papers intended to be used" in evidence is sufficient; and it is proper thereupon, the demand not being complied with, for the court to exclude at trial all papers offered by the defendant. Kansas Ins. Co. *v.* Berry, 8 Kan. 159.

4. For formal parts of notices, generally, consult the title MOTIONS.

5. *California.* — Code Civ. Proc. (1897), § 1000.

Consult also note 2, p. 906, *supra*.

to *plaintiff*, dated *January 4*, 1*898*, wherein and whereby *defendant* ordered from *plaintiff* certain goods,[1] which letter contains evidence relating to the merits of this action; and that said motion will be based upon the affidavit of *Richard Roe*, verified the *seventh* day of *June*, 1*898*, a copy whereof is hereto annexed, and upon all the papers on file and records, in said cause.

Joseph Story, *Defendant's* Attorney.

3. Motion or Petition.[2]

Form No. 7615.[3]

(*Title of court and cause as in Form No. 5916.*)

The plaintiff states that, as he believes, certain books and papers are under the control of the defendant; that said books and papers are (*Here particularly describe the books and papers desired*); that said books and papers are each and all material to the just determination of the above entitled cause now herein pending; that said books and papers are thus material because (*state reasons*); and that the plaintiff expects to prove by said books and papers, and each of them, certain facts as follows: (*Here state facts expected to be proved by each.*)

Wherefore plaintiff asks that a rule be granted, requiring the said defendant to produce said books and papers for inspection and copy by the plaintiff, or to show cause against such rule.

Jeremiah Mason, Plaintiff's Attorney.

(*Verification.*)[4]

Form No. 7616.

Precedent in Seligman *v.* Real Est. Trust Co., 20 Abb. N. Cas. (N. Y. Supreme Ct.) 212.)[5]

[(*Title of court and cause as in Form No. 5926.*)][6]

The petition[7] of *James Seligman* respectfully shows to the court:

1. Description of Document. — The notice must describe the paper with reasonable certainty. Rose *v.* King, 5 S. & R. (Pa.) 241.

2. For the formal parts of a motion or petition in a particular jurisdiction consult the titles MOTIONS; PETITIONS.

3. *Iowa.* — Code (1897), § 4655.

Missouri. — Rev. Stat. (1889), § 2178.

Nebraska. — Comp. Stat. (1897), § 5974.

New Jersey. — Gen. Stat. (1895), p. 2559, § 157.

Oral Motion Insufficient. — An oral motion cannot be a substitute for the sworn petition for a rule for inspection. Beebe *v.* Equitable Mut. L., etc., Assoc., 76 Iowa 129.

Materiality. — "The petition should also state some facts or circumstances from which the court can, independent of the party's oath, judge of the materiality of the evidence and the propriety of ordering a discovery." Condict *v.* Wood, 25 N. J. L. 319.

4. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

5. *New York.* — Birds. Rev. Stat. (1896), p. 874, § 3.

6. The matter to be supplied within [ ] will not be found in the reported case.

7. Ex Parte Petition. — Under the present code, application for an order for inspection is *ex parte* on a verified petition, not on a notice of motion as under section 388 of the Code of Civil Procedure. Cutter *v.* Pool, 3 Abb. N. Cas. (N. Y. C. Pl.) 130.

But the application will not be denied upon the ground that it was made by motion verified by affidavit, instead of by petition. Johnson *v.* Consolidated Silver Min. Co., 2 Abb. Pr. N. S. (N. Y. Supreme Ct.) 413.

I. That he is one of the plaintiffs in the above-entitled action.

II. That this action is brought by your petitioner and his co-plaintiff, constituting the firm of *J. & W. Seligman & Co.*, on a certain agreement made by the defendant company with the plaintiffs, set out in the complaint herein, to which reference is made as a part of this petition, and that the complaint alleges that the defendant wrongfully delivered to *T. C. Bates*, mentioned in said agreement, the stock, bonds and coupons therein mentioned, without receiving from him, for account of the plaintiffs, the payment of the sum therein mentioned.

III. That the defendant's answer sets up among other things (at folios *15–18* thereof) that the bonds mentioned in said agreement were on or about *February 21*, 1*885*, delivered by defendant's then president to said *Bates*, mentioned in said agreement, in pursuance[1] among other things of a certain certificate,[2] bearing date *September 23*, 1*882*, and made with the knowledge of the plaintiffs by the person who at the date thereof was secretary of the defendant.

IV. That neither your petitioner, nor so far as he can discover after inquiry, any person connected with the said firm of *J. & W. Seligman & Co.*, had, at the time of its date, or at any time thereafter, any knowledge or information of the making, existence or contents of the said certificate dated *September 23*, 1*882*.

V. That the said plaintiffs have, through their attorney in this action, requested of defendant's attorney to be furnished with a copy of the said certificate dated *September 23*, 1*882*, which request has been refused.

VI. That it is necessary and material[3] for your petitioner, in order

The petition and order must be served upon the adverse party's attorney. Service upon the party is not sufficient. Schmidt *v.* Selinger, 1 N. Y. Month. L. Bul. 61.

The order for inspection may be served simply upon the adverse party's attorney. Mechanics' Bank *v.* James, 2 Code Rep. (N. Y. Supreme Ct.) 46.

North Carolina. — The application for discovery may be either by petition or by motion upon affidavits. Justice *v.* National Bank, 83 N. Car. 8.

1. The nature of the evidence contained in the books of which discovery is sought must be specifically stated. It is insufficient to state that they "relate to the merits of the action." Cassard *v.* Hinman, 6 Duer (N. Y.) 695; New England Iron Co. *v.* New York Loan, etc., Co., 55 How. Pr. (N. Y. Super. Ct.) 351. Or to designate them as "containing evidence in relation to the subject of the action" or "to the merits of the action." Merguelle *v.* Continental Bank Note Co., 7 Robt. (N. Y.) 77.

Where the affidavit alleges that the books will show a partnership, but does not allege a single entry from the character of which the court can judge it to be material, the application should be denied. Kaupe *v.* Isdell, 3 Robt. (N. Y.) 699.

Where a petition called for the minutes kept by the defendant corporation between the years 1696 and 1716, and merely stated that the petitioner "is informed and believes that such minutes contain evidence" in petitioner's favor, it was held insufficient to warrant an order for inspection. People *v.* Rector of Trinity Church, 6 Abb. Pr. (N. Y. Supreme Ct.) 177.

2. Description of Books or Papers. — A petition stating that the plaintiff is "unable to name specifically all the books which would be necessary," but that the application is intended to cover any book which the defendants have relating to the transactions in which the plaintiff is interested, is insufficient to warrant any order. Dickie *v.* Austin, 4 Civ. Proc. Rep. (N. Y. City Ct.) 123.

3. Materialty. — It is not necessary to allege or show that the evidence contained in the documents sought is ab-

to prepare this action for trial,[1] and to try this cause, to obtain the discovery and production of said certificate dated *September 23*, 1*882*, and an inspection and copy, or permission to take a copy, of the same; and that as your petitioner is informed, and believes, the said certificate is in the possession or control of the defendant herein, or its attorneys, and that annexed hereto and marked "Exhibit *A*," is a copy of the correspondence in respect thereto between the attorneys of the parties.

VII. That your petitioner cannot obtain production or inspection or a copy of the said certificate except from the defendant or his attorneys.

Wherefore your petitioner prays that this court may grant an order that the said defendant produce and discover the said certificate dated *September 23*, 1*882*, or give your petitioner an inspection or copy thereof, or permission to take a copy thereof, and that your petitioner may have such other and further relief as may be proper.

James Seligman.[2]

[(*Verification.*)][3]

Form No. 7617.[4]

John Doe against *Richard Roe.* } In the *Superior* Court for *Monroe* County, *February* Term, 1*898.*

The *plaintiff* moves, upon the annexed affidavit made by himself, and the annexed affidavit of service of notice, that the *defendant* be ordered to produce at the trial of this cause a certain document (*describe*); and in default thereof, that judgment be rendered against him by *default.*

Jeremiah Mason, Plaintiff's Attorney.

Form No. 7618.[5]

(*Caption and address as in Form No. 2961.*)

Your petitioner respectfully represents that he is the plaintiff in the above entitled action and that he is informed, and believes, that the defendant is in the possession and control of a certain document,

solutely indispensable. Whitworth *v.* Erie R. Co., 37 N. Y. Super. Ct. 437.

1. To Aid in Framing Pleading. — Discovery of documents may also be had to assist, when necessary, in the framing of any pleading. Bliss' Anno. Code (1895), p. 1172, rule 14; Livingston *v.* Curtis, 54 How. Pr. (N. Y. Supreme Ct.) 370, 12 Hun (N. Y.) 121; Gelston *v.* Marshall, 6 How. Pr. (N. Y. Super. Ct.) 398; Inyo Consol. Min., etc., Co. *v.* Pheby, 49 N. Y. Super. Ct. 392.

North Carolina. — The order may be made before the complaint is filed where the petition or motion affidavit states that the discovery is necessary in order to frame the complaint. Justice *v.* National Bank, 83 N. Car. 8.

2. Who May Make. — Where the party seeking discovery is a partnership, an affidavit of lack of information and need for discovery, made by one partner, is sufficient. Seligman *v.* Real Est. Trust Co., 20 Abb. N. Cas. (N. Y. Supreme Ct.) 210.

3. Verification. — The facts of the petition may be verified by a person other than the petitioner. Exchange Bank *v.* Monteath, 4 How. Pr. (N. Y. Supreme Ct.) 280; Strong *v.* Strong, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 233.

4. *Ohio.* — Bates' Anno. Stat. (1897), § 5289.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 813, § 1.

Wyoming. — Rev. Stat. (1887), § 2637.

5. This form is based on the facts in the case of Arnold *v.* Pawtuxet Valley Water Co., 18 R. I. 189. See also R. I. Gen. Laws (1896), c. 244, § 47.

to wit, the book containing a record of the transactions and proceedings of the association in the plaintiff's declaration mentioned, prior to its incorporation, and also containing a record of the transactions and proceedings of said defendant corporation since its incorporation and organization. Your petitioner further represents that it is necessary for him to examine the records contained in said book in order to prepare the said case for trial, and to furnish the bill of particulars asked for by the defendant.[1]

Wherefore your petitioner prays that the court order said defendant, or the treasurer, or some other officer thereof, to answer on oath as to what documents it has in its control relating to the matter in dispute between said parties, and what it knows relating to the custody of any such documents, and if any documents be in its possession, or control, whether it objects to the production of same, and the grounds of such objection.

John J. Arnold.

4. Affidavit.[2]

a. In Support.

Form No. 7619.

(Precedent in Rigdon *v.* Conley, 31 Ill. App. 631.)[3]

[(*Title of court and cause, and venue.*)][4]

Charles W. Rigdon, being duly sworn, deposes and says, that he is the defendant in the above entitled cause (*Here followed a recitation of the affiant's defense and set-off, and a recitation of facts in support of said defense and set-off which would be shown by specified books and papers*); affiant says that in support of his plea of set-off, and for the proper defense of himself in said cause, it is necessary that the said books be examined and inspected by himself and his attorney before the trial of said cause as to all the matters aforesaid, in order to be properly prepared for the trial of said cause; and also that the said books should be produced before trial by the order of this court for that purpose, and also produced at the trial to be used as evidence on the part of affiant; that all the said entries are evidence pertinent to the issues in said cause, and all of said books contain such evidence; that said books are in the custody and control of said plaintiff; affiant says he knows no other source from (*sic*) whence to obtain the facts set forth in said books and said evidences, than in said books, and that he cannot safely proceed to trial without the production and inspection of said books before such trial.

[(*Signature and jurat.*)][4]

1. The application should set forth the reasons which give rise to the necessity for inspection, that the court may judge for itself. Ely *v.* Mowry, 12 R. I. 570.

See this case also for form of petition held insufficient for above and other defects.

2. For the formal parts of an affidavit in a particular jurisdiction consult the title AFFIDAVITS, vol. 1, p. 548.

3. *Illinois.*—Starr & C. Anno. Stat. (1896). c. 51, par. 9. Consult also list of statutes cited *supra*, note 2, p. 906.

4. The matter to be supplied within [ ] will not be found in the reported case.

Form No. 7620.[1]

Virginia:

Albemarle County, to wit:

This day *Richard Roe* made oath before me, a justice of the peace in and for the county aforesaid, that *John Doe* is *plaintiff* and he *defendant* in an action of *assumpsit* now pending in the *Circuit* Court of said county; that there is, as he verily believes, a certain book of accounts (*describe*) in the possession of said *John Doe*, containing material evidence for him in said action; that the nature of said evidence is (*stating it*), and said evidence will be found in (*state names of the accounts, if possible*).

Given under my hand this *fourth* day of *September*, in the year of our Lord 1897.

Abraham Kent, J. P.

Form No. 7621.[2]

Circuit Court, *Green* County.

Mary Schuetze, plaintiff,
against
The Continental Life Insurance Company of Hartford, Connecticut, defendant.

State of *Wisconsin*, *Green* County. } ss.

Mary Schuetze, being duly sworn, says:

I. That she is the plaintiff[3] in the above entitled action.

II. That the averments in her complaint therein that duly verified proofs of the death of the insured, required by the policy, had been delivered to the defendant company and payment demanded, are put in issue by the answer.

III. That no copy of said proofs and demand for payment was retained by the plaintiff, or her agents or attorneys.

IV. That the original writings of said proofs of death and demand for payment are not in the possession of affiant, her agents or attorneys, but are in the possession of the defendant company, its officers and agents.

V. That affiant is informed by her counsel, *Jeremiah Mason*, Esq., of the city of *Madison*, and verily believes that such inspection and copy of said writings above mentioned is necessary to enable her to prepare for trial.

(*Signature and jurat as in Form No. 877.*)

1. *Virginia.*—Code (1887), § 3371. Consult also statutes cited *supra*, note 2, p. 906.

2. This form is based on the facts in the case of Schuetze *v.* Continental L. Ins. Co., 69 Wis. 252. See also Sanb. & B. Anno. Stat. Wis. (1889), § 4183; Cir. Ct. Rules, No. XIX; and consult statutes cited *supra*, note 2, p. 906.

3. **The attorney** may make the affidavit instead of the party. In such case the paragraph as to advice of counsel may be omitted. Schuetze *v.* Continental L. Ins. Co., 69 Wis. 252.

b. In Opposition.

Form No. 7622.

(*Title of court and cause.*)

State of *Illinois*, }
Cook County. } ss.

Richard Roe, being duly sworn, deposes and says that he is the *defendant* in the above action; that the document in the order of court, directed to him, and made the *fourth* day of *January*, 1*898*, is not in his possession or under his control;[1] that he has no knowledge or belief as to its existence or whereabouts, and that he has not concealed or instigated any one to conceal, or been privy to the concealment of said document, but though he has made diligent search therefor he has been unable to discover said document or its whereabouts,[2] or to recollect that such document ever existed.

Richard Roe.

Sworn to and subscribed before me this *twentieth* day of *January*, A. D. 1*898*.

Abraham Kent, Justice of the Peace.

5. Orders and Rules.[3]

a. To Show Cause.

Form No. 7623.[4]

The State of *Iowa*,

To the Sheriff of *Fayette* County, Greeting:

Whereas *John Doe*, plaintiff in a certain action now pending in the *District* Court of the state of *Iowa*, in and for the county of *Fayette*, wherein *Richard Roe* is defendant, has filed therein his petition alleging that, as he believes, certain books and papers, to wit: (*describe as in the petition*) are under the control of the defendant, and are each and all material to the just determination of the said cause.

You are therefore hereby commanded to make known to the said

1. An answer which states that the document is in the hands of another, who holds it partly for the party required to produce it and partly for others, is not sufficient, because it does not state that the document is not under the party's control. Munford *v.* Wilson, 19 Mo. 669.

An affidavit by a party against whom discovery is sought alleging that "he has made diligent search therefor and has been unable to find any such books," but not directly denying possession and control, is insufficient to stay the granting of an order for inspection. Hicks *v.* Charlick, 10 Abb. Pr. (N. Y. Supreme Ct.) 129.

An affidavit by a party "that he has not now, nor has he had ever in his possession or under his control, any of the above-named contracts," where the fact suggests some explanation, is also insufficient. Hepburn *v.* Archer, 20 Hun (N. Y.) 535.

2. Any excuse for nonproduction of a document duly noticed is addressed to the discretion of the court, and its finding thereon is conclusive. Herndon *v.* Givens, 16 Ala. 261.

3. For the formal parts of an order in a particular jurisdiction consult the title ORDERS.

4. *Iowa.* — Code (1897), § 4655. Consult also statutes cited *supra*, note 2, p. 906.

Richard Roe that he is required to produce said books and papers in our said court on the *twenty-fifth* day of *July*, 1*898*, for the purpose of inspection and copy by the said plaintiff, or to show cause to the contrary.

In witness whereof I have hereto set my hand and affixed the seal of said court, this *eighteenth* day of *July*, 1*898*.

(SEAL) *Jared Sparks*, Clerk.

Form No. 7624.[1]

(*Caption as in Form No. 5926.*)

Upon reading the annexed petition of *James Seligman*, verified the *twenty-fifth* day of *November*, 1*886*, wherein said plaintiffs pray an inspection and copy, or permission to take a copy, of a certain paper or certificate dated the *twenty-third* day of *September*, 1*882*, in said petition particularly described:

Now therefore upon the prayer of said petition:

It is ordered that the defendant herein allow the plaintiffs on or before the *thirtieth* day of *November*, 1*886*, to inspect said paper or certificate and to take a copy thereof, or in default thereof to show cause at a special term of the *Supreme* Court to be held before the Hon. *George C. Barrett*, justice, at *the county court-house* in the city of *New York*, at *ten* o'clock on said day, why such inspection with copy as prayed in said petition should not be granted.

Dated *November 26*, 1*886*.

John Marshall, J. *S.* C.

Form No. 7625.

(Precedent in Congdon *v.* Aylsworth, 16 R. I. 282.)[2]

[(*Caption as in Form No. 2961.*)][3]

Upon the application in writing of the complainant in the above-entitled suit, it is ordered that the defendant therein, *Hiram B. Aylsworth*, answer on oath on or before *May 19*, 1*888*, at *10 A.* M., as to what documents he has in his possession or control relating to the matter in dispute between the parties, and what he knows as to the custody of any such documents, and, if any such documents be in his possession or control, whether he objects to the production of the same, and the grounds of such objection; and particularly what documents mentioned in said complainant's application he has in his possession or control, and what he knows as to the custody of any such documents so mentioned; and, if any of such mentioned documents be in his possession or control, whether he objects to the production of the same, and the grounds of such objection.

1. A peremptory order for the production of books and papers cannot be made *ex parte*. The adverse party must have an opportunity to show cause against the granting of such order. Dick *v.* Phillips, 41 Hun (N. Y.) 603.

2. *Rhode Island.* — Gen. Laws (1896), c. 244, § 47.

This form is practically an order nisi. Upon the return day, after hearing, an absolute order is made or denied.

3. The matter to be supplied within [ ] will not be found in the reported case.

b. To Produce.

(1) For Inspection.

(*a*) *Generally.*

Form No. 7626.

(Precedent in Rigdon *v.* Conley, 141 Ill. 567.)[1]

[(*Caption as in Form No. 6120.*)][2]

It is ordered that the plaintiff, *John W. Conley*, produce and deliver to the clerk of this court all the books of *John W. Rumsey & Co.* used by them in their business from the *1st* day of *September*, 1884, to the last day of *September*, 1884; that then the defendant, his attorney or expert, shall, upon giving *one* day's notice to the attorney of said *Conley*, (or in case of his absence from *Chicago*, upon said *Conley*,) have the right, in the presence of said clerk, to examine the account of said *Conley* with the firm of *John W. Rumsey & Co.*, and all entries or stubs of checks which show, or tend to show, the amount of money belonging to said *Conley* in the possession and control of said *John W. Rumsey & Co.*

(*b*) *And Copy.*

Form No. 7627.[3]

In the *Superior* Court of the County of *Los Angeles*, State of *California*.

Present: The Hon. *John Marshall*, Judge.[4]

1. Interference with Business. — In a later case than that from which the principal form is taken, the court (Shope, C. J.) said:

"While an order for the production of a party's books on the trial, to be used as evidence, in proper cases and upon proper showing, is not an unreasonable seizure of them, an order by which his books are taken from his custody and committed to that of a third person, for an indefinite period of time, for an inspection, generally, into all his affairs by the opposite party and his counsel, with leave to take copies of the entries therein, in our opinion is unwarranted by the law, amounts to an unlawful deprivation of his property rights, and is in palpable violation of his constitutional right to be secure against unreasonable seizure of his papers and effects."

The order in this case was improper on account of the defective affidavits upon which it was granted; but the above language shows that the court is disposed to go further, and further even than the defect of too great latitude in the order of inspection. The right to preliminary examination for the purpose of preparing one's case is denied; and it is laid down that inspection must be in the presence of the court. Inspection in the presence of an officer of the court is said to be improper.

This decision, probably, must be read with a view to the facts of the principal case. So read, it may be taken to declare against an inspection in the nature of a "fishing bill," and to deny the right of the court to order an inspection of general books of account, unsealed and uncovered, out of the presence of the court. Lester *v.* People, 150 Ill. 408.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. Consult, generally, the statutes cited *supra*, note 2, p. 906.

4. In Chambers. — The order for inspection and copy may be made by a judge in chambers, or in vacation, if proof of written notice, neglect to allow inspection, and proper motion and notice thereof, appear. Dorchester First Nat. Bank *v.* Smith, 36 Neb. 199.

John Doe, plaintiff,
against
Richard Roe, defendant. } Order.

Now on this day the court, having heard counsel for both parties, and read the affidavit of *Richard Roe* verified the *seventh* day of *June*, 1*898*, and examined the pleadings on file and records in said cause, and it appearing that the plaintiff is entitled to an inspection and copy of the letter referred to in said affidavit and motion, it is hereby ordered that the plaintiff give to the defendant an inspection and copy (or *permission to take a copy*) of said letter[1] within *twenty* days from the entry of this order.

Dated the *twenty-first* day of *June*. 1*898*.

John Marshall, Judge.

Form No. 7628.

(Precedent in Seligman *v.* Real Est. Trust Co., 20 Abb. N. Cas. (N. Y. Supreme Ct.) 210.)[2]

[(*Caption as in Form No. 5926.*)][3]

An order having been heretofore on *November 26*, 1*886*, entered in this action directing the defendant herein to allow the plaintiffs herein on or before *November 30*, 1*886*, to inspect a certain paper or certificate dated *September 23*, 1*882*, referred to in the petition on which said order was granted, and to take a copy of said paper or certificate, or in default thereof to show cause before this court why such inspection with copy should not be allowed; and the said defendant having appeared and failed to show sufficient cause why such inspection with copy should not be allowed:

Now on reading and filing copies of said order to show cause and of the petition on which the same was granted, and on the pleadings and proceedings herein, and after hearing *John E. Burrill*, Esq., of counsel for the said plaintiffs, in support of said motion, and *George W. Wickersham*, of counsel for the said defendant, in opposition thereto:

It is on motion of *Geo. W. Seligman*, attorney for said plaintiffs:

Ordered that the said defendant produce at the office of the said plaintiffs' said attorney, at No. *15 Broadway*, in the city of *New York*, on *November 28*, 1*886*, at *twelve* o'clock in the noon, the aforesaid paper or certificate,[4] and there allow plaintiffs or their said attor-

1. **Description.** — An order for the inspection of books should particularly designate the books of which inspection is to be had. Under ordinary circumstances, it is improper to order an inspection of "all the books of a corporation." The order should not be made in such terms as to operate as license to the party obtaining it to search the books and papers of his adversary at pleasure, or to require him to produce books which may be of no use when produced. Whitman *v.* Weller, 39 Ind. 515. But where certain books and documents are described with sufficient particularity, and others are not so described, the order is valid and effective as to those well described and as to them must be obeyed. Forsyth Com'rs *v.* Lemly, 85 N. Car. 341.

2. Consult, generally, the statutes cited *supra*, note 2, p. 906.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. **Description.** — An order for the deposit for inspection of certain books of a bank for the period of five years, "and all other books of the defendants which contain any accounts or entries showing, or tending to show, the times

ney[1] to inspect the same and to take a copy thereof.[2]

And it is further ordered that the said defendant pay to the said plaintiffs $*10* of the costs[3] of this motion.

[*G. C. B.*, J. *S.* C.]

(*c*) *With Permission to Seal Up Irrelevant Parts.*[4]

Form No. 7629.

(Precedent in Pynchon *v.* Day, 118 Ill. 9.)

[(*Caption as in Form No. 6120.*)

Ordered:][5] that the account book containing the account of the defendants with *Lapsley, Field & Co.*, having been produced in court, and it appearing, by affidavit and by an inspection of said account, that it contains items and entries relating to transactions between the defendants and parties other than the plaintiff, and in no wise connected with the transactions between the plaintiff and defendants, it [is] ordered that the defendants, under the direction of the clerk of the court, be at liberty to seal or cover the names of such parties other than the plaintiff, as they appear in said account, and that thereupon the plaintiff, or his attorney, have full liberty to inspect said entire account, except the names so sealed or covered, and to take copies thereof.

(2) To be Attached to Interrogatories.

Form No. 7630.

(Precedent in Faircloth *v.* Jordan, 15 Ga. 511.)[6]

[*Benj. S. Jordan* vs. *Samuel Faircloth, and John Doe.* } No. *482.*

when the bonds were sold." is too broad and will be vacated. Walker *v.* Granite Bank, 19 Abb. Pr. (N. Y. Supreme Ct.) 111.

Distant Corporation.—An order against a corporation located in a distant state should not be for the production of the books, but of sworn copies of the entries desired. Ervin *v.* Oregon R., etc., Co., 22 Hun (N. Y.) 566.

1. Examination by Expert. — An order allowing inspection by adverse party's counsel and experts is proper. The time for inspection should be limited and the method ordered to be such as not to interfere with current business. Burden *v.* Burden, 23 N. Y. Wkly. Dig. 289.

2. Judge's Order. — Where the order is a judge's order and not a court order, it should not declare a penalty for disobedience. Broderick *v.* Shelton, 18 Abb. Pr. (N. Y. Supreme Ct.) 213; Rice *v.* Ehele, 55 N. Y. 518.

3. Costs. — The order for costs is included only when the party applying shows a previous demand for inspection unreasonably refused. Seligman *v.* Real Est. Trust Co., 20 Abb. N. Cas. (N. Y. Supreme Ct.) 210.

4. Sealing Up Irrelevant Entries. — See on this point Dias *v.* Merle, 2 Paige (N. Y.) 494; Gerard *v.* Penswick, 1 Swanst. 533; Pynchon *v.* Day, 118 Ill. 9; 3 Greenl. Ev., § 301.

5. The matter to be supplied within [ ] will not be found in the reported case.

6. Consult, generally, statutes cited *supra*, note 2, p. 906.

Ordered:][1] that the plaintiffs do file, in the Clerk's office of this Court, the original deed from *John Baugh* to *John Carmichael*, under which they claim, subject to the inspection and control of defendant and his counsel, to be attached to interrogatories, for the purpose of enabling him to attack it for forgery, upon leaving a certified copy thereof, in the Clerk's office, to be used as evidence in the cause, in the event that said original deed is lost, or not returned into Court.

[*H. B.*, J. *S.* C.][1]

(3) Before a Referee.

Form No. 7631.

(Precedent in Pirz *v.* Follett, 1 Civ. Proc. Rep. (N. Y. Super. Ct.) 185.)[2]

[(*Caption and recitals as in Form No. 7628.*) Ordered:][1] that the plaintiff have a full discovery and inspection of all the books of account containing entries relating to the business and matters in controversy in this action, with leave to take a copy of any and all thereof and for such purpose that the defendant forthwith produce and deposit with *Alfred Erbe*, Esq., referee, at his office [at No. *35 Broadway*, in the city of *New York*,][1] the following books, papers and documents, to wit: ledger, journal, day-book, cash-book, receipt and delivery books kept by plaintiff and defendant, or either of them, in the said business and now in the possession or under the control of the defendant; there to remain for the period of *thirty* days.

[*J. M.*, J. *S.* C.][1]

1. The words enclosed by and to be supplied within [ ] will not be found in the reported case.

2. *New York.* — Birds. Rev. Stat. (1896), p. 874, § 5.

DISEASED ANIMALS.[1]

I. ALLOWING DISEASED ANIMAL AT LARGE, 922.
II. DRIVING DISEASED ANIMALS FROM PLACE TO PLACE, 922.
III. FAILURE TO BURN CARCASS OF HOG DYING FROM CHOLERA, 923.
IV. IMPORTING DISEASED CATTLE, 923.
V. IMPORTING TEXAS CATTLE, 923.
VI. USING DISEASED ANIMAL, 924.

CROSS-REFERENCES.

For other Forms relating to Animals, see the title ANIMALS, vol. 1, p. 789.

1. **Requisites of Indictment, etc.** — Offenses relating to diseased animals being purely statutory, the indictment, information or criminal complaint must charge the offense in the language of the statute. For statutes of the various states relating to infectious and contagious diseases among animals, and providing for the suppression thereof and the punishment of offenses connected therewith, see as follows:

Alabama. — Crim. Code (1886), § 3839.

California. — Pen. Code (1897), § 402 *et seq.*

Colorado. — Mills' Anno. Stat. (1891), § 4285 *et seq.*

Connecticut. — Laws (1897), c. 199.

Florida. — Laws (1895), p. 119, No. 30.

Georgia. — 3 Code (1895), § 562 *et seq.*

Idaho. — Rev. Stat. (1887), § 6932 *et seq.*

Illinois. — Starr & C. Anno. Stat. (1896), p. 402, par. 19 *et seq.*

Indiana. — Horner's Stat. (1896), §§ 2102 *et seq.*, 2651, 2653, 6662 *et seq.*; Acts (1897), c. 101.

Iowa. — Code (1897), §§ 2350 *et seq.*, 5012 *et seq.*

Kansas. — Gen. Stat. (1897), c. 100, § 332 *et seq.*, c. 139.

Kentucky. — Stat. (1894), § 49 *et seq.*

Maine. — Rev. Stat. (1883), c. 14. § 37 *et seq.*, as *amended* Laws (1885), c. 302; Laws (1889), c. 177; Laws (1897), c. 311.

Maryland. — Pub. Gen. Laws (1888), art. 58; Laws (1890), c. 321.

Massachusetts. — Stat. (1894), c. 491, as *amended* Stat. (1895), c. 496.

Michigan. — How. Anno. Stat. (1882), § 2133 *et seq.*; How. Anno. Stat. (Supp. 1890), § 2136*f et seq.*

Minnesota. — Stat. (1894), §§ 1466 *et seq.*, 6794, 6805, 6976 *et seq.*

Mississippi. — Anno. Code (1892), § 1010.

Missouri. — Rev. Stat. (1889), §§ 351 *et seq.*, 3920 *et seq.*; Laws (1891), p. 43, as *amended* Laws (1897), p. 36.

Montana. — Pen. Code (1895), §§ 700, 701, 1169 *et seq.*

Nebraska. — Comp. Stat. (1897). §§ 453 *et seq.*, 479 *et seq.*, 6729 *et seq.*, 6895.

Nevada. — Stat. (1887), c. 45; Stat. (1891), c. 32, as *amended* Stat. (1895), c. 99.

New Hampshire. — Pub. Stat. (1891), c. 113.

New Jersey. — Gen. Stat. (1895), p. 48, § 92 *et seq.*

New Mexico. — Comp. Laws (1897), § 181 *et seq.*

North Carolina. — Code (1883), § 2319 *et seq.*

North Dakota. — Rev. Codes (1895), § 1592 *et seq.*

Ohio. — Bates' Anno. Stat. (1897), §§ 4211–9 to 4211–26, 6855.

Oklahoma. — Stat. (1893), § 2442; Laws (1897), c. 31.

I. ALLOWING DISEASED ANIMAL AT LARGE.

Form No. 7632.[1]

State of *Missouri*, } ss. In the *Barton Circuit* Court,
County of *Barton*. } *February* Term, A. D. 1*898*.

The grand jurors for the state of *Missouri*, impaneled, sworn, and charged to inquire within and for the county of *Barton*, and state aforesaid, do present that *Richard Roe*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-eight*, in the county aforesaid,* did unlawfully and knowingly suffer to run at large a certain *bay stallion*, which *stallion* was then and there affected by the disease known as *glanders*, he the said *Richard Roe* then and there well knowing that said *stallion* was so affected with said disease, as aforesaid, against the peace and dignity of the state.

Daniel Webster,
Prosecuting Attorney for the County of *Barton*.

II. DRIVING DISEASED ANIMALS FROM PLACE TO PLACE.[2]

Form No. 7633.[3]

(*Commencing as in Form No. 7632, and continuing down to* *) did then and there wilfully and knowingly drive from one part of this state to another, to wit, from the county of *Cedar* to the said county

Oregon. — Hill's Anno. Laws (1892), § 3365 *et seq.*; Laws (1895), p. 60.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 89, § 45 *et seq.*

Rhode Island. — Gen. Laws (1896), c. 98.

Tennessee. — Code (1896), § 2819 *et seq.*; Acts (1897), c. 51.

Texas. — Pen. Code (1895), art. 809 *et seq.*

Utah. — Rev. Stat. (1898), § 58 *et seq.*

Vermont. — Stat. (1894), §§ 4802–4820.

Virginia. — Code (1887), § 2195 *et seq.*

Washington. — Ballinger's Anno. Codes & Stat. (1897), §§ 3447 *et seq.*, 3490 *et seq.*

Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 1482 *et seq.*, 4605.

Wyoming. — Rev. Stat. (1887), §§ 4144 *et seq.*, 4199 *et seq.*

For the formal parts of an indictment, information or criminal complaint in a particular jurisdiction consult the titles INDICTMENTS; INFORMATIONS; CRIMINAL COMPLAINTS, vol. 5, p. 930.

1. *Missouri.* — Rev. Stat. (1889), § 3920. Consult also statutes cited *supra*, note 1, p. 921.

2. **Insufficient Indictment.** — In State *v.* Sterritt, 19 Oregon 352, it was held that an indictment under section 3352, Hill's Anno. Laws, for moving diseased sheep, which fails to follow the descriptive words of the statute by alleging the ownership of the sheep, is bad on demurrer. The indictment in this case, which was deficient for the above reason, charged the offense as follows: "*D. Sterritt* is accused by the grand jury of *Grant* county and State of *Oregon* by this indictment of the crime of unlawfully moving sheep infected with scab from place to place without first having obtained a traveling permit therefor, committed as follows: The said *D. Sterritt*, on the *first* day of *April*, A. D. 18*89*, in the county of *Grant* and State of *Oregon*, having then and there a band of sheep of about *1,500* head, infected with scab, did unlawfully move said band of sheep over and across the range of one *E. Mumford*, a distance of about *fifteen* miles; he, the said *D. Sterritt*, then and there having no traveling permit to move said sheep, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of *Oregon*."

3. *Missouri.* — Rev. Stat. (1889), § 3921. Consult also statutes cited *supra*, note 1, p. 921.

of *Barton*, *twenty* head of diseased and distempered cattle, affected with what is commonly known as Texas or Spanish fever, the driving of said cattle from one part of this state to another as aforesaid, by the said *Richard Roe*, not then and there being to remove them from one piece of ground to another of the same owner, against the peace (*concluding as in Form No. 7632*).

III. FAILURE TO BURN CARCASS OF HOG DYING FROM CHOLERA.

Form No. 7634.[1]

(*Commencing as in Form No. 7636, and continuing down to* *) at the county of *Posey* aforesaid, being then and there the owner and having the care of a certain hog, which hog had theretofore died with the disease of hog-cholera, did then and there unlawfully, and well knowing all the facts aforesaid at said time, fail and neglect to burn the carcass of said hog, or to cause the same to be burned within *ten* hours after the death of said hog, as aforesaid, contrary (*concluding as in Form No. 7636*).

IV. IMPORTING DISEASED CATTLE.

Form No. 7635.[2]

(*Commencing as in Form No. 7632, and continuing down to* *) did unlawfully and knowingly import and bring into and within this state *fifty* head of *sheep*, which *sheep* then and there had a contagious disease commonly known as (*naming it*), he the said *Richard Roe* knowing the said *sheep* to be so diseased, against (*concluding as in Form No. 7632*).

V. IMPORTING TEXAS CATTLE.

Form No. 7636.[3]

In the *Posey Circuit* Court of *Indiana*, of the *October* Term, A. D. 1897.

The State of Indiana
against
Richard Roe.

The grand jury of the county of *Posey*, upon their oath, present: That *Richard Roe*, on the *first* day of *May*, A. D. 1897,* the same being after the *first* day of *April*, and before the *first* day of *October* in said year, at the county of *Posey* aforesaid, did then and there unlawfully bring *thirty* head of Texas cattle, then and there being the property of the said *Richard Roe*, into the county of *Posey* and state of *Indiana*, from the state of *Texas*, the said cattle not being brought

1. *Indiana.* — Acts (1897), c. 101, § 2. Consult also statutes cited *supra*, note 1, p. 921.

2. *Missouri.*—Rev. Stat. (1889), § 3924. Consult also statutes cited *supra*, note 1, p. 921.

3. *Indiana.* — Horner's Stat. (1896), § 2104. Consult also statutes cited *supra*, note 1, p. 921. See also Hannibal R. Co. *v.* Husen, 95 U. S. 465, and Chicago, etc., R. Co. *v.* Erickson, 91 Ill. 613, which cases hold similar statutes of *Missouri* and *Illinois* to be unconstitutional.

into this county in the course, or for the purpose, of transit through this state on the road to any other state, and said cattle not being then and there cattle that had been throughout the entire previous winter north of the thirty-eighth degree of latitude, all of which the said *Richard Roe* then and there well knew, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Indiana.*

Daniel Webster, Prosecuting Attorney.

VI. USING DISEASED ANIMAL.

Form No. 7637.[1]

The State of Texas
against
Richard Roe.

In the name, and by the authority, of the state of *Texas.* The grand jurors for the county of *Freestone*, state aforesaid, duly organized as such at the *October* term, A. D. 1897, of the *District* Court for said county, upon their oaths, in said court present: That *Richard Roe*, on the *first* day of *May*, A. D. 1897, in the county and state aforesaid, did ride an animal of the horse (or *ass*) species, the said animal then and there being diseased with the glanders (or *farcy*), he, the said *Richard Roe* then and there knowing the said animal to be so diseased, against the peace and dignity of the state of *Texas.*

Andrew Jackson, Foreman of the Grand Jury.

1. *Texas.* — Pen. Code (1895), art. 810. Consult also statutes cited *supra*, note 1, p. 921.

DISMISSAL.

See the title DISCONTINUANCE, DISMISSAL AND NON-SUIT, ante, p. 852.

DISORDERLY CONDUCT AND PERSONS.

By Walter R. Dedrick.

I. **Discharging Firearms**, 926.
  1. *In a City or Town*, 926.
  2. *In a Public Highway*, 926.
II. **Disturbing the Peace**, 927.
III. **Exhibiting Puppet-show**, 933.
IV. **Frequenting Houses of Ill Fame**, 934.
  1. *In General*, 934.
  2. *Not Being a Physician Visiting Patients*, 936.
  3. *Living in*, 936.
  4. *Acting as Servant or Bartender*, 937.
V. **Lewd, Lascivious and Disorderly Persons**, 938.
VI. **Night-walking**, 938.
VII. **On a Public Conveyance**, 940.
  1. *In General*, 940.
  2. *On a Street Car*, 940.
    a. *Refusing to Desist from Smoking*, 940.
    b. *Refusing to Pay Fare*, 941.
  3. *On a Railroad Car*, 941.
    a. *In General*, 941.
    b. *Disturbing Women*, 941.
    c. *Jumping Upon Cars*, 942.
VIII. **Peeping in Window of Dwelling**, 942.
IX. **Profane Swearing**, 943.
X. **Prostitutes**, 945.
  1. *Committing Fornication for Hire*, 945.
  2. *Endeavoring to Ply Vocation in Public Place*, 946.
XI. **Using Obscene, Insulting or Abusive Language**, 947.
  1. *In General*, 947.
  2. *In Presence of Particular Persons*, 948.
    a. *Women*, 948.
    b. *Children*, 949.
  3. *Near a Dwelling*, 950.
  4. *Tending to Cause Breach of Peace*, 950.

CROSS-REFERENCES.

For Forms in Prosecutions relating to Disorderly Houses, see the title DISORDERLY HOUSES.
For Forms in Prosecutions for Disturbing Meetings, see the title DISTURBING MEETINGS.
For Forms in Prosecutions for Drunkenness for Being a Common Drunkard, see the title DRUNKENNESS.
For Forms in Prosecutions of Disorderly Children, see the title JUVENILE OFFENDERS.
For Forms relating to Proceedings to Prevent a Breach of the Peace, see the title SURETIES OF THE PEACE.
For Forms in Prosecutions of Vagrants, see the title VAGRANCY.

I. DISCHARGING FIREARMS.

1. In a City or Town.

Form No. 7638.

(Precedent in Cottonwood Falls *v.* Smith, 36 Kan. 402.)[1]

[(*Caption and commencement as in Form No. 6729.*)][2]

On or about the *25th* day of *April*, 18*83*, *J. A. Smith*, within the corporate limits of the city of *Cottonwood Falls*, *Chase* county, *Kansas*, the same being a city of the *third* class, then and there being, did then and there shoot and discharge a pistol, commonly called a revolver, the said shooting not being done in any public display or commemoration of any extraordinary event, and that the said *J. A. Smith* was not then and there an officer of said city or state, or United States, contrary to, and in violation of section *one*, ordinance No. *8*, of said city.

[(*Signature and jurat as in Form No. 6729.*)][2]

2. In a Public Highway.

Form No. 7639.

(Precedent in Woods *v.* State, 67 Miss. 575.)[3]

[State of *Mississippi*, County of *Yalobusha*. } ss.

The State of Mississippi, against *Ephraim Woods*. } At the *February* Term, A. D. 1*897*, of the *Yalobusha Circuit* Court.

The grand jurors of the state of *Mississippi*, elected, summoned, impaneled, sworn and charged to inquire in and for the body of

1. This form was held sufficient to charge an offense under the provisions of the ordinance of the city of Cottonwood Falls, which city was held to have power to pass an ordinance prohibiting the discharge of firearms within its limits.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. This form is drawn under a statute which provides that "if any person shall be guilty of racing or shooting in any street or public highway, he shall, on conviction thereof, be fined," etc.

Yalobusha county, state of *Mississippi*, at the term aforesaid, of the court aforesaid in the name and by the authority of the state of *Mississippi*, upon their oaths present: That *Ephraim Woods*, late of the county aforesaid, on the *first* day of *January*, A. D. 1897, in the county aforesaid, and within the jurisdiction of this court,][1] unlawfully did shoot and discharge a certain gun on[2] the *Water Valley* and *Coffeeville* road, the same being then and there a public[3] road and highway, [contrary to the form of the statute in such case made and provided, and against the peace and dignity of the statute of *Mississippi*.

T. M. Miller, District Attorney.][1]

II. DISTURBING THE PEACE.[4]

Miss. Anno. Code (1892), § 1148. Similar statutes exist in the following states, to wit:

Alabama. — Crim. Code (1886), § 4095.

Connecticut. — Gen. Stat. (1888), § 1510.

Florida. — Rev. Stat. (1892), § 2683.

Kentucky. — Stat. (1894), § 1347.

Minnesota. — Stat. (1894), § 6661.

Missouri. — Rev. Stat. (1889), § 3504.

New Hampshire. — Pub. Stat. (1891), c. 264, § 6.

New York. — Cook's Pen. Code (1898), § 468.

North Dakota. — Rev. Codes (1895), § 7358.

Ohio. — Bates' Anno. Stat. (1897), § 6962.

Oklahoma. — Stat. (1893), § 2302.

Rhode Island. — Gen. Laws (1896), c. 110, § 1.

Tennessee. — Code (1896), § 6803.

Wyoming. — Rev. Stat. (1887), § 984.

1. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. **"On" for "In."** — It was held in this case that the words "on a public highway" are equivalent to those of the statute, "in a public highway."

3. **Public Highway.** — To authorize a conviction in a prosecution for shooting across a public road, it is necessary to prove that the road across which the shooting was done was a public road. Johnson *v.* State, 105 Ala. 113.

4. **Requisites of Complaint, Indictment or Information** — *Generally.* — For the formal parts of a criminal complaint, indictment or information in a particular jurisdiction consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

Language of Statute Sufficient. — Where the offense is charged in the language of the statute, it is sufficient. State *v.* Craddock, 44 Kan. 489; State *v.* Brumley, 53 Mo. App. 126; State *v.* Ramsey, 52 Mo. App. 668. But the language of the statute must be followed strictly; thus, where, under Mo. Rev. Stat. (1889), § 3784, an information which charged the defendant with disturbing the peace of one "*Martha Martin* by offensive and indecent conversation," the language of the statute being by "loud and offensive or indecent conversation," was properly quashed on account of omitting to charge that the conversation was loud. State *v.* Gallego, 57 Mo. App. 515. But the language used need not be set out. State *v.* Fare, 39 Mo. App. 110, *overruling* State *v.* Bach, 25 Mo. App. 554. See also State *v.* Fogerson, 29 Mo. 416.

Several Acts May be Charged. — Under a statute which provides several modes by which a breach of the peace may be committed, an indictment or complaint which charges several modes by which the defendant committed a single breach of the peace is not subject to the objection of duplicity, if it appears from the indictment or complaint that the acts charged were committed at the same time and are parts of the same transaction. State *v.* Matthews, 42 Vt. 542.

Time and Venue. — Where an indictment for disturbing the peace fails to state the time and venue of the offense, the defects are cured by the statute of jeofails after verdict. State *v.* Hughes, 82 Mo. 86.

Intent. — No allegation of intent to break the peace is necessary. The statute does not require it, and the act is of a character which necessarily im-

Form No. 7640.

(Precedent in Com. *v.* Oaks, 113 Mass. 8.)

[Commonwealth of *Massachusetts.*

To *Abraham Kent*, Esq., a trial justice within and for the county of *Worcester*:

ports intent. State *v.* Archibald, 59 Vt. 548.

The nature of the offensive conduct must be stated. Thus, an indictment which charged that "*Sampson Finch*, in said county, on the *first* day of *October*, A. D. 18*82*, did wilfully disturb the peace of *Rebecca Jones*, then and there by offensive conduct there, against the peace and dignity of the State of *Mississippi*," was held insufficient for the failure to allege what constituted the offensive conduct, or the nature or character of the offensive conduct. Finch *v.* State, 64 Miss. 461.

And to allege that one broke the public peace "by his tumultuous carriage" is insufficient. State *v.* Archibald, 59 Vt. 548.

Where an indictment charged "that *Edward James*, on the *first* day of *February*, A. D. 18*88*, etc., did unlawfully and wilfully disturb the peace of a certain family, to wit: — The family of *Richard Cox*, by then and there cursing and swearing and by loud and unusual noise, against the peace and dignity of the state," an appeal was prosecuted mainly upon the ground that the indictment was insufficient, and it was held that the charge of cursing and swearing is not included in the statutory group of offenses, and that so much of the charge as was embraced by those words was surplusage; that the indictment was insufficient in that it failed to state the specific act complained of, and therefore failed to inform the defendant of the particular offense charged. But the court also held that these principles of pleading are not applicable to those offenses mentioned in the same section which are individuated by the statute itself. State *v.* James, 37 Mo. App. 215.

"*Inhabitance*" *for* "*Inhabitants.*" — Where an information charged that the defendant "on the *twenty-eighth* day of *February* in the year of our Lord one thousand eight hundred and *eighty-seven*, with force and arms, in the county and State aforesaid, did wilfully and unlawfully go into a public street in the town of *Montague*, and use loud and vociferous language, curse and swear, in a manner calculated to disturb the inhabitance thereof, contrary," etc., it was held that the word "inhabitance" was used for "inhabitants," that the two words are *idem sonans*. Keller *v.* State, 25 Tex. App. 325.

"*Language*" *and* "*Conversation*" *Equivalent in Meaning.* — Where an indictment charged the defendant with disturbing the peace by "cursing and swearing and by loud and abusive and indecent language," it was held sufficient although the statute used the word conversation, the two words being sufficiently equivalent in meaning. State *v.* Fogerson, 29 Mo. 416.

Force and Violence. — It is unnecessary to allege that the offense was committed *vi et armis* when the averments in English show that the criminal act was committed with force and violence. State *v.* Hanley, 47 Vt. 290.

Sufficient Forms. — A complaint charging that the defendant unlawfully and wilfully disturbed the peace and quiet of the city of Topeka, by the use of loud, profane and indecent language, states an offense under a city ordinance which provides that "if any person shall disturb the quiet of the city he shall be punished by a fine," etc. Topeka *v.* Heitman, 47 Kan. 739.

In State *v.* Burns, 35 Kan. 387, a complaint which was held sufficient charged the offense as follows: "on the *23d* day of *September*, 18*85*, in the county of *Washington* and state of *Kansas*, one *Louisa Burns* did then and there unlawfully and wilfully disturb the peace and quiet of one *Silas Blodgett* and of the family of said *Silas Blodgett*, by making loud and boisterous noises and by uttering profane and vulgar oaths, and by rude and indecent behavior, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of *Kansas*."

In State *v.* Brumley, 53 Mo. App. 126, a conviction was had on an information which charged the offense as follows:

"Comes *J. H. Duncan*, assistant prosecuting attorney, within and for

Richard Roe of *Brookfield*, in the county of *Worcester*, on behalf of the Commonwealth of *Massachusetts*, on oath, complains: that *Peter Oaks* of *Brookfield*, in the county of *Worcester*, on the *tenth* day of

the county of *Greene*, state of *Missouri*, under his oath of office informs the court that one *William Brumley*, on or about the *thirty-first* day of *March*, 1891, at the said county of *Greene*, state of *Missouri*, did then and there unlawfully and wilfully disturb the peace of the family of *Celina Schoner*, and did then and there use loud, offensive and indecent conversation, and by quarreling and threatening, and drawing a stick to strike and fight. And against the peace and dignity of the state."

Where a statute provides that, "If any person or persons shall, in the night time, wilfully disturb the peace of any neighborhood, or of any family, by loud and unusual noise, loud and offensive or indecent conversation, or by threatening, challenging or fighting, every person so offending shall be guilty of a misdemeanor," etc., and an indictment thereon charged that the defendant did, "in the night time, with force and arms, unlawfully and wilfully disturb the peace of the family of *Mary Riggs*, by then and there making loud and unusual noise," etc., it was held that it was properly charged that the woman was the head of the family, her husband having abandoned her five years before the finding of the indictment. State *v.* Slater, 22 Mo. 464.

Where an indictment charged that defendant, "on the *tenth* day of *February*, in the year one thousand eight hundred and *thirty-one*, in the night season, with force and violence, and with clubs at the county of *Cooper*, aforesaid, unlawfully, violently, forcibly, and injuriously did throw down, and did pull down, the roof and chimney of a dwelling house, the property of the *United States of America*, and then and there being in the peaceable possession of one *Clarissa Hosty*, and situated in the township of *Booneville*, in the county of *Cooper* aforesaid, the said *Clarissa* being then and there, and whilst the said *Davis* and *Wilson* and the others whose names are unknown as aforesaid, were pulling down and throwing down the said chimney and roof as aforesaid in the said house, and put in great fear thereby, to the evil example of others, to the great disturbance of the peace, against the form of the statute in that case made and provided, and against the peace," etc., it was held that it sufficiently describes a breach of the peace at common law. State *v.* Wilson, 3 Mo. 125.

Where an indictment charged that the defendant, "on the *24th* day of *August*, 1809, about the hour of *ten* of the clock in the night of the same day, with force and arms at *Lurgan* township, in the county aforesaid; the dwelling house of *James Strain* there situate, unlawfully, maliciously and secretly did break and enter, with intent to disturb the peace of the commonwealth, and so being in said dwelling house, unlawfully, vehemently and turbulently did make a great noise, in disturbance of the peace of the commonwealth, and greatly misbehave himself, in the said dwelling house; and, *Elizabeth Strain*, the wife of the said *James*, greatly did frighten and alarm, by means of which said fright and alarm she the said *Elizabeth*, being then and there pregnant, did, on the *7th* day of *September* in the year aforesaid, at the county aforesaid, miscarry, and other wrongs to the said *Elizabeth* then and there did, to the evil example," etc., it was held sufficient. Com. *v.* Taylor, 5 Binn. (Pa.) 277.

Where an information charged that "*James Redshaw* did act in a disorderly manner upon one of the highways of the borough of *Homestead* by calling scab, and damned scab, to affiant and two other non-union men who were then passing along said highway, with intent to provoke said non-union workmen, and to cause a breach of the public peace, and tending to a breach of the public peace," it was held that, as there had been a troubled state of affairs, for a considerable time, between the employees and employers of the Carnegie Company and several thousand former employees were idle and their former employers were endeavoring to operate their mills with new men, and the defendant knew these facts, the information stated an offense and the defendant was adjudged guilty of disorderly conduct and being a disorderly person. Com. *v.* Redshaw, 12 Pa. Co. Ct. Rep. 91.

A complaint which alleged that the defendant "did disturb and break the public peace by tumultuous and offensive carriage, by firing guns, blowing

June, in the year of our Lord one thousand eight hundred and *seventy-three*, at *Brookfield* aforesaid, within the judicial district of

horns and beating tin pans and other unnecessary and offensive noise," charged an offense under the statute and was sufficient. State *v.* Coffin, 64 Vt. 25.

Where an indictment charged that the defendant "with force and arms did disturb and break the public peace by his tumultuous carriage then and there exhibited to the public, to wit: the said *Archibald* then and there with a loud, angry and boisterous voice and in a noisy and tumultuous manner in the presence of divers good citizens of this State called one *George H. Day* vile, vulgar, obscene and opprobrious names, and then and there in a loud, tumultuous and boisterous manner cursed and swore at the said *Day*, and then and there in a loud, boisterous and tumultuous manner used and applied vile, blasphemous, obscene and indecent names to the said *Day*, and then and there quarreled with the said *Day* by cursing and swearing at the said *Day*, and by calling him opprobrious, indecent and obscene names, which carriage of the said *Archibald* so by him exhibited had the effect to annoy the good citizens of the State then and there present, destroy their comfort and disturb the public peace," it was held that it charged the offense of quarreling, but doubt was expressed with reference to the allegation by which it was attempted to charge tumultuous carriage for the reason that the statute makes tumultuous and offensive carriage, in the conjunctive, the offense. State *v.* Archibald, 59 Vt. 548.

Where a complaint charged that M., at a certain time and place, "in and upon one *W.*, did make an assault and him the said *W.* did then and there with fists, clubs, sticks and iron instruments strike, beat, bruise and wound, to the great injury of the said *W.*, and thereby by his tumultuous and offensive carriage and by threatening and challenging the said *W.*, the said *M.* did disturb and break the peace, contrary," etc., it was held that it was not subject to the objection of duplicity. State *v.* Matthews, 42 Vt. 542

For other forms see State *v.* Hughes, 82 Mo. 86; State *v.* Batchelder, 5 N. H. 549; State *v.* Benedict, 11 Vt. 236.

Insufficient Forms. — Where an indictment charged that the defendant, a colored person, used to and in the presence of Mrs. McJunkin, a white lady, the following indecent and vulgar language: "I want to stay here awhile," that is in the house with Mrs. McJunkin, "meaning by said language to ask said *Mrs. McJunkin* to have sexual intercourse with him, said language then and there tending to cause a breach of the peace," it was held that the language "I want to stay here awhile" was not, *per se*, either obscene or vulgar, and although it was charged that the defendant meant to ask the woman to have sexual intercourse with him, the evidence entirely failed to support that charge, and that a conviction was contrary to law and evidence. Stamps *v.* State, 95 Ga. 475.

Where a complaint charged that the defendants "with force and arms, were disturbers and breakers of the peace, and then and there contriving and intending to disturb the peace of said commonwealth, did, in one of the public streets and other public places of said town, utter loud exclamations and outcries, and other loud noises, and did then and thereby draw together a number of persons, to the great disturbances of divers citizens, in evil example to all others in like cases to offend, against good morals, against the peace of said commonwealth, and contrary to the form of the statutes in such case made and provided," it was held insufficient in that it failed to allege that the noises made by the defendants were to the great damage and common nuisance of all the citizens of the commonwealth there inhabiting, being and residing, etc. Com. *v.* Smith, 6 Cush. (Mass.) 80.

Where the statutes provide that any person who wilfully disturbs the peace of a family or person by loud or unusual noise, or by any tumultuous or offensive conduct, and also any person who enters the dwelling-house of another, or the yard or curtilage thereof, or upon the public highway or any other place near such premises and in the presence or hearing of the family of the possessor or occupant thereof or any member thereof, or of any female, makes use of abusive, profane, vulgar or indecent language, shall be pun-

said justice, in the county of *Worcester*, with force and arms]*[1] was a disturber and breaker of the peace, and then and there contriving and intending to disturb the peace of said Commonwealth, did, in and near to one of the public streets of said town, utter loud exclamations and outcries, and did then and thereby draw together a number of persons, to the great disturbance, damage and common nuisance[2]

ished, etc., an affidavit which charged that the defendant "did wilfully disturb the peace of *Morman Harris* by offensive conduct, to wit, by saying to the said *Morman Harris*, 'that if he did not dry up he would slap hell out of him,' and that 'if he, the said *Harris*, got up out of that chair, he, the said *Brooks*, would kill him,' then and there, all done in a threatening and angry manner," etc., was held to charge no offense under the statutes, it not being alleged that the offense was committed with a view to disturb the peace of a family, or of any single person constituting a family, nor was it alleged that there was any offensive conduct as distinguished from merely offensive language. Brooks *v.* State, 67 Miss. 577.

Where a complaint was as follows, to wit:

"State of *Missouri*, }
County of *St Louis*, } ss.

Katy Cahill being duly sworn says that *Frank Schlottman* on or about the *12th* day of *July*, 1872, at the county aforesaid, did wilfully disturb the peace of this affiant by calling her a whore and that said affiant keeps a whorehouse, in a loud and angry manner without any cause or provocation and against the peace and dignity of the state of *Missouri*, and that this affiant further saith that the said *Frank Schlottmnn*, has not to her knowledge and belief been arrested, held to bail, or otherwise dealt with for the said disturbance, and further saith not.

Katy Cahill.

Sworn and subscribed to before me this *12th* day of *July*, 1872.

Philip Doherty,
Justice of the Peace."

It was held that a conviction could not be had for the reason that there was no statute rendering such act criminal, that the statute against disturbing the peace of families or neighborhoods did not cover the offense of disturbing the peace of a single individual by the use merely of loud and abusive language. State *v.* Schlottman, 52 Mo. 164. But see Mo. Rev. Stat. (1889), § 3784, which provides that if any person shall wilfully disturb the peace of any neighborhood, or of any family, or of any person, by loud and offensive or indecent conversation, etc., he shall, etc.

Where an information charged that on a day named the defendant did "wilfully disturb the peace of the family of one *John Eschmann*, then and there being at number *3738 Kosciusko* street, by loud and unusual noise, loud, offensive, and indecent conversation, and by then and there threatening. quarreling, challenging, and fighting, contrary," etc., and was signed by the assistant prosecuting attorney of St. Louis and was verified by the affidavit of a private person, who swore that the facts therein stated "were true, according to his best knowledge and belief," it was held that the verification was sufficient under the special law applicable to the St. Louis court of criminal correction, but that the information was too indefinite in that it embodied in one count several independent offenses, although it follows the language of the statute, which groups them together in one section. It was also held that the information should at least state the substance of the conversation. State *v.* Bach, 25 Mo. App. 554, *overruled* by State *v.* Fare, 39 Mo. App. 110, and State *v.* Parker, 39 Mo. App. 116.

A complaint charging that the defendants did break and disturb the public peace by ringing and causing to be rung and tolled a certain church bell, and, well knowing that one P. was then living, did report and aver that the said P. was dead and was to be buried on the next succeeding day, and did ring the said bell with intent to have it believed that the said P. was then dead, and with intent to annoy, harass and vex the said P. and his family and friends, is insufficient and does not state an offense under the statute. State *v.* Riggs, 22 Vt. 321.

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. **Common Nuisance.** — It was held in this case that while it is necessary to

of all the citizens of said Commonwealth, then and there inhabiting, being and residing, [against the peace and dignity of said Commonwealth.

Richard Roe.

Worcester, ss: Received and sworn to the *eleventh* day of *June*, in the year of our Lord one thousand eight hundred and *seventy-three*, Before me,

Abraham Kent, Trial Justice.][1]

Form No. 7641.

(Precedent in State *v.* Parker, 39 Mo. App. 118.)[2]

[*The State of Missouri* against *John Parker.* } In the *Reynolds* County *Circuit* Court.][1]

William L. Beyersdorff, prosecuting attorney of *Reynolds* county, *Missouri*, comes and informs the court upon the information of an affidavit[3] filed herein that, on the *twenty-fourth* day of *November*, A. D. 1*888*, at the county and state aforesaid, the defendant *John Parker* did then and there wilfully disturb the peace of a certain family, to wit, the family of *W. T. Sawyer*, by then and there making loud and

allege that the offense was to the great damage and common nuisance of all the citizens of the commonwealth there being, it is not necessary that the proof be as broad as the allegation, and that it is sufficient to prove that the offense was of such a nature as to and did annoy all good citizens present and not favoring the unlawful acts.

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. This information was objected to because it was not supported by the affidavit of the prosecuting attorney; but the court held that this was unnecessary, that all the official acts of the prosecuting attorney were presumed to have the sanction of his official oath and that that portion of the statute requiring informations to be sworn to by him was surplusage.

The information is drawn under a statute which provides that, "If any person or persons shall wilfully disturb the peace of any neighborhood, or of any family, or of any person, by loud and unusual noise, loud and offensive or indecent conversation, or by threatening, quarreling, challenging or fighting, every person so offending shall, upon conviction, be adjudged guilty of a misdemeanor." Mo. Rev. Stat. (1889), § 3784.

For similar statutes see as follows, to wit:

Arizona. — Pen. Code (1887), § 659.

Arkansas. — Sand. & H. Dig. (1894), § 1532.

California. — Pen. Code (1897), § 415.

Colorado. — Mills' Anno. Stat. (1891), § 1305.

Connecticut. — Gen. Stat. (1888), § 1509.

Idaho. — Rev. Stat. (1887), § 6959.

Illinois. — Starr & C. Anno. Stat. (1896), c. 38, par. 146.

Iowa. — Code (1897), § 5033.

Kentucky. — Stat. (1894), § 1268.

Maryland. — Pub. Gen. Laws (1888), art. 27, § 67.

Mississippi. — Anno. Code (1892), § 1032.

Montana. — Pen. Code (1895), § 753.

Oregon. — Hill's Anno. Laws (1892), § 1857.

Utah. — Rev. Stat. (1898), § 4310.

Vermont. — Stat. (1894), §§ 5043, 5046.

Wyoming. — Rev. Stat. (1887), § 971.

3. The affidavit upon which this information was drawn, omitting formal parts, is as follows: "*W. T. Sawyer*, being duly sworn, upon his oath states that on the *twenty-fourth* day of *November*, A. D. 1*888*, at the said county of *Reynolds*, *Missouri*, one *John Parker* did then and there wilfully disturb the peace of the family of *W. T. Sawyer* by loud and unusual noise, loud and offensive and indecent language, and by threatening, quarreling, challenging and fighting."

unusual noise by loud and offensive and indecent conversation,[1] by cursing and swearing and by threatening, quarreling, challenging and fighting, against the peace and dignity of the state.

[*William L. Beyersdorff*,
Prosecuting Attorney.][2]

Form No. 7642.

(Precedent in State *v.* Hanley, 47 Vt. 290.)[3]

[State of *Vermont*,
City of *Burlington*, ss. } To the Honorable *City* Court, within and for the city of *Burlington*, in the county of *Chittenden*, state of *Vermont*, comes *S. M. Flint*, city grand juror, within and for said city of *Burlington*, in his proper person, and on his oath of office complains that *Martin Hanley*, on the *eighteenth* day of *March*, 1874, at the city of *Burlington* in the county of *Chittenden*][2] did disturb and break the public peace by tumultuous and offensive carriage then and there to the public exhibited, by threatening, quarreling with, challenging, assaulting, beating and striking *Joseph Langlois*, of said city; which said offensive carriage of the said *Martin*, exhibited as aforesaid, did disturb and break the public peace, [contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the state.

S. M. Flint, City Grand Juror.

The foregoing complaint exhibited to me this *twentieth* day of *March*, A. D. 1874.

Charles Jones, City Judge.][2]

III. EXHIBITING PUPPET-SHOW.

Form No. 7643.[4]

State of *Michigan*,
County of *Kent*. } ss.

The complaint of *John Doe*, taken and made before me, *Abraham Kent*, a justice of the peace of the town of *Lowell* in said county, at my office in the town of *Lowell* in said county, upon the *first* day of

1. At this point in the precedent will be found the words "by cursing and swearing," which have been omitted for the reason that it was held in State *v.* James, 37 Mo. App. 215, not to be included in the statute, and so much of the charge as was embraced by these words was rejected as surplusage.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. It was held that the gist of the offense is the breach of the peace by tumultuous and offensive carriage, by a certain character of acts, and that when by any of those acts, or by all of them, a person has broken the peace, he has committed the offense; and when it is averred that he did break the peace at a place and time named, by doing specific acts of the kind named, towards or upon a certain named person, it is sufficient.

The omission of *vi et armis* is not fatal when the averments in English show that the criminal act was committed with force and violence.

4. This form is drawn under How. Anno. Stat. Mich. (Supp. 1890), § 1997*a*, which provides that all jugglers, common showmen and mountebanks who exhibit or perform for profit any puppet-show, wire or rope dance, or other idle show, acts or feats, shall be deemed disorderly persons.

October, A. D. 1897, who being duly sworn says that heretofore, to wit:* on the *first* day of *October*, A. D. 1897, and for *five* days preceding that day, at the town of *Lowell* in said county, *Richard Roe* of the town and county aforesaid, has been, and is a disorderly person within the meaning of section one of act 264 of the Public Acts of Michigan of 1889, being § 1997*a* of Howell's Annotated Statutes of the State of Michigan, for that the said *Richard Roe*, at the town of *Lowell* in said county, during and at the times aforesaid was and is a juggler (or *common showman* or *mountebank*), and did then and there unlawfully during and at the times aforesaid, exhibit (or *perform*) for profit a puppet-show (or *wire or rope dancing*), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of *Michigan*.

Wherefore, the said complainant prays that the said *Richard Roe* may be apprehended and held to answer this complaint, and further dealt with in relation to the same as law and justice may require.

John Doe.

Taken, subscribed and sworn to before me, this *first* day of *October*, A. D. 1897.

Abraham Kent, Justice of the Peace.

IV. FREQUENTING HOUSES OF ILL FAME.

1. In General.

Form No. 7644.

(Precedent in Fahnestock *v* State, 102 Ind. 157.)[1]

State of *Indiana*, } ss.
County of *Randolph*. }

In the *Randolph Circuit* Court *October* term, A. D. 1884.

State of Indiana }
against }
James Fahnestock. }

The grand jury of *Randolph* county, in the state of *Indiana*, good and lawful men, duly and legally impaneled, charged and sworn at the *October* term of the *Randolph Circuit* Court for the year A. D. 1884, to inquire into felonies and certain misdemeanors in and for

1. This indictment was objected to on the ground of duplicity, but was sustained. It was drawn under an *Indiana* statute, substantially the same as Horner's Stat. Ind. (1896), § 2002, which provides that whoever, being a male person, frequents or visits a house or houses of ill fame or of assignation, or associates with females known or reputed as prostitutes, shall be fined, etc.

For similar statutes see as follows, to wit:

Colorado. — Mills' Anno. Stat. (1891), § 1354.

Connecticut. — Gen. Stat. (1888), §§ 1529, 1530.

Florida. — Rev. Stat. (1892), § 2642.

Illinois. — Starr & C. Anno. Stat. (1896), c. 38, par. 147.

Iowa. — Code (1897), § 4943.

Utah. — Rev. Stat. (1898), § 4251.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4589*b*.

Precedent. — Where an information drawn under Wis. Laws (1887), c. 116, § 2, charged "that on the *26th* day of *November*, A. D. 1889, at the town of *Vaughn* in said county of *Ashland*," the accused "did unlawfully and feloniously resort

the body of said county of *Randolph*, in the name and by the authority of the said state of *Indiana*, on their oaths, present: * That one *James Fahnestock*, late of said county,][1] on the *first* day of *September*, 1884, at said county and state aforesaid, did then and there unlawfully frequent houses of ill fame, well knowing them to be such, and did then and there unlawfully frequent houses of assignation, well knowing them to be such, and did then and there unlawfully associate with females[2] known and reputed as prostitutes, to wit, with one *Hattie Knecht* and others whose names are to the grand jury unknown, well knowing them to be such, and was then and there unlawfully engaged in and about a house of prostitution, the said *James Fahnestock* then and there being a male person, contrary to the form of the statute [in such cases made and provided, and against the peace and dignity of the state of *Indiana*.

W. B. Hord, Prosecuting Attorney.][1]

Form No. 7645.

(Precedent in Com. *v.* Brown, 141 Mass. 78.)[3]

[(*Commencing as in Form No. 7640, and continuing down to* *)][4] was and is[5] an idle and disorderly person, and on said days and times, at said *Boston*, has neglected all lawful business and habitually misspent her time by frequenting houses of ill fame, gaming-houses and tippling-shops, against the peace [(*concluding as in Form No. 7640*)].[4]

to, frequent and become an inmate of a house of ill fame, resorted to for the purpose of prostitution and lewdness, then and there situate, against the peace and dignity of the state of *Wisconsin*," it was objected to on the ground that it did not state an offense under the law, in that it failed to charge that the defendant had knowledge of the character of the house and that the premises or house was not sufficiently described. The court held that it was not necessary to state with more particularity the place where the house was situated; with reference to the former objection, the court held that it was inclined to hold the information good, certainly after verdict. State *v.* Richards, 76 Wis. 354.

See also the substance of an indictment in Weideman *v.* State, 4 Ind. App. 397, in which case it was held not necessary that the accused should participate in any acts of lewdness.

1. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. "Females" or "Female." — Under a statute providing against any person associating with "females" known or reputed as prostitutes, an indictment which charged the defendant with associating "with one *Flora Wagner*, a female who was then and there known and reputed as a prostitute," was objected to on the ground that associating with one prostitute did not constitute an offense under the statute, but the indictment was sustained and the objection overruled. Jessup *v.* State, 14 Ind. App. 257.

3. This complaint was drawn under Mass. Pub. Stat. (1882), c. 207, § 29. See also a similar statute in *Florida*. Fla. Rev. Stat. (1892), § 2642.

The complaint was objected to on the ground that it did not aver that the defendant was under any necessity or duty of laboring or supporting herself, or following any business or vocation, but it was held that such an averment was not necessary and that the complaint was sufficient. See also Com. *v.* Doherty, 137 Mass. 245; Com. *v.* Hart, 137 Mass. 247.

Precedents. — For other forms see Com. *v.* Sullivan, 5 Allen (Mass.) 511; Com. *v.* Norton, 13 Allen (Mass.) 550; Com. *v.* Carter, 108 Mass. 17; Com. *v.* Doherty, 137 Mass. 245.

4. The matter to be supplied within [ ] will not be found in the reported case.

5. The addition of the words "and is" does not change the character of the

2. Not Being a Physician Visiting Patients.

Form No. 7646.[1]

(*Commencing as in Form No. 7644, and continuing down to* *) that *Richard Roe*, late of said county, being over *fourteen* years of age, on the *first* day of *September*, A. D. 1897, and on divers other days and times between that day and the day of finding this indictment, did then and there unlawfully frequent a certain house of ill fame, to wit, the house of *Skip Dutton*, he, the said *Richard Roe*, not being a physician, frequenting said house as aforesaid to treat a patient or patients, contrary to the form (*concluding as in Form No. 7644*).

3. Living in.[2]

Form No. 7647.

(Precedent in State *v.* Nichols, 83 Ind. 228.)[3]

[(*Caption as in Form No. 7644.*)][4]

The grand jurors for the county of *Allen* and State of *Indiana*, upon their oath, charge and present that, on the *first* day of *July*, A. D. 1882, *Martha Nichols*, a female of said county of *Allen* and State aforesaid, did unlawfully live in a house[5] of ill-fame, and on divers other days and times before the *first* day of *July*, A. D. 1882, said *Martha Nichols*, a female, did unlawfully live in said house of ill-fame aforesaid, said house aforesaid being then and there situate on lot number *fourteen*, *S. C. Evans'* addition to the city of *Fort Wayne*, in said county and State [contrary to the form (*concluding as in Form No. 7644*).][4]

allegation or make the day of the termination of the offense uncertain, and these words may be rejected as surplusage. Com. *v.* Sullivan, 5 Allen (Mass.) 511.

1. *Indiana.* — Horner's Stat. (1896), § 1995.

2. **Precedent.** — See also a form in People *v.* Ah Ho, 1 Idaho 691, in which case it was held that the statute under which the indictment was attempted to be drawn delegated power to the common council of Boise City to make any ordinance on the subject, but did not directly create an offense.

3. This form is drawn under Horner's Stat. Ind. (1896), § 2003.

Under this statute, all the things mentioned may be charged conjunctively in a single count as constituting but a single offense; thus, the information was held sufficient in State *v.* Stout, 112 Ind. 245, when in the following language, to wit: "The said *Florence Stout* did then and there unlawfully frequent and live in a certain house of ill-fame, to wit, the house of *James Stout*, on *Third* street, in the city of *Bloomington*, State and county aforesaid, and did then and there unlawfully associate with women of bad character for chastity, to wit, *Martha Mershon*, *Jane Releford* and *Emma J. Young*, in public places then and there situate, to wit, on the public walks of said city of *Bloomington*, and at houses which men of bad character frequent and visit, to wit, the house of said *James Stout*, and the house of one *Martha Mershon*, and did then and there commit fornication for hire with *Oscar Strother* and divers other persons."

4. The words enclosed by and to be supplied within [ ] will not be found in the reported case.

5. The statute under which this indictment is drawn makes it an offense for a female to live in "houses" of ill fame. This was held to import also the singular.

Form No. 7648.

(Precedent in State *v.* Russell, 95 Iowa 407.)[1]

[*The State of Iowa* against *Maggie Russell.* } *District* Court of the County of *Washington.*

The grand jury of the county of *Washington*, in the name and by the authority of the state of *Iowa*, accuse *Maggie Russell* of the crime of using and occupying a place for the purpose of prostitution and lewdness, committed as follows:][2]

The said *Maggie Russell*, on or about the *twenty-fifth* day of *August*, 1894, in the county aforesaid, did unlawfully and feloniously resort to, use, occupy, and inhabit a certain place, commonly called a dwelling house for the purpose of prostitution and lewdness; said place being then and there in possession of, and under the control of the said *Maggie Russell*, [contrary to the form of statute in such case made and provided, and against the peace and dignity of the state of *Iowa*.

Daniel Webster, District Attorney.][2]

4. Acting as Servant or Bartender.

Form No. 7649.[3]

State of *Connecticut*, *Hartford* County. } ss. Town of *Plainville.*

To *Abraham Kent*, Esq., a justice of the peace for the county of *Hartford*, in said town. Comes *John Doe*, a grand juror in and for said town of *Plainville*, and on his oath of office complaint and information makes, that at said town of *Plainville*, on the *twentieth* day of *January*, 1898, and on divers other days and times between that day and the day of filing this complaint and information, *Richard Roe*, of the town of *Plainville*, in said county,* did then and there unlawfully act as a servant (or *bartender*), in a house of ill fame, which is resorted to for the purposes of prostitution and lewdness (or *in a house reputed to be a house or place of assignation*), to wit, the house of *Mary Roe*, situated on *Main* street, in the said town of *Plainville*, contrary to

1. This indictment was drawn to cover an offense described in McClain's Anno. Code Iowa (1888), § 5326, which reads as follows: "If any person, for the purpose of prostitution or lewdness, resorts to, uses or occupies or inhabits any house of ill fame or place kept for such purposes, or if any person be found in any hotel, boarding house, cigar store or other place leading a life of prostitution and lewdness, such person shall be punished by imprisonment in the penitentiary," etc. It was contended that this indictment did not charge an offense under the statute, for the reason that it did not appear therefrom that the place resorted to, used and occupied was a house of ill fame, or place kept for such purpose; but it was held that, while it did not expressly charge that the place resorted to was a house of ill fame, or one kept for the purpose of prostitution and lewdness, it did allege that the defendant was in possession of a dwelling-house which she unlawfully and feloniously resorted to for the purpose of prostitution and lewdness, which made it a place kept for that purpose, within the meaning of the law, and sufficiently charged the offense.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. *Connecticut.* — Gen. Stat. (1888), § 1532.

the form of the statute in such case made and provided, and against the peace. Wherefore the grand juror aforesaid prays process, and that the said *Richard Roe* may be arrested and examined touching this complaint, and he thereon dealt with according to law.

Dated at *Plainville* this *tenth* day of *March*, A. D. 1*898*.

John Doe, Grand Juror.

V. LEWD, LASCIVIOUS AND DISORDERLY PERSONS.

Form No. 7650.[1]

(*Commencing as in Form No. 7640, and continuing down to* *), and on divers other days and times, at said *Lowell*, between that day and the day of the making of this complaint, was and still is a lewd, wanton and lascivious person in speech and behavior, against the peace and dignity of said commonwealth, and contrary to the form of the statute in such case made and provided.

(*Signature and jurat as in Form No. 7640*).

VI. NIGHT-WALKING.[2]

1. This form is based on the facts in Com. *v.* Parker, 4 Allen (Mass.) 313. The form is drawn under Mass. Pub. Stat. (1882), c. 207, § 29. For similar statutes see as follows, to wit:

Connecticut. — Gen. Stat. (1888), §§ 3400, 3401.

Florida. — Rev. Stat. (1892), § 2642.

Maine. — Rev. Stat. (1883), c. 141, § 4.

Michigan. — How. Anno. Stat. (Supp. 1890), § 1997*a*.

New Hampshire. — Pub. Stat. (1891), c. 264, § 21.

Rhode Island. — Gen. Laws (1896), c. 281, § 24.

Vermont. — Stat. (1894), § 5066.

Virginia. — Code (1887), § 3787.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4579.

To the Common Nuisance. — In a complaint for being a lewd, wanton and lascivious person in speech and behavior, it is not necessary to allege that the offense was committed to the common nuisance of the people of the commonwealth. Com. *v.* Parker, 4 Allen (Mass.) 313.

2. **Precedents.** — In Williams *v.* State, 98 Ala. 52, a conviction was had on an indictment which charged that the defendant "was a common night-walker, and did walk and ramble in the streets and common highways in the city of *Montgomery*, *Alabama*, at unseasonable hours of night, without having any lawful business and without any necessity therefor, for the unlawful purpose of picking up men for lewd intercourse, against good morals and good manners, to the common nuisance of all good people of said county."

In State *v.* Dowers, 45 N. H. 543, an indictment under the *New Hampshire* statute was held sufficient which charged that the defendant, on a certain day, "was a common night-walker, and, from the said *tenth* day of *July* to the day of the filing of the complaint, during divers nights within the time aforesaid, did walk and ramble in the streets and common highways in the said city of *Portsmouth*, at unseasonable hours of said nights, without having any lawful business and without any necessity therefor, against good morals and good manners."

Where a complaint charged that defendant "on *September 24th*, 1*865*, and from that day to *March 24th*, 1*866*, at said *Boston*, did habitually walk the streets of said city in the night time for the purpose of prostitution, and was and now is a common night-walker, against the peace," etc., it was moved, at the superior court on appeal, that the complaint be dismissed because "the time is not set forth with sufficient certainty, and the same is bad for duplicity, and there is no sufficient statement of the offense;" but it was held that the motion to dismiss came too late, that it should have been made in the police court in which the complaint was originally made. Com. *v.* Norton, 13 Allen (Mass.) 550.

Form No. 7651.

(Precedent in Stokes *v.* State, 92 Ala. 74.)[1]

[(*Commencing as in Form No. 2383, and continuing down to* *)][2] *Nora Stokes* was a common night-walker, and did walk and ramble in the streets and common highways in the city of *Montgomery*, in said county and State, at unreasonable hours of night, without having any lawful business, and without any necessity therefor, for the unlawful purpose[3] of picking up men for lewd intercourse; against good morals and good manners, to the common nuisance of all good people of the county, against the peace [(*concluding as in Form No. 2383*)].[2]

Form No. 7652.[4]

(*Commencing as in Form No. 7649, and continuing down to* *) was a common night-walker, and did then and there unlawfully walk and ramble in the streets and common highways in the town of *Plainville*, at unseasonable hours of the night (or *by night* or *day frequent streets, highways, and public places*, or *go abroad and about in the said town of Plainville*), with intent to entice, allure, and invite certain persons to the complainant unknown, to illicit sexual intercourse, contrary (*concluding as in Form No. 7649*).

1. It was held in this case that night-walking is punishable as a nuisance at common law, and that a conviction might be had against a woman as a night-walker on proof that she strolled through the streets without necessity at unreasonable hours of the night for the purpose of enticing men to her room for lewd purposes, although she did not go far from her house and was not actuated by the desire to make money or the love of gain.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. **Intent.** — The indictment must contain an averment of unlawful intent; thus, where an indictment charged that the defendant "before the finding of this indictment, was a common night-walker, and did walk and ramble in the streets and common highways at unseasonable hours of night, without having any lawful business and without necessity therefor, against good morals and good manners, to the common nuisance of all the good people of the county, against the peace," etc., it was held that at common law night-walking was indictable only upon a charge that the accused had some criminal or unlawful purpose or intent, and that the indictment was insufficient for failing to charge such purpose or intent. Thomas *v.* State, 55 Ala. 260.

4. The statute upon which this complaint is drawn is as follows: "All common night-walkers, all lewd, wanton, and lascivious persons, in speech or behavior; all persons, male or female, who by day or night frequent streets, highways or public places, or go abroad or about with intent to entice, allure or invite any one to illicit sexual intercourse, may be committed to the workhouse," etc. Conn. Gen. Stat. (1888), § 3401.

Similar statutes exist in other states as follows:

Florida. — Rev. Stat. (1892), § 2642.

Maine. — Rev. Stat. (1883), c. 141, § 4.

Massachusetts. — Pub. Stat. (1882), c. 207, § 29.

New Hampshire. — Pub. Stat. (1891), c. 264, § 15.

New Jersey. — Gen. Stat. (1895), p. 1198, § 1.

Rhode Island. — Gen. Laws (1896), c. 281, § 24.

See also the statutes of the different states prohibiting vagrancy.

Offense, How Charged.— Under statutes providing punishment for the nuisance of night-walking, it is sufficient in a complaint to charge the offense in general terms without specifying the particular acts constituting it. State *v.* Dowers, 45 N. H. 543 (*supra*, note 2, p. 938); State *v.* Russell, 14 R. I. 506.

VII. ON A PUBLIC CONVEYANCE.

1. In General.

Form No. 7653.[1]

State of *Minnesota*, } ss.
County of *Ramsey*. }

John Doe, being first duly sworn and examined on oath, makes complaint and says that on the *first* day of *January*, A. D. 1*898*, at the county of *Ramsey*, one *Richard Roe*, did then and there* wilfully and unlawfully disturb and annoy (or *interfere with*) the passengers (or *occupants*) of a certain railroad car (*or other public conveyance, naming it*) then and there operated by the *Chicago, Burlington and Northern Railroad Company*, incorporated as such railroad company under the laws of the state of *Minnesota*, by a disorderly and offensive act (or *display* or *by offensive language*), to wit, (*describing the particular offense or setting forth the words used*), contrary to the form of the statute in such case made and provided, against the peace and dignity of the state of *Minnesota* (*concluding as in Form No. 6683*).

2. On a Street Car.

a. Refusing to Desist from Smoking.

Form No. 7654.[2]

State of *Ohio*, *Vinton* County, ss.

Before me, *Abraham Kent*, a justice of the peace in and for said county, personally came *John Doe*, who, being duly sworn according to law, deposes and says: that on about the *first* day of *January*, A. D. 1*898*, at the county of *Vinton*, one *Richard Roe** having been then and there requested by *Samuel Short*, an employee of the *Metropolitan Street Railway Company*, to desist from smoking on (or *in*) a certain passenger car running on the *Metropolitan Street Railway*, failed immediately to do so.

John Doe.

Sworn to and subscribed before me this *fifth* day of *January*, A. D. 1*898*.

Abraham Kent, Justice of the Peace.

1. The statute upon which this form is drawn is as follows:

"Any person who shall wilfully, by any offensive or disorderly act or language, annoy or interfere with the passengers of any public stage, railroad car, ferry-boat, or other public conveyance, or who shall wilfully disturb or annoy the occupants or passengers of such public stage, car, ferry-boat or other public conveyance, by any disorderly act, language or display, although such act, conduct, or display may not amount to assault, or assault or battery, shall be deemed guilty of a misdemeanor," etc., and upon conviction before any municipal court, police court or justice of the peace in which the act is committed shall be punished by fine, etc. Minn. Stat. (1894), § 6944.

Similar statutes exist in other states as follows, to wit:

Arkansas. — Sand. & H. Dig. (1894), § 6230.

Georgia. — 3 Code (1895), § 396.

Kentucky. — Stat. (1894), § 806.

Maine. — Rev. Stat. (1883), c. 51, § 73.

West Virginia. — Code (1891), c. 145, § 31.

2. The statute upon which this form

b. Refusing to Pay Fare.

Form No. 7655.[1]

(*Commencing as in Form No. 7654, and continuing down to* *) upon demand being made by *Samuel Short*, an employee of the *Metropolitan Street Railway Company*, failed and refused to pay the proper fare on (or *in*) said passenger car by delivering the money (or *a ticket*) to the said employee (or *depositing the money* or *a ticket in the fare-box*), as required by the said employee, and the said *Richard Roe* also failed and refused to immediately leave said street car immediately after his said failure and refusal to pay said fare, and after the said car had been stopped.

(*Signature and jurat as in Form No. 7654.*)

3. On a Railroad Car.

a. In General.

Form No. 7656.[2]

Oxford, ss.

To *Abraham Kent*, Esq., a trial justice within and for the county of *Oxford*.

John Doe of *Bethel*, in said county, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-eight*, on behalf of said county, on oath complains of *Richard Roe* of *Bethel*, in said county of *Oxford*, did then and there behave in a disorderly and riotous manner while on a train of railroad cars then and there run and operated by the *Grand Trunk Railroad Company*, by (*Here state the nature of the disorderly conduct*), against the peace of said city, and contrary (*concluding as in Form No. 6679*).

b. Disturbing Women.

Form No. 7657.

(Ala. Crim. Code (1886), p. 270, No. 36.)[3]

(*Commencing as in Form No. 2383, and continuing down to* *) *John Doe*, by rude and indecent behavior (or *by profane or obscene language*) wilfully disturbed a woman on a railroad car (*or other public conveyance*), against the peace (*concluding as in Form No. 2383*).

is drawn is as follows: "Whoever, being requested by an employe of a street railroad company, or by an employe of a person operating a street railroad, to desist from smoking on or in a passenger car running on such road, fails immediately to do so, * * * or fails, on demand, to pay the proper fare on or in such car, by delivering the money or a ticket, or depositing the same in a fare-box, as required by such employe, shall be fined," etc., "but on demand of such fare, the person of whom the demand is made may immediately leave the car instead of paying the same." Bates' Anno. Stat. Ohio (1897), § 6983. See also Minn. Stat. (1894), § 6943.

1. See *supra*, note 2, p. 940.

2. The statute upon which this complaint is drawn is as follows: Whoever behaves in a disorderly or riotous manner while on any train of railroad cars is guilty of a breach of the peace and shall be fined, etc. Me. Rev. Stat. (1883), c. 51, § 73.

3. *Alabama.* — Crim. Code (1886), § 4032. See also 3 Ga. Code (1895), § 396.

c. Jumping Upon Cars.

Form No. 7658.

(*Commencing as in Form No. 7654, and continuing down to* *) did then and there unlawfully climb, jump and step (or *stand*) upon a certain locomotive (or *engine* or *car*) upon the track of the *Baltimore and Ohio Southwestern Railroad Company*, in violation of the lawful rules and regulations of the said railroad company.

(*Signature and jurat as in Form No. 7654.*)

VIII. PEEPING IN WINDOW OF DWELLING.

Form No. 7659.

(Precedent in Grand Rapids *v.* Williams, (Mich. 1897) 70 N. W. Rep. 547.)[2]

[(*Commencing as in Form No. 7643, and continuing down to* *)][3] on the *8th* day of *September*, A. D. 1895, at the city of *Grand Rapids*, in the county aforesaid, and within the corporate limits of said city, one *George Williams* was then and there guilty of indecent, insulting and immoral conduct and behavior, by peeking in the window of a house on the corner of *Wenham* avenue and *Lagrave* street, said house being then and there occupied by persons living there, and not being the residence of said *Williams*, and was then and there found in a state of intoxication, to the evil example of all others in like case offending, contrary to the provisions of section one of an ordinance of said city, entitled "An ordinance relative to disorderly persons."

[Wherefore said complainant (*concluding as in Form No. 7643*).][3]

1. The statute of *Ohio* provides as follows: "A person who climbs, jumps, steps, or stands upon, or clings, or in any way attaches himself to, any locomotive, engine or car, upon any part of the track of a railroad, unless in so doing he acts in compliance with law, or by permission under the lawful rules and regulations of the corporation then managing such railroad, shall be fined," etc. Bates' Anno. Stat. Ohio (1897), § 6982.

For similar statutes existing in other states see as follows, to wit:

Illinois. — Starr & C. Anno. Stat. (1896), c. 114, par. 85.

Iowa. — Code (1897), § 4811.

Kentucky. — Stat. (1894), § 805.

Missouri. — Rev. Stat. (1889), § 3927.

New Jersey. — Gen. Stat. (1895), p. 1109, § 324.

Texas. — Pen. Code (1895), art. 1010*h*.

2. The ordinance upon which this complaint was drawn is as follows: "All persons who shall be engaged in any illegal or improper diversion, or shall use any insulting, indecent or immoral language, or shall be guilty of any indecent, insulting or immoral conduct or behavior in any public street or elsewhere in said city, shall be deemed a disorderly person, and shall be punished," etc.

Upon the trial, objection was made to the admission of any testimony because the complaint does not state an offense — First, because looking into a house where persons reside is not immoral, insulting or indecent; second, because no improper or unlawful purpose is alleged; third, because the complaint does not set forth any circumstances from which it would appear that the alleged act was immoral, indecent or insulting; fourth, because it does not allege any person was in the house, and because the complaint does not describe the place of the alleged offense. The objection was overruled and the defendant was convicted, which conviction was sustained by the higher court.

3. The words enclosed by and to be supplied within [ ] will not be found in the reported case.

IX. PROFANE SWEARING.[1]

1. For statutes relating to the subject of profane swearing see as follows, to wit:

Arkansas. — Sand. & H. Dig. (1894), § 1844.

California. — Pen. Code (1897), § 415.

Connecticut.—Gen. Stat. (1888), § 1536.

Delaware. — Rev. Stat. (1893), p. 733, § 14.

Florida. — Rev. Stat. (1892), § 2622.

Indiana. — Horner's Stat. (1896), § 1999.

Kentucky. — Stat. (1894), § 1319.

Maine.—Rev. Stat. (1883), c. 124, § 16.

Maryland. — Pub. Gen. Laws (1888), art. 27, § 67.

Massachusetts. — Pub. Stat. (1882), c. 207, § 20.

Michigan. — How. Anno. Stat. (1882), § 9294.

Mississippi. — Anno. Code (1892), § 1219.

New Hampshire. — Pub. Stat. (1891), c. 271, § 2.

New Jersey. — Gen. Stat. (1895), p. 3712, § 14.

North Dakota. — Rev. Codes (1895), § 6832.

Ohio. — Bates' Anno. Stat. (1897), § 7031.

Oklahoma. — Stat. (1893), § 1870.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 530, § 341.

Rhode Island. — Gen. Laws (1896), c. 281, § 16.

Tennessee. — Code (1896), § 3032 *et seq.*

Virginia. — Code (1887), § 3798.

Vermont. — Stat. (1894), § 5071.

West Virginia. — Code (1891), c. 149, § 15.

Profane swearing is indictable at common law when repeated so often and so publicly as to become an offense to the public, and thus a public nuisance. Goree *v.* State, 71 Ala. 7; *Exp.* Delaney, 43 Cal. 479; State *v.* Chrisp, 85 N. Car. 529; State *v.* Jones, 9 Ired. L. (31 N. Car.) 38; State *v.* Graham, 3 Sneed (Tenn.) 134; State *v.* Steele, 3 Heisk. (Tenn.) 135.

For substance of indictments at common law see State *v.* Chrisp, 85 N. Car. 529; State *v.* Graham, 3 Sneed (Tenn.) 134.

Requisites of Criminal Complaint, Indictment or Information — *Generally.* — For the formal parts of a criminal complaint, indictment or information in a particular jurisdiction consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

The profane words must be set out in the indictment or complaint. Walton *v.* State, 64 Miss. 207; State *v.* Barham, 79 N. Car. 646. But it is not necessary to set out the whole conversation in which the offensive words occurred. State *v.* Steele, 3 Heisk. (Tenn.) 135. But in Bodenhamer *v.* State, 60 Ark. 10, an indictment drawn under Mansf. Dig. Ark. (1884), § 1880, charging that the defendant "in the county and state aforesaid, on the *10th* day of *June*, 1893, unlawfully did profanely swear and curse," following the language of the statute, was held sufficient without setting out the language used, or stating that it was used publicly.

An information and conviction for swearing the same profane oath several times on the same day need not complain or convict of each of them separately, and the charge in the precise words spoken is sufficiently specific. Johnson *v.* Barclay, 16 N. J. L. 1.

In Presence or Hearing of Others. — It should be alleged that the profane swearing was done in the presence or hearing of some person or persons. Goree *v.* State, 71 Ala. 7; State *v.* Barham, 79 N. Car. 646; State *v.* Pepper, 68 N. Car. 259; Com. *v.* Linn, 158 Pa. St. 22. And a general allegation that the offense was committed to the common nuisance is insufficient. State *v.* Barham, 79 N. Car. 646; State *v.* Pepper, 68 N. Car. 259; Com. *v.* Linn, 158 Pa. St. 22. But see Gaines *v.* State, 7 Lea (Tenn.) 410, wherein it was held not a fatal defect to omit the allegation that the words were uttered in the presence of divers good citizens, the omission being supplied by other averments.

Where an indictment charged "that before the finding of this indictment, *Joe Goree* did indulge publicly in profane swearing by using such expressions as, to wit, (*setting out certain profane language*), or words of like import, to the evil example of all others in like case offending, and against the peace and dignity of the state of *Alabama*," it was held fatally defective because it failed to state that the act was done in the presence or hearing of any one, and that the averment that it was done publicly is not sufficient. Goree *v.* State, 71 Ala. 7.

Where an indictment charged that the defendant "in the public streets of

Form No. 7660.

(Precedent in Taney *v.* State, 9 Ind. App. 47.)[1]

[(*Caption as in Form No. 6674.*)][2]

Before me, *M. H. Daniels*, a justice of the peace, in and for said county, came *Sarah E. Kant*, who, being duly sworn according to law, deposes and saith, that on or about the *16th* day of *October*, in the year 18*92*, at the county of *Marion* and State of *Indiana*, *Michael Taney*, late of said county, did then and there unlawfully and profanely[3] curse, swear, aver and imprecate by and in the name of God, Jesus Christ, and the Holy Ghost, by then and there unlawfully saying God damned, he, the said *Michael Taney*, being then and there a person over *fourteen* years of age, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Indiana*.

[(*Signature and jurat as in Form No. 6674.*)][2]

the town of *Lumberton*, with force and arms, and to the great displeasure of Almighty God, and the common nuisance of all the good citizens of the state, then and there being assembled, did, for a long time, to wit, for the space of *twelve* seconds, profanely curse and swear and take the name of Almighty God in vain, to the common nuisance as aforesaid," etc., it was held that the averment "to the common nuisance of all the good citizens of the state then and there being assembled" is equivocal and is not the same as saying "in the presence of divers persons being then and there assembled"; that the indictment should have alleged that the words were uttered in the presence and hearing of persons; and that the words should have been set forth therein. State *v.* Pepper, 68 N. Car. 259.

Where the material count of an indictment was as follows: "The Grand Inquest of the Commonwealth of *Pennsylvania* aforesaid, upon their oath aforesaid, do further present that *Rolla Linn*, late of said county, *yeoman*, *Daniel Linn*, late of said county, *yeoman*, being evil disposed persons, on the day and year aforesaid and divers other times, as well before as since, at the county aforesaid and within the jurisdiction of this court, did, on the public streets and highways, profanely curse and swear and take the name of God in vain, to the evil example and to the common nuisance of the good citizens of the state of *Pennsylvania*, and contrary to the form of the act of assembly in such case made and provided, and against the peace and dignity of the Commonwealth of *Pennsylvania*, it was held that it did not state an offense under the statutes prohibiting blasphemy, and that as a common-law indictment it was insufficient for the reason that it did not charge the profane language to have been uttered in the presence and within the hearing of citizens present; that this is an essential and an indispensable fact, which must be charged in the indictment in order to make out a sufficient allegation of the offense at common law. Com. *v.* Linn, 158 Pa. St. 22.

To the Common Nuisance. — The gravamen of the offense of using profane language is in its being a public or common nuisance, and the averment to the common nuisance, or its equivalent, is essential. Young *v.* State, 10 Lea (Tenn.) 165; Gaines *v.* State, 7 Lea (Tenn.) 410; State *v.* Barham, 79 N. Car. 646.

Precedents. — For other forms of indictments and complaints for this offense see State *v.* Chrisp, 85 N. Car. 528; State *v.* Ellar, 1 Dev. L. (12 N. Car.) 267; Com. *v.* Spratt, 14 Phila. (Pa.) 365; Young *v.* State, 10 Lea (Tenn.) 165; State *v.* Steele, 3 Heisk. (Tenn.) 135; State *v.* Graham, 3 Sneed (Tenn.) 134.

1. The statute upon which this affidavit is drawn is as follows: "Whoever, being over fourteen years of age profanely curses, swears, avers, or imprecates by or in the name of God, Jesus Christ, or the Holy Ghost, is guilty of profanity, and, upon conviction thereof, shall be fined," etc. Horner's Stat. Ind. (1896), § 1999.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. It was held that it was sufficiently

Form No. 7661.[1]

(*Commencing as in Form No. 7643, and continuing down to* *) on the *first* day of *October*, A. D. 1897, at the town of *Lowell* in said county, *Richard Roe*, having arrived at the age of discretion, to wit, *seventeen* years of age, did then and there unlawfully and profanely curse, damn and swear by the name of God, Jesus Christ and the Holy Ghost, by uttering and proclaiming in the presence and hearing of him, the said *John Doe*, and divers other persons to the complainant unknown, the following words, to wit, (*setting forth the words*), contrary to the (*concluding as in Form No. 7643*).

X. PROSTITUTES.

1. Committing Fornication for Hire.[2]

averred that the words were spoken profanely and that only one offense was charged.

1. *Michigan.* — How. Anno. Stat. (1882), § 9294. See also *supra*, note 1, p. 943.

2. **Precedents** — *Sufficient Information.* — Where an information was as follows:

"State of *New York*,
County of *Franklin*, } ss.
Village of *Malone*.

Be it remembered, that I, *J. J. Flynn*, residing in the village of *Malone*, county of *Franklin*, *N. Y.*, now come before *O. C. Earle*, Esq., a police justice of the village of *Malone*, in the county of *Franklin*, and give information under oath as follows, upon information and belief: That one *Nellie Cowie*, on the *1* day of *September*, 1894, at the village of *Malone*, in the town of *Malone*, county of *Franklin*, *N. Y.*, at about *8* o'clock in the *after*noon of said day, did commit the crime of being a common prostitute, against the person or property of the People of the State of *New York* by, on or about *Aug. 15*, 1894, having unlawful sexual intercourse with one *Philip Goosha*, and receiving pay therefor, and with divers and sundry persons prior and subsequent thereto, whose names are to the deponent unknown, wherefore your informant prays that the depositions of this informant and *John Mahaney*, *Philip Goosha*, *W. A. Fobear*, witness may be reduced to writing and duly subscribed, and that a warrant issue for the arrest of said accused, and that she be dealt with pursuant to the provisions of the Code of Criminal Procedure," and was duly verified on the 15th day of September, 1894, it was objected to as being insufficient in that it does not state a crime known to the law as defined and regulated by the Code of Criminal Procedure, and did not give the justice authority to issue his warrant. It was held that, although under the provisions of the Code of Criminal Procedure common prostitution seems to be treated only as an evidence of vagrancy, and in that case only when the accused has no lawful employment whereby to maintain herself, the information charged an offense and gave the justice jurisdiction under the provisions of section 8 of chapter 187 of the Laws of 1881, as amended by section 1 of chapter 17 of the Laws of 1887, which prescribes the nature and name of the offense punishable by confinement in the "house of refuge for women," and among them is embraced "common prostitutes." People *v.* Cowie, 88 Hun (N. Y.) 498.

Insufficient Forms. — Where an affidavit set forth upon information and belief that, "on or about the *8th* day of *December*, 1878, at and within *Jackson* county and state of *Indiana*, *Electa Delano* was then and there a female prostitute, contrary to the form of the statute," etc., and thereupon the following information was filed, "*Fred. L. Prow*, prosecuting attorney within and for the *Forty-second* Judicial Circuit of the State of *Indiana*, now gives the court here to understand and be informed, that on the *8th* day of *December*, 1878, at and within the county of *Jackson* and State of *Indiana*, *Electa Delano* was then and there a female prostitute. Wherefore he prays for a warrant," etc., it was held that, under the *Indiana* Vagrant

Form No. 7662.[1]

(*Commencing as in Form No. 7644, and continuing down to* *) that one *Jane Doe*, a female, late of said county, on the *first* day of *September*, 1897, at said county and state aforesaid, did then and there unlawfully commit fornication for hire with one *Samuel Short*, a male person, for the price of *five* dollars, contrary to the form (*concluding as in Form No. 7644*).

2. Endeavoring to Ply Vocation in Public Place.

Form No. 7663.[2]

State of *Colorado*, }
County of *El Paso*, } ss.

The complaint and information of *John Doe*, made before *Abraham Kent*, Esq., one of the justices of the peace in and for the said county, on the *first* day of *January*, A. D. 1898, being duly sworn on oath, says that *Mary Roe* on or about the *twentieth* day of *December*, A. D. 1897, at, to wit, the said county of *El Paso*, in the state aforesaid, being a prostitute (or *courtesan* or *lewd woman*), did then and there unlaw-

act of 1877, which provides that "Any female who shall so conduct herself as to be recognized and known as a courtesan, or shall frequent or live in houses of ill-fame, or associate with women of bad character for chastity, or at a house where men of bad character frequent or visit, or who is known to be guilty of fornication for hire, shall be deemed and known as a female prostitute," the affidavit and information were insufficient for the reason that they were too general in that they did not charge the defendant with the commission of the acts constituting the offense. Delano *v.* State, 66 Ind. 348.

Where a complaint averred as follows: "*Chemung* County, }
City of *Elmira*. } ss:

James Kelly, on information and belief, on oath complains that at said city on the *1st* day of *January*, 1879, and on divers days and times between that day and the present time, *Anna Kingsley* was, and now is a disorderly person, to wit, a common prostitute, and has during the time aforesaid, for gain, permitted and procured men to visit her at her rooms in said city and with them committed whoredom and fornication.

James Kelly.

Subscribed and sworn before me, this *18th* day of *March*, 1880.

George E. Pratt, Recorder of said city," it was held insufficient for the reason that it was founded upon information and belief only, without stating the source of information or ground of belief, and because it failed to state any fact showing or tending to show that the accused was a common prostitute. People *v.* Pratt, 22 Hun (N. Y.) 300.

1. This form is drawn under Horner's Stat. Ind. (1897), § 2003, which provides that "any female * * * who commits fornication for hire shall be deemed a prostitute, and upon conviction thereof shall be fined," etc.

For similar statutes see as follows, to wit:

Alabama.—Crim. Code (1886), § 4047.

Connecticut.—Gen. Stat. (1888), § 1528.

Michigan. — How. Anno. Stat. (Supp. 1890), § 1997*a*.

New Hampshire. — Pub. Stat. (1891), c. 264, § 15.

New Jersey. — Gen. Stat. (1895), p. 1198, § 1.

Rhode Island. — Gen. Laws (1896), c. 281, § 24.

2. The statute upon which this complaint is drawn is as follows: "That any prostitute, courtesan or lewd woman who shall, by word, gesture or action, endeavor to ply her vocation upon the streets, or from the door or windows of any house, or in any public place in any city or town in this state, or who, for such purpose, shall make a bold and meretricious display of herself, shall be deemed guilty of a misdemeanor, and upon any conviction before any justice of the peace shall be fined," etc. Mills' Anno. Stat. Colo. (1891), § 1331.

fully, by words, gestures and actions, endeavor to ply her vocation (or *make a bold and meretricious display of herself in an endeavor to ply her vocation*) upon a certain public street, to wit, *Tejon* street (or *from the door and windows of a certain house, to wit, the house of one Mary Short*, or *in a public place, to wit, the post-office*), in the city of *Colorado Springs*, in the county and state aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of *Colorado*. He therefore prays that the said *Mary Roe* may be arrested and dealt with according to law.

John Doe.

Subscribed and sworn to before me, this *twentieth* day of *December*, A. D. 1897.

Abraham Kent, Justice of the Peace.

XI. USING OBSCENE, INSULTING OR ABUSIVE LANGUAGE.[1]

1. In General.

Form No. 7664.

(Precedent in Com. *v.* Mohn, 52 Pa. St. 244.)[2]

(*Caption and first count as in Form No. 5903.*)

2. That the said *Elenora Mohn*, afterwards, to wit, on the day and year aforesaid, and on divers other days and times as well before as

1. Requisites of Criminal Complaint, Indictment or Information — *Generally.* — For the formal parts of a criminal complaint, indictment or information in a particular jurisdiction consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

Parties Defendant. — Two or more persons cannot be jointly indicted for the offense. Cox *v.* State, 76 Ala. 66; State *v.* Lancaster, 36 Ark. 56.

Setting Out Language Used. — It is not necessary to set forth the language used. Yancy *v.* State, 63 Ala. 141; Moore *v.* State, 50 Ark. 25; *Ex p.* Foley, 62 Cal. 508; Com. *v.* Mohn, 52 Pa. St. 243. *Compare* Bell *v.* State, 1 Swan (Tenn.) 42; Steuer *v.* State, 59 Wis. 472. And if set out it is not necessary that the words should be proven exactly as charged to have been spoken. Bell *v.* State, 1 Swan (Tenn.) 42.

When words are set out which are not in their nature obscene or licentious, the allegation must be aided by extrinsic averments. State *v.* Coffing, 3 Ind. App. 305; State *v.* Cone, 16 Ind. App. 350.

Allegation as to Place. — Where the statute prohibits the use of offensive language at particular places, there must be an allegation as to the place where the offense was committed. Ivey *v.* State, 61 Ala. 58; Quin *v.* State, 65 Miss. 479; State *v.* Kennison, 55 N. H. 242.

The place of the offense, being material, must be proved as alleged. Thus, where an indictment charged that the defendant, "on the *9th* day of *January*, 1888, in the county aforesaid, unlawfully did enter the yard of *Bob Jones*, and did then and there unlawfully, in the presence and in the hearing of the family of the said *Bob Jones* (he, the said *Bob Jones*, and family then and there being the occupants and owner of said yard and dwelling house therein situated), unlawfully make use of abusive, profane and vulgar language," and it was proved at the trial that the words were uttered "near" the yard, and the defendant was convicted, the judgment was reversed on appeal. Quin *v.* State, 65 Miss. 479.

Precedents. — See also State *v.* Appling, 25 Mo. 315; Bassette *v.* State, 51 N. J. L. 502; State *v.* Brewington, 84 N. Car. 783.

2. This indictment was held to sufficiently charge an offense at common law. The first count of the indictment set out *ante*, Form No. 5903, charged the defendant with being a common scold.

since, at the county aforesaid, being an evil-disposed person, and designing, contriving and intending the morals, as well of youth as of divers other citizens of this Commonwealth to debauch and corrupt, openly and publicly with a loud voice, in the public highways, wicked, scandalous and infamous words did utter, in the hearing of the citizens of the said Commonwealth, and to their manifest corruption and subversion, and to the common nuisance of all the good citizens of the Commonwealth, and against the peace (*concluding as in Form No. 5903*).

Form No. 7665.[1]

(*Commencing as in Form No. 6670*) says that one *John Doe*, on the *second* day of *March*, A. D. 1*898*, in the county and district aforesaid, did then and there publicly, to wit, in a public street in the town of *Orlando*, in the county and district aforesaid, use and utter indecent and offensive language to the said *Richard Roe*.

(*Signature and jurat as in Form No. 6670.*)

2. In Presence of Particular Persons.[2]

a. Women.

Form No. 7666.

(Ala. Crim. Code (1886), p. 266, No. 3.)[3]

1. *Florida.* — Rev. Stat. (1892), § 2624. For other statutes see *infra*, note 1, p. 949.

2. **Requisites of Complaint, Indictment or Information** — *Generally.* — For the formal parts of a criminal complaint, indictment or information in a particular jurisdiction consult the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS; INFORMATIONS.

Presence of Others. — The statute against the use of abusive, vulgar and insulting language is not violated unless such language is used at a place and in the presence of persons, or some of them specially mentioned in the statute, and an indictment is defective if it fails to aver such presence. Ivey *v.* State, 61 Ala. 58.

Setting Out Words Used. — Under the *Alabama* code making it an offense to use obscene or insulting language in the presence of females, etc., the indictment need not set out the words used. Yancy *v.* State, 63 Ala. 141.

Spoken Words Only Contemplated by Statutes. — Under the *Georgia* statute which prohibits the use of obscene and vulgar language in the presence of a female, the safer construction is that the use of spoken words only is contemplated, but if the statute embraces written as well as spoken words, to render the writing or its contents admissible in evidence it is necessary that the indictment should allege that the words were written and describe with reasonable certainty the instrument of writing which contained them. Stevenson *v.* State, 90 Ga. 456.

Insufficient Affidavit. — Where the words charged are not obscene or licentious *per se*, it should appear by extrinsic averments that they were used in that sense, and were so understood by the female. Accordingly, the affidavit in State *v.* Cone, 16 Ind. App. 350, was held insufficient. Omitting the formal parts, it was in the following words, to wit: "In the county of *Elkhart*, and state of *Indiana*, on the *7th* day of *October*, 1*895*, *Bert Cone* was then and there a male person of over *fourteen* years of age, and that said *Cone* did then and there, in the presence of a female, *Katie Marker*, use and utter obscene and licentious language and words, such words being as follows: 'After my balls are over,' meaning by the word 'balls' his testicles; and further crying out, 'Is there anything in it?' meaning thereby to inquire if said *Katie Marker* was not a woman of bad character for chastity."

3. *Alabama.* — Crim. Code (1886), § 4031.

Precedents. — For similar forms see Golsom *v.* State, 86 Ala. 601; Bragg *v.*

(*Commencing as in Form No. 2383, and continuing down to* *) *John Doe*, in the presence or hearing of a woman, made use of abusive, insulting or obscene language, against the peace (*concluding as in Form No. 2383*).

Form No. 7667.[1]

(*Commencing as in Form No. 7653, and continuing down to* *) wilfully and unlawfully did utter and use obscene and licentious language (or *words*), to wit, (*setting out the words used*) in the presence and hearing of a female, to wit, *Mary Dee*, he the said *Richard Roe* being then and there over *fourteen*[2] years of age, contrary to the form of the statute (*concluding as in Form No. 7653*).

b. Children.

Form No. 7668.

(Precedent in *Ex p.* Foley, 62 Cal. 509.)[3]

[(*Commencing as in Form No. 6665*) says that][4] defendant, [*Thomas K. Foley*,] on the *nineteenth* day of *October*, 1*880*, at *Watsonville*, in the county of *Santa Cruz*, State of *California*, committed a misdemeanor, as follows, to wit: The said *T. K. Foley*, at the time and place aforesaid, did use vulgar and indecent language within the hearing of children, in a loud and boisterous manner, wilfully and unlawfully, all of which is contrary to the form of the statute [(*concluding as in Form No. 6663*).][4]

State, 69 Ala. 204; Benson *v.* State, 68 Ala. 513; Henderson *v.* State, 63 Ala. 193.

Where an indictment charged "that before the finding of this indictment *Sterling McVay* did, in the presence or hearing of a woman, make use of abusive, insulting or obscene language," etc., it was held that to authorize a conviction the language must be used in the presence or hearing of a female, and where there is no doubt that the language was not used in the presence of a female it must be proved that it was heard, proof that it might have been heard being insufficient to sustain the indictment. McVay *v.* State, 100 Ala. 110, *distinguishing* Yancy *v.* State, 63 Ala. 141, holding that where language is used in the presence of a female, it is immaterial whether or not the language was heard.

1. The statute upon which this form is drawn is substantially as follows: Whoever, being over fourteen years of age * * *, utters or uses any obscene or licentious language or words in the presence or hearing of a female, shall be fined. Minn. Stat. (1894), § 6972.

For similar statutes in other states see as follows, to wit:

Alabama. — Crim. Code (1886), § 4032.

Arizona. — Rev. Stat. (1887), § 515.

California. — Pen. Code (1897), § 415.

Florida. — Rev. Stat. (1892), § 2624.

Georgia. — 3 Code (1895), § 396.

Indiana. — Horner's Stat. (1896), § 1995.

Kentucky. — Stat. (1894), § 1271.

Mississippi. — Anno. Code (1892), § 1033.

Missouri. — Rev. Stat. (1889), § 3784.

New Hampshire. — Pub. Stat. (1891), c. 264, § 2.

New Jersey. — Gen. Stat. (1895), p. 1199, § 6.

New Mexico. — Comp. Laws (1884), § 912.

North Dakota. — Rev. Codes (1895), § 6836.

Ohio. — Bates' Anno. Stat. (1897), § 7026.

Oklahoma. — Stat. (1893). § 1874.

Oregon. — Hill's Anno. Laws (1892), § 1906.

2. Age.— Similar provisions with reference to age will be found in the statutes of the following states:

Indiana. — Horner's Stat. (1896), § 1995.

Ohio. — Bates' Anno. Stat. (1897), § 7026.

3. *California.* — Pen. Code (1897), § 415.

4. The matter to be supplied within [ ] will not be found in the reported case.

3. Near a Dwelling.

Form No. 7669.

(Ala. Crim. Code (1886), p. 266, No. 3.)[1]

(*Commencing as in Form No. 2383, and continuing down to* *) *John Doe* did enter into or go sufficiently near to the dwelling-house of *Samuel Short*, and in the presence or within the hearing of the family, or a member of the family of the occupants thereof, made use of abusive, insulting, or obscene language, against the peace (*concluding as in Form No. 2383*).

4. Tending to Cause Breach of Peace.[2]

1. *Alabama.*—Crim. Code (1886), § 4031.

Intent.—Under this statute, the intent with which the language is used is immaterial. Thus, a conviction may be had where the defendant was at the time on his own adjacent premises and used the words in ordinary conversation with visitors and without any intention of being overhead by his neighbors. Mullens *v.* State, 82 Ala. 42. Or where the defendant was quarreling with his own wife on his own premises. Thomas *v.* State, 92 Ala. 85.

Offense Cannot be Committed Jointly.—Thus, where an indictment alleged "that *James Cox* and *Albert Martin* entered into the dwelling-house of *T. L. Head*, or went sufficiently near thereto to be heard by the inmates thereof, and then and there in the presence of the family of said *Head*, or a member of said family, or of a female, made use of abusive, insulting or obscene language, against the peace," etc., it was held that the offense of using abusive, insulting and obscene language cannot be committed by two or more persons conjointly and that it was error to indict them jointly. Cox *v.* State, 76 Ala. 66.

And in State *v.* Lancaster, 36 Ark. 56, the indictment was held defective for the same reason, where it charged "that the said *Columbus Lancaster* and the said *James Harris*, on the *thirtieth* day of *November*, A. D. 1879, in the county of *Stone*, etc., unlawfully did go to the domicile of *Lidia Brantley* then and there being, and then and there unlawfully did utter and publish profane language, against the peace," etc.

2. **For statutes** prohibiting the use of language tending to cause a breach of the peace see as follows, to wit:

Arkansas.—Sand. & H. Dig. (1894), § 1534.

California.—Pen. Code (1897), § 415.

Connecticut.—Gen. Stat. (1882), § 1509.

Georgia.—3 Code (1895), § 396.

Iowa.—Code (1897), § 5033.

Kentucky.—Stat. (1894), § 1271.

Maryland.—Pub. Gen. Laws (1888), art. 27, § 67.

Minnesota.—Stat. (1894), § 6940.

Mississippi.—Anno. Code (1892), § 1033.

Missouri.—Rev. Stat. (1889), § 3784.

Virginia.—Code (1887), § 2897.

Wisconsin.—Sanb. & B. Anno. Stat. (1889), § 4398.

Setting Out Language.—Where an information charged "that *Dan Foreman* did, in the county of *Kaufman* and State of *Texas*, on or about the *24th* day of *September*, A. D. 1891, in the presence and hearing of *D. C. Crain*, curse, abuse and use violently abusive language to said *D. C. Crain*, concerning him, under circumstances reasonably calculated to produce a breach of the peace," etc., it was held that it was sufficient to charge that the defendant swore, etc., in the presence or hearing of another under circumstances reasonably calculated to provoke a breach of the peace; that it was unnecessary to set out the language used; *disapproving* the opinion in Elkins *v.* State, 26 Tex. App. 220, in which it was intimated that the language used should be set out in the complaint. Foreman *v.* State, 31 Tex. Crim. Rep. 477.

Form No. 7670.

(Precedent in Moore *v.* State, 50 Ark. 26.)[1]

State of Arkansas against *John Moore.* } Indictment. [*Washington Circuit* Court.

The grand jurors of *Washington* county, duly impaneled, sworn and charged in the name and by the authority of the state of *Arkansas*, accuse *John Moore* of the crime of using profane and abusive language, calculated to cause a breach of the peace, committed as follows, to wit: The said *John Moore*, on the *twentieth* day of *September*, 1897,][2] unlawfully did make use of violent, abusive and insulting language towards and about one *Asher Willie*,[3] and in his presence and hearing; which language, in its common acceptation, was calculated to arouse to anger him, the said *Asher Willie*, and cause a breach of the peace, against the peace [and dignity of the state of *Arkansas*, and contrary to the form of the statute in such case made and provided.

D. W. Jones, Prosecuting Attorney,
Fifth Judicial District.][2]

Form No. 7671.[4]

The *District* Court for the county of *Ramsey* and state of *Minnesota*.

The State of Minnesota against *John Doe.* }

John Doe is accused by the grand jury of the county of *Ramsey* by this indictment of the crime of using abusive and obscene language in reference to and in the presence of another, intended (or *naturally tending*) to provoke a breach of the peace (or *an assault*), committed as follows: The said *John Doe* on the *first* day of *January*, A. D. 1898, at the city of *St. Paul*, in said county of *Ramsey*, did then and there unlawfully use, in reference to and in the presence of *Richard Roe* (or *Mary Roe*, *a member of the family of Richard Roe*),[5] abusive and obscene language, which said language was intended (or *naturally tended*) to provoke a breach of the peace (or *an assault*), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Minnesota*.

Dated at *St. Paul*, in the county of *Ramsey*, the *fourth* day of *October*, A. D. 1898.

A true bill.

Daniel Webster, Foreman of the Grand Jury.

1. *Arkansas.* — Sand. & H. Dig. (1894), § 1534. Consult also statutes cited *supra*, note 2, p. 950.

Precedents. — See also forms in State *v.* Moser, 33 Ark. 140; State *v.* Hutson, 40 Ark. 361.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. **To Whom Language is Addressed.** — An indictment for using insulting language, which is calculated to cause a breach of the peace, addressed to a company of men and intended to apply to all of them, may charge it as having been made to all or any one or more of them. Hearn *v.* State. 34 Ark. 550.

4. *Minnesota.* — Stat. (1894), § 6940. See also *supra*, note 2, p. 950

5. **Name of Person in Reference to Whom Language is Used.** — Under a statute

Form No. 7672.[1]

(*Commencing as in Form No. 6706*) complains and says, that on the *seventh* day of *June*, 1*882*, at said county, *John Doe* did use to and in the presence of him, the said *Richard Roe*,[2] abusive language intended and naturally tending to provoke an assault or breach of the peace, without excuse or justification, which said language was as follows, to wit: (*setting forth the words used*), contrary to the statute in such case made and provided, and against the peace (*concluding as in Form No. 6706*).

providing that any person who shall use, in reference to and in the presence of another, abusive or obscene language, intended or naturally tending to provoke an assault or a breach of the peace, shall be punished, etc., a complaint should state the name of the person in reference to or in whose presence the language was used, if the name be known; if it be unknown, it is at least necessary to so allege. State *v.* Clarke, 31 Minn. 207.

1. This form is based upon the complaint in Steuer *v.* State, 59 Wis. 472, in which case the complaint was defective for failing to set forth the abusive or obscene language used. The form is sufficient under Sanb. & B. Anno. Stat. Wis. (1889), § 4398. Consult also the statutes cited *supra*, note 2, p. 950.

2. In Whose Presence Used.—A complaint for the use of abusive or obscene language tending to provoke an assault should state that such language was used in the presence of the complainant or of some member of his family. Peters *v.* State, 66 Wis. 339.

DISORDERLY HOUSES.

By Mel Emerson Peters.

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CROSS-REFERENCES.

For Forms in Prosecutions for Disorderly Conduct, see the title DISORDERLY CONDUCT AND PERSONS.

For Forms in Prosecutions for Maintaining Gaming-houses, see the title GAMING.

For Forms in Prosecutions for Illegal Sale of Intoxicating Liquors, see the title INTOXICATING LIQUORS.

I. Criminal Prosecution.

1. In General.[1]

1. Requisites of Indictment, etc., Generally. — For the formal parts of a criminal complaint, indictment or information in a particular jurisdiction consult the titles Criminal Complaints, vol. 5, p. 930; Indictments; Informations.

Offense, How Charged — *Generally.* — At common law, a general allegation that the defendant kept a disorderly house without stating the facts constituting the offense was insufficient. Rex *v.* Dixon, 10 Mod. 335. Under statutes creating the offense, it is generally sufficient to charge the same in the language of the statute. State *v.* Bregard, 76 Mo. 322.

Unlawfully, Knowingly, Corruptly. — It is sufficient if the indictment charge the offense to have been committed

"unlawfully" without saying "knowingly" or "corruptly." State *v.* Bailey, 21 N. H. 343.

Charging Facts in Conjunctive. — It is no objection to an indictment that it is charged in the same count that the disorderly house is kept as a bawdy-house, a tippling-house and a dance-house. People *v.* Carey, 4 Park. Cr. Rep. (Buffalo Super. Ct.) 240. Or that the defendant kept, and knowingly permitted his house to be kept, as a disorderly house. Willis *v.* State, 34 Tex. Crim. Rep. 148. Or that the defendant was the owner, tenant and lessee of the disorderly house. Merrill *v.* State, (Tex. Cr. App. 1895) 29 S. W. Rep. 41.

Location of House. — It is not necessary to allege the location of the house with greater particularity than that it was in a certain county. State *v.* Staker, 3 Ind. 570; State *v.* Crogan, 8 Iowa 523; Handy *v.* State, 63 Miss. 207; State *v.* Prescott, 33 N. H. 212. Thus, it has been held that an indictment need not state the street in which the house was situated. State *v.* Stevens, 40 Me. 559. And that the real estate upon which the house is situated need not be described, and if described is mere surplusage. Johnston *v.* State, 13 Ind. App. 299; Howard *v.* State, 6 Ind. 444. But where the place is stated in an indictment as a matter of local description and not as venue, it is necessary to prove it as laid. State *v.* Crogan, 8 Iowa 523. And in State *v.* Nixon, 18 Vt. 70, it was held that the offense is local in its nature, and must be charged as having been committed in a particular town.

An indictment charging that the defendant kept a disorderly house "by allowing and permitting great numbers of drunken negroes to congregate and use indecent language, and entertaining them to the great annoyance," etc., without an averment that he so permitted and entertained them at his house, is insufficient. Stephanes *v.* State, 21 Tex. 206.

"*Tenement*" *for* "*House.*" — An indictment averring that the defendant kept a "disorderly tenement" instead of charging that he kept a disorderly house, charges no offense known to the law. Com. *v.* Wise, 110 Mass. 181.

Time. — The offense of keeping a disorderly house may be charged as having been committed on a certain day named. Wells *v.* Com., 12 Gray (Mass.) 326. But the usual mode is to charge that the offense was committed on a day named and on "divers other days," etc. Wells *v.* Com., 12 Gray (Mass.) 326. And see the precedents given throughout this article. And in Com. *v.* Bessler, 97 Ky. 498, it was held that where the offense is charged as a common nuisance, it consists in a repetition of the improper conduct, and a charge that it was committed on a day named "and before the finding of this indictment without any words charging a repetition or frequency of the acts of disorder," etc., is insufficient.

In a prosecution for keeping a house of ill fame, the indictment may fix a different date from that alleged in the complaint; and the offense may be charged as committed on a particular day, and divers days between that and another day previous thereto; it is not essential that the earlier date should be named first. People *v.* Russell, (Mich. 1896) 67 N. W. Rep. 1099. The indictment is not double or uncertain because it alleges that the defendant kept the house or place on a certain day and allowed gaming there on that day and on divers days and times before and afterwards. State *v.* Prescott, 33 N. H. 212. But where an indictment fixes the times of the commission of the crime charged at a date subsequent to the finding of the indictment, it is bad on motion in arrest of judgment. State *v.* Noland, 29 Ind. 212.

In an indictment under the *Missouri* statutes for keeping a bawdy-house, it is not necessary to specify any time. State *v.* Wister, 62 Mo. 592. See also U. S. *v.* Burch, 1 Cranch (C. C.) 37. But see Wells *v.* Com., 12 Gray (Mass.) 326.

Character of Frequenters. — In an indictment for keeping a disorderly house, it is not necessary to allege the character of the persons who frequent the house; nor is it necessary to set forth in such indictment the circumstances which go to make the keeping and maintaining of such house unlawful, where such house was in itself a nuisance; but the rule is otherwise, if the thing against which the indictment is aimed is not a nuisance in itself, but becomes so only by reason of particular circumstances; in such case the special matter must be shown. State *v.* Dame, 60 N. H. 479.

For Lucre. — An allegation that the disorderly house was kept "for filthy lucre and gain," though often found in

Form No. 7673.

(2 Chit. Cr. L. 40.)[1]

Middlesex. The jurors for our lord the king upon their oath present, that *Elizabeth Powell*, late of the parish of *Saint Paul, Covent Garden*, in the County of *Middlesex*, *widow*, on the *twentieth* day of *February*, in the *sixth* year of the reign of our sovereign lord *George the Fourth*, by the grace of God of the United Kingdom of Great Britain and Ireland, king, defender of the Faith, with force and arms, at the said parish of *Saint Paul, Covent Garden*, in the said county of *Middlesex*, and on divers other days and times, between that day and the day of the taking of this inquisition, with force and arms, at the said parish of *St. Paul, Covent Garden*,* did keep and maintain, and yet doth keep and maintain, a certain common, ill-governed and disorderly house, and in the said house, for her own lucre and gain, certain persons, as well men as women, of evil name and fame, and of dishonest conversation to frequent and come together, then, and on the said other days and times, there unlawfully and wilfully did cause and procure, and the said men and women in the said house at unlawful times, as well in the night as in the day, then, and on the said other days and times, there to be and remain, drinking, tippling, whoring and misbehaving themselves unlawfully, and wilfully did permit, and yet doth permit, to the great damage and common nuisance of all the liege subjects of our said lord the king, there inhabiting, residing and passing, to the evil example of all others in like case offending, and also against the peace of our said lord the king, his crown and dignity.

Form No. 7674

(Precedent in Cahn *v.* State, 110 Ala. 57.)[2]

[(*Caption as in Form No. 2383.*)][3]

The grand jury of said county charge that before the finding of this indictment, *A. Cahn*, whose christian name is to the grand jury unknown, did keep a disorderly, public and ill governed house, and did then and there unlawfully cause and procure certain persons, as

the precedents, is unnecessary. State *v.* Porter, 38 Ark. 637; State *v.* Homer, 40 Me. 438; Com. *v.* Ashley, 2 Gray (Mass.) 356; Com. *v.* Wood, 97 Mass. 225; State *v.* Bailey, 21 N. H. 343; State *v.* Nixon, 18 Vt. 70. And in this respect there is no difference between the different kinds of disorderly houses; they are all indictable upon the same principle, as being common nuisances. State *v*, Bailey, 21 N. H. 343.

As a Common Nuisance. — Where the indictment charges the keeping of a disorderly house as a common nuisance, it must conclude to the common nuisance. Hunter *v.* Com., 2 S. & R. (Pa.) 298. But where the facts charged constitute a nuisance *per se*, the omission of the conclusion to the common nuisance is immaterial. State *v.* Baldwin, 1 Dev. & B. L. (18 N. Car.) 195. And where the offense of keeping a disorderly house is statutory, irrespective of the question of nuisance, a conclusion to the common nuisance is not required. State *v.* Homer, 40 Me. 438; State *v.* Stevens, 40 Me. 459.

Precedents. — For other forms see Beard *v.* State, 71 Md. 276; Com. *v.* Stewart, 1 S. & R. (Pa.) 342; State *v.* Flynn, 35 Tex. 354.

1. See *supra*, note 1, p. 953.

2. This indictment was held good and sufficient at common law as an indictment for keeping a disorderly house. See also forms in Price *v.* State, 96 Ala. 1; Toney *v.* State, 60 Ala. 97. See also *supra*, note 1, p. 953.

3. The matter to be supplied within [ ] will not be found in the reported case.

well women as men, of evil name and fame, to frequent and come together, in his said house at many unlawful times, as well in the night as in the day, and did permit them there to be and remain, drinking, tippling, carousing, swearing, indecently dancing, and misbehaving themselves, to the great damage and common nuisance and evil example of all the citizens, not only the neighborhood, but all the citizens of the county, and against the peace and dignity of the State of *Alabama.*

[(*Signature as in Form No. 2383.*)][1]

Form No. 7675.

(Precedent in Thatcher *v.* State, 48 Ark. 62.)[2]

Garland County *Circuit* Court.

The State of Arkansas
against
H. A. Ballentine and Henry Thatcher. } Indictment.

The grand jury of *Garland* county, in the name and by the authority of the state of *Arkansas*, accuse *H. A. Ballentine* and *Henry Thatcher* of the crime of keeping a disorderly house, committed as follows: The said *H. A. Ballentine* and *Henry Thatcher*, on the *15th* day of *March*, 18*86*, in the county and state aforesaid, and on divers other days and times between that day and the day of the presentation of this indictment, a certain, common, ill-governed and disorderly house, unlawfully, did keep and maintain; and, in said house, for their own gain and lucre, certain evil-disposed persons, as well men as women, of evil name, fame and conversation to come together, on the days and times aforesaid there unlawfully and willingly did cause and procure; and the said persons in the said house, at unlawful times, as well in the night as the day, on the days and times aforesaid, there to be and remain drinking, tippling, cursing, swearing, quarreling, gambling, whoring and otherwise misbehaving themselves, unlawfully did permit and suffer, to the great injury and common nuisance of all the peaceable citizens of the state, there residing, inhabiting and passing; to the evil example of all others in the like case offending to the great injury of public morals, the perversion of public justice, and against the peace and dignity of the state of *Arkansas.*

J. P. Henderson, Prosecuting Attorney.

Form No. 7676.

(Precedent in State *v.* DeLadson, 66 Conn. 8.)[3]

[State of *Connecticut*, *New Haven* County. } ss. City and Town of *New Haven.*

To the Honorable *City* Court of the City of *New Haven*, in the

1. The matter to be supplied within [ ] will not be found in the reported case.

2. This indictment sufficiently charges an offense at common law. The statutes of *Arkansas* have re-enacted the common law to some extent by making it a misdemeanor for any owner or occupant of a house knowingly to permit gaming in such house. Sand. & H. Dig. Ark. (1894), § 1616. See also *supra*, note 1, p. 953.

3. This form is drawn under Conn. Gen. Stat. (1888), § 1529, which provides that any person "who shall keep or maintain a disorderly house, or a

County of *New Haven*, State of *Connecticut*. Comes *John Price*, a grand juror in and for said city and town of *New Haven*, and on his oath of office complaint and information makes,][1] that on the *7th* day of *February*, A. D. 1894, at said city and town of *New Haven*, *Edward S. DeLadson*, [of said city and town of *New Haven*,][1] with force and arms did then and there keep and maintain, and for a long time previous thereto did there keep and maintain, and still does there keep and maintain, a disorderly house, and a house where lewd, dissolute and drunken persons did then and there, and for a long time previous thereto did, and still do, resort, which said house is known as *53 Orange* street, against the peace [(*concluding as in Form No. 6667*).][1]

Form No. 7677.[2]

(*Caption and commencement as in Form No. 3*) upon their oath present: that *John Doe*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-eight*, and on divers other days and times between that day and the day of the finding of this indictment, at the city of *Carrollton* and county of *Greene* aforesaid, did then and there unlawfully keep and maintain a common, ill-governed and disorderly house, to the encouragement of idleness, gaming, drinking, fornication and other misbehavior, and unlawfully and willingly did cause and procure certain evil disposed persons, as well men as women, of evil name, fame and conversation, to come together on the days and times aforesaid in the said house, for his own gain and lucre, and unlawfully did permit the said persons in the said house at unlawful times, as well in the night as in the day time, on the days and times aforesaid, there to be and remain drinking, tippling, cursing, swearing and otherwise misbehaving, to the great injury and common nuisance of the people of this state, and contrary to the form of the statute (*concluding as in Form No. 3*).

Form No. 7678.

(Precedent in State *v.* Osgood, 85 Me. 288.)[3]

[State of *Maine*.

Knox, ss. At the *Supreme Judicial* Court, begun and holden at *Rockland*, within and for the county of *Knox* on the *fourth Tuesday* of *September*, in the year of our Lord one thousand eight hundred and *ninety-one*,* the grand jurors for said state, upon their oath present that *Josie Osgood* of *Rockland*, in said county of *Knox*, *spinster*,][4] on

house where lewd, dissolute or drunken persons resort, etc., shall be fined, etc." It was held that the information charged but one offense, and was not demurrable on the ground of duplicity. See also *supra*, note 1, p. 953.

1. The words enclosed by and to be supplied within [ ] will not be found in the reported case.

2. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 38, par. 147.

Colorado. — Mills' Anno. Stat. (1891), § 1323.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 491, § 110.

Wyoming. — Rev. Stat. (1887), § 1002. See also *supra*, note 1, p. 953.

3. This indictment was sufficient under Me. Rev. Stat. (1883), c. 17, §§ 1, 2. See also *supra*, note 1, p. 953.

Precedents. — For other forms see State *v.* Stanley, 84 Me. 555; State *v.* Boardman, 64 Me. 523.

4. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

the *thirteenth* day of *April*, in the year of our Lord one thousand eight hundred and *ninety-one*, and on divers other days and times between that day and the day of the finding of this indictment, at *Rockland* aforesaid, in the county of *Knox* aforesaid, unlawfully did keep and maintain a certain place, to wit: a certain building occupied by the said *Josie Osgood* as a dwelling, situated on *Main* street in said *Rockland*, then and on said divers other days and times there used as a house of ill-fame, then and on said divers other days and times there resorted to for lewdness and gambling, and which said place being so used as aforesaid was then and there a common nuisance, to the great injury and common nuisance of all good citizens of said State, against the peace of said State, and contrary to the form of the statute in such case made and provided.

Form No. 7679.

(Precedent in Com. *v.* Bulman, 118 Mass. 456.)[1]

[Commonwealth of *Massachusetts*, } ss. At the *Superior* Court, begun
County of *Franklin*. } and holden at *Greenfield*,
within and for the County of *Franklin*, on the *second Monday* of *March*, in the year of our Lord one thousand eight hundred and *seventy-five*.

The jurors for said commonwealth on their oath present, that *Cornelius Bulman*, late of *Greenfield*, in the county of *Franklin*, on the *first* day of *October*, in the year of our Lord one thousand eight hundred and *seventy-four*,]*[2] at *Montague* in the county aforesaid, and on divers other days and times between said last mentioned day and the day of finding this indictment, at said *Montague*, did keep and maintain a certain common, ill-governed and disorderly house there situate, and in the said house, for his own lucre and gain, certain evil-disposed persons whose names to said jurors as yet are not known, of evil name and fame, and conversation, to frequent and come together, then, and on the said other days and times, there unlawfully and wilfully did cause and procure, and the said persons in the said house, as well in the night as in the day, then, and on said other days and times, there to be and remain, drinking, tippling, cursing, swearing, quarreling, making great noises and otherwise misbehaving themselves, then and there unlawfully and knowingly did permit and suffer, to the great injury and common nuisance of all the citizens of said Commonwealth there being, residing, passing and repassing, and against the peace of the Commonwealth aforesaid.

[*Daniel Webster*, District Attorney.][2]

1. It was held in this case that under an indictment at common law for keeping a disorderly house, it is no variance that the defendant kept only a single story in the building. See also *supra*, note 1, p. 953.

Precedents. — For forms drawn under Mass. Stat. (1855), c. 405, § 1, see as follows: Com. *v.* Kelley, 7 Gray (Mass.) 332, note; Com. *v.* Kimball, 7 Gray (Mass.) 328; Com. *v.* Barnes, 13 Gray (Mass.) 26; Com. *v.* Langley, 14 Gray (Mass.) 21; Com. *v.* Hill, 14 Gray (Mass.) 24; Com. *v.* Taylor, 14 Gray (Mass.) 26. See also Com. *v.* Davenport, 2 Allen (Mass.) 299; Com. *v.* Ballou, 124 Mass. 26.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

Form No. 7680.

(Precedent in State *v.* M'Gregor, 41 N. H. 409.)[1]

State of *New Hampshire*, *Hillsborough*, ss. — At the trial term of the *Supreme Judicial* Court, holden at *Amherst*, within and for the county of *Hillsborough* aforesaid, on the *first Tuesday* of *September*, in the year of our Lord one thousand eight hundred and *sixty*:

The grand jurors for the State of *New Hampshire*, upon their oath present, that *James M'Gregor*, of *Manchester*, in the said county of *Hillsborough*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *sixty*, at *Manchester* aforesaid, in the county aforesaid, and on divers other days and times between that day and the *twenty-second* day of *June*, now last past, a certain common, ill-governed, and disorderly house then and there unlawfully did keep and maintain, and in the said house, for his own lucre and gain, certain persons, as well men as women, of evil name, fame, and conversation, to come together, on the days and times aforesaid, there unlawfully and wilfully did cause and procure, and the said persons, in the said house, at unlawful times, as well in the night as in the day, on the days and times aforesaid, there to be and remain drinking, whoring, and otherwise misbehaving themselves, unlawfully did permit and still doth permit, to the great damage and common nuisance of all the peaceable citizens of said State there residing, inhabiting, and passing, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

A. F. Stevens, Solicitor.

This is a true bill:

Eli Spaulding, Foreman of the Grand Jury.

Form No. 7681.

(Precedent in People *v.* Hatter, (Ct. of Sess.) 22 N. Y. Supp. 689.)[2]

[*Supreme* Court, *Ulster* County.

The People of the State of New York
against
Jacob Hatter.

The grand jury of the county of *Ulster* by this indictment accuse *Jacob Hatter* of the crime of keeping a disorderly house, committed as follows: The said *Jacob Hatter*, on the *eighteenth* day of *December*,

1. In this case, after plea of not guilty pleaded, and the jury had been impaneled and sworn, defendant moved to quash the indictment for want of addition, and later moved in arrest of judgment for the same reason, both of which motions were properly denied. See also *supra*, note 1, p. 953.

See also the substance of a similar indictment in State *v.* Bailey, 21 N. H. 343.

2. *New York.* — Cook's Pen. Code (1898). § 322. This statute provides that "a person who keeps a * * * disorderly house * * * or any place of public resort by which the peace, comfort or decency of a neighborhood is habitually disturbed," is guilty of a misdemeanor.

The following statutes are similar, to wit:

Arizona. — Pen. Code (1887), § 529.
California. — Pen. Code (1897), § 316.
Georgia. — 3 Code (1895), § 392.
Minnesota. — Stat. (1894), § 6575.
Montana. — Pen. Code (1895), § 567.
North Dakota. — Rev. Codes (1895), § 7211.

1892, in the city of *Kingston*, in said county of *Ulster*, and at divers other days and times between said day and the *first* day of *June*, 1892, at the city of *Kingston*, in the county of *Ulster*][1] aforesaid, did keep and maintain a certain common, ill-governed, and disorderly house, and in said house, for his own lucre and gain, certain persons, as well men as women, of evil name and fame and of dishonest conversation, to frequent and come together then and on said days and times, there, unlawfully and wilfully, did cause and procure, and the said men and women, in his house, at unlawful times, as well in the night, as in the day, then and on said days and times there to be and remain, drinking, tippling, gambling, whoring, and misbehaving themselves, unlawfully and willfully did permit and get, there, thereby, habitually disturbing the peace, comfort, and decency of the neighborhood of the said common, ill-governed, and disorderly house, to the great damage and common nuisance of the people of the state of *New York* then and there inhabiting, residing, and passing, to the evil example of others, and against the form of the statute [in such case made and provided, and against the peace and dignity of the people of the state of *New York*.

F. Arthur Westbrook,
District Attorney for the County of *Ulster*.][1]

Form No. 7682.

(Precedent in State *v.* Patterson, 7 Ired. L. (29 N. Car.) 70.)[2]

State of *North Carolina*, } *Superior* Court *of Law*,
Greene County. } *Fall* Term, 1846.

The jurors for the State upon their oath present that *John Patterson*, late of the County of *Greene*, on the *1st* day of *August*, 1845, and

Ohio. — Bates' Anno. Stat. (1897), § 7025.

Utah. — Rev. Stat. (1898), § 4252.

See also *supra*, note 1, p. 953.

Precedents. — In a criminal prosecution before a justice of the peace of the city of Minneapolis, the warrant charged that the defendant "*William Reckards*, on the *2d* day of *June*, 1873, within the corporate limits of said city of *Minneapolis*, * * * wilfully and unlawfully did keep * * * a disorderly place, in that he did allow, suffer and permit, in said place, quarreling, brawls, loud and boisterous talk, fighting, and disorderly conduct, in violation of the charter and ordinances in such case made and provided," etc. It was held that the warrant was not bad for charging the keeping of the place complained of for a single day. State *v.* Reckards, 21 Minn. 47.

A complaint "that, at the time and place aforesaid, the said *William Hulett* has kept a house or place for persons to visit for obscene and indecent purposes; that said place is, and has been for the year last past, a disorderly house, and a public resort, by which the peace and comfort and decency of the neighborhood has been and is habitually disturbed; that frequent quarrels occur in said house, and men and women of bad repute frequently visit there; that said quarrels and visits are at all times of day and night," sufficiently charges the offense under Cook's N. Y. Pen. Code (1898), § 322. People *v.* Hulett, (Supreme Ct.) 15 N. Y. Supp. 630.

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. Upon a motion in arrest of judgment, it was held that this indictment charged a criminal offense, and that it was not necessary to state particulars as to the names of those who frequented the house. See also *supra*, note 1, p. 953. For a similar indictment see State *v.* Wright, 6 Jones L. (51 N. Car.) 25.

on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at and in the County aforesaid, did keep and maintain a certain common ill governed and disorderly house, and, in his said house, for his own lucre and gain, certain persons, as well free as slaves, to frequent and come together, then and on the said other days and times, there unlawfully and wilfully did cause and procure, and the said persons in his said house at unlawful times, as well in the night as in the day, then and on the said other days and times there to be and remain, drinking, tippling, and misbehaving themselves, unlawfully and wilfully did permit and doth permit to the great damage and common nuisance of all the citizens of the State there inhabiting, residing and passing, to the evil example of all others in like case [offending,][1] and against the peace and dignity of the State.

Form No. 7683.

(Precedent in State *v.* Evans, 5 Ired. L. (27 N. Car.) 603.)[2]

North Carolina, } ss. *Superior* Court *of Law*,
Rowan County. } *Fall* Term, 1844.

The jurors for the State upon their oath present, that *Augusta Anna Evans*, late of the said county, *spinster*, on the *10th* day of *August*, 1843, and thence continually to the time of the finding of this bill, and before, in the county of *Rowan*, with force and arms, unlawfully did keep and maintain a certain ill-governed and disorderly house, and in the said house then, and on the said other days there, did procure and cause and permit persons of lewd conversation and demeanor to frequent and come together, and then and on the said other days, there to remain drinking, whoring, cursing, swearing and misbehaving themselves, to the great damage and common nuisance of all the good citizens of the said State there inhabiting and living and passing, to the evil example of all others in the like case offending, and against the peace and dignity of the State.

2. Bawdy-house.

a. Keeping.[3]

1. The word appearing in [ ] is supplied in the place of the word "appending" found in the reported case.

2. This indictment was held good as an indictment for keeping and maintaining a disorderly house, but defective as an indictment for keeping a bawdy-house. An indictment at common law for keeping a bawdy-house must allege that the house was kept for the resort and convenience of lewd people of both sexes. See also *supra*, note 1, p. 953. For a similar indictment see State *v.* Wright, 6 Jones L. (51 N. Car.) 25.

3. **For statutes** of the various states and territories relating to the offense of keeping a bawdy-house, or house of ill fame, see as follows, to wit:

Arizona. — Pen. Code (1887), § 529.
California. — Pen. Code (1897), § 315.
Colorado. — Mills' Anno. Stat. (1891), § 1323.
Connecticut. — Gen. Stat. (1888), § 1529.
Florida. — Rev. Stat. (1892), § 2615.
Georgia. — 3 Code (1895), § 391.
Illinois. — Starr & C. Anno. Stat. (1896), c. 38, par. 147.
Indiana. — Horner's Stat. (1896), § 1994.
Iowa. — Code (1897), § 4939.
Kansas. — Rev. Stat. (1889), § 2382.
Maine. — Rev. Stat. (1883), c. 124, § 9.

Massachusetts. — Pub. Stat. (1882), c. 207, § 13.

Michigan. — How. Anno. Stat. (1882), § 9286.

Missouri. — Rev. Stat. (1889), § 3811.

Montana. — Pen. Code (1895), § 566.

New York. — Cook's Pen. Code (1898), § 322.

North Dakota. — Rev. Codes (1895), § 7210.

Ohio. — Bates' Anno. Stat. (1897), § 7025.

Oklahoma. — Stat. (1893), § 2210.

Oregon. — Hill's Anno. Laws (1892), § 1867.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 478, § 42.

Texas. — Pen. Code (1895), art. 359 *et seq.*

Utah. — Rev. Stat. (1898), § 4251.

Vermont. — Stat. (1894), § 5067.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7239.

West Virginia. — Code (1891), c. 149, § 10.

Wisconsin. — Stat. (1898), § 4589.

Wyoming. — Rev. Stat. (1887), § 1002.

Requisites of Indictment, etc. — *Generally.* — See *supra*, note 1, p. 953.

An indictment at common law for keeping a bawdy-house must allege that the house was kept for the resort and convenience of lewd people of both sexes. State *v.* Evans, 5 Ired. L. (27 N. Car.) 603.

But a charge in an indictment that the defendant maintained and kept a lewd house was held sufficient under the provisions of the code, without alleging that the lewd house was a place for the practice of fornication or adultery. The words "lewd house" import that it is a house given to the unlawful indulgence of lust, including fornication or adultery. Clifton *v.* State, 53 Ga. 244.

Under the territorial code of *Dakota*, the indictment for keeping a bawdy-house, or house of ill fame, must allege that defendant's house was a bawdy-house, or house of ill fame, and that such house was kept for persons to visit for unlawful sexual intercourse, or prostitution. Territory *v.* Chartrand, 1 Dak. 368.

Under the *Texas* statute, to charge the gravamen of the offense it is sufficient to allege in the indictment that the accused "did unlawfully keep a disorderly house, said house then and there being kept for the purpose of public prostitution," without alleging that prostitutes did resort to the house or that acts of prostitution occurred there. Thompson *v.* State, 2 Tex. App. 82; Brown *v.* State, 2 Tex. App. 189; Brooks *v.* State, 4 Tex. App. 567.

Charging Offense in Conjunctive. — An indictment, under a statute prescribing a punishment for anyone who shall "set up or keep" a bawdy-house, may properly charge that the defendant "did unlawfully set up and keep" a bawdy-house, etc. State *v.* Bregard, 76 Mo. 322. And an indictment under a statute making it an offense to keep a house of ill fame, resorted to for the purpose of "prostitution or lewdness," may charge the keeping of such house for the purpose of "prostitution and lewdness." King *v.* State, 17 Fla. 188. Or the statutory language "prostitution or lewdness" may be used. State *v.* Toombs, 79 Iowa 741.

But the disjunctive cannot be used when the offense is described in the statute in the conjunctive. Tompkins *v.* State, 4 Tex. App. 161.

Precedents. — In People *v.* Buchanan, 1 Idaho 681, an indictment was held sufficient which charged that the said "*Flora Buchanan* on the *thirteenth* day of *January*, 1877, and at divers other days and times between that day and the day of finding the indictment, in the county of *Ada*, and territory of *Idaho*, and within the corporate limits of *Boise city* — to wit, on *Idaho* street in said *Boise city*, wilfully and unlawfully did keep a bawdy-house, then and there resorted to for the purpose of public prostitution and lewdness."

In Dutton *v.* State, 2 Ind. App. 448, the defendant was convicted upon an indictment which charged that he "on the *1st* day of *January*, A. D. 1890, and continuously from thence to the making of this presentment, at said county and State as aforesaid, did then and there unlawfully keep a certain house of ill-fame, then and there situated on lot numbered *one* (*1*), in block numbered *thirty-five* (*35*), in the original town (now city) of *Valparaiso* in said county, which said house of ill-fame was then and there, and during all of said time, unlawfully resorted to for the purpose of prostitution and lewdness by divers persons male and female, whose names are to the grand jury unknown, all of said persons being then and there of bad repute for chastity and virtue, contrary to the form of the statute," etc.

In State *v.* Hendricks, 15 Mont. 194, an information was held sufficient which charged that the defendant kept

(1) In General.

Form No. 7684.

(2 Chit. Cr. L. 39.)[1]

(*Commencing as in Form No. 7673, and continuing down to* *) a certain bawdy house, situate in the parish of *St. Paul, Covent Garden* aforesaid, unlawfully and wickedly did keep and maintain; and in the said house, for filthy lucre and gain, divers evil-disposed persons, as well men as women, and whores, on the days and times aforesaid, as well in the night as in the day, there unlawfully and wickedly did receive and entertain, and in which said house, the said evil-disposed persons and whores, by the consent and procurement of the said *Elizabeth Powell* on the days and times aforesaid, there did commit whoredom and fornication, whereby divers unlawful assemblies, riots, routs, affrays, disturbances and violations of the peace of our said lord the king, and dreadful filthy and lewd offenses in the same house, on the days and times aforesaid, as well in the night as in the day, were there committed and perpetrated, to the great damage and common nuisance of all the liege subjects of our said lord the king, in manifest destruction, ruination and subversion of youth and other people, their manners, conversation, estate and obedience, and against the peace (*concluding as in Form No. 7673*).

Form No. 7685.

(Precedent in State *v.* Porter, 38 Ark. 637.)[2]

[(*Title of court and cause as in Form No. 7675.*)][3]

The grand jury of *Garland* county, in the name and by the authority of the State of *Arkansas*, accuse *George Porter* and *Mrs. George*

and maintained "a certain house of ill-fame, commonly called a 'bawdy house,' open to the public night and day for common bawdry, then and on said other days and times, there situate on *Sixth* street, in the city of *Miles City*, county of *Custer*, and state of *Montana*, and then and on said other days and times, by her, the said *Fannie French*, kept and used as a house of ill-fame, and then and on said other days and times there resorted to for the purpose of prostitution and lewdness; and the said *Fannie French*, in said house, and for her own lucre and gain, certain evil-disposed persons, whose names to said informant aforesaid as yet are not known, as well as men and women of evil name and fame, and of dishonest conversation, to frequent and come together, did then and on said other days and times there unlawfully and wickedly cause, permit and procure, and said men and women in said house, as well in the day as in the night, then and on said other days and times, there did suffer and permit to be and remain whoring, to the common nuisance of all good citizens, then and on said other days and times there resided, passing and being, and an evil example to all others in like case offending, and against the peace and dignity of the state of *Montana*."

For other forms see Cadwell *v.* State, 17 Conn. 467; Betts *v.* State, 93 Ind. 375; Johnson *v.* State, 13 Ind. App. 299; State *v.* Lee, 80 Iowa 75; State *v.* Toombs, 79 Iowa 741; State *v.* Homer, 40 Me. 438; Com. *v.* Lavonsair, 132 Mass. 1; Palmer *v.* People, 43 Mich. 413; State *v.* Bregard, 76 Mo. 322.

1. See *supra*, note 3, p. 961.

2. This indictment was held sufficiently to charge the offense of keeping a bawdy-house, and it was held unnecessary to allege in the indictment or prove that it was kept for lucre or gain. See also *supra*, note 3, p. 961.

3. The matter to be supplied within [ ] will not be found in the reported case.

Porter, of the crime of keeping a common bawdy house, committed as follows, to wit: The said *George Porter*, on the *first* day of *June*, A. D. 1*881*, and on divers other days and times between that day and the day this indictment is filed in said court, in the city of *Hot Springs*, in the county of *Garland*, [state aforesaid,] did unlawfully keep and maintain a certain common bawdy house, and in said house, certain persons, as well men as women, of evil name and fame, and of dishonest conversation, then and there, and on the said other days and times, then unlawfully and wilfully did cause and procure to frequent and come together, and the said men and women in the said house then and on the said other days and times, there to be and remain drinking, whoring and misbehaving themselves, unlawfully and wilfully did permit, to the great annoyance and damage, and common nuisance of all persons there inhabiting, being, residing and passing, and against the peace and dignity of the State of *Arkansas*.

[(*Signature as in Form No. 7675.*)][1]

Form No. 7686.

(Precedent in King *v.* State, 17 Fla. 188.)[2]

The State of *Florida*.

In the name and by the authority of the State of *Florida*:

In the *Circuit* Court of the *First* Judicial Circuit of the State of *Florida* for *Escambia* county, at the *Fall* Term thereof, in the year of our Lord one thousand eight hundred and *seventy-seven*.

Escambia County, to-wit:

Be it remembered that *William H. Milton*, State Attorney for the *First* Judicial Circuit of the State of *Florida*, prosecuting for said State, being present in said court on the *27th* day of *September*, 1877, gave the court to be informed and understand that one *Melissa King*, late of the county of *Escambia* aforesaid, in the Circuit and State aforesaid, on the *first* day of *September*, in the year of our Lord one thousand eight hundred and *seventy-six*, then and there being in the county of *Escambia*, then and there at said time and on divers other days and times between that day and the filing of this information, then and there being, then and there unlawfully did keep a house of ill fame resorted to for prostitution and lewdness, and the said *Melissa King* certain persons as well men as women of evil name and fame and of dishonest conversation, then and on the said other days and times there unlawfully and willingly did cause and procure to frequent and come together, and the said men and women in the said house of her, the said *Melissa King*, at unlawful times, as well in the night as in the day, then and on the said other days and times there to be and remain drinking, tippling and whoring and misbehaving themselves, unlawfully did permit and yet do permit, against the form of the statute in such cases made and provided, to the evil example of all others in the like case offending and against the peace and dignity of the State of *Florida*, wherefore the said *William H. Milton*,

1. The matter to be supplied within [] will not be found in the reported case.

2. This information was held sufficient. For the present statute in *Florida* see Fla. Rev. Stat. (1892), § 2615. See also *supra*, note 3, p. 961.

the State Attorney as aforesaid, prosecuting for said State as aforesaid, prays the advice of the said court in the premises, and that the said *Melissa King* may be arrested and held for trial under the foregoing information, and that a capias may issue forthwith for her arrest.

W. H. Milton,
State Attorney for the *First* Judicial Circuit of the
State of *Florida* prosecuting for said State.

Form No. 7687.

(Precedent in Scarborough *v.* State, 46 Ga. 26.)[1]

Georgia — *Sumter* County.

The grand jurors, sworn, chosen and selected for the county of *Sumter*, to wit: [(*setting out the names of the jurors*).] In the name and behalf of the citizens of *Georgia*, charge and accuse *Malta Scarborough* and *Harriet Scarborough*, of the county and State aforesaid, with the offense of keeping a lewd house; for that the said *Malta Scarborough* and *Harriet Scarborough*, on *March 20th*, 1872, in the county aforesaid, did then and there, unlawfully, by themselves and by others, maintain and keep a lewd house, or a place for the practice of fornication or adultery, or fornication and adultery, contrary to the laws of said State, the good order, peace and dignity thereof.

Form No. 7688.

(Precedent in State *v.* Alderman, 40 Iowa 375.)[2]

1. This indictment was drawn under the *Georgia* statute in force in 1872 (3 Ga. Code (1895), § 391). It was objected to by defendant on demurrer that the indictment charged and joined two offenses and that the "others" charged with keeping and maintaining the house for the defendant were not specified, but the objections were overruled and the indictment sustained. See also *supra*, note 3, p. 961.

For another form see Jordan *v.* State, 60 Ga. 656.

2. This form was held sufficiently to charge the offense described in Iowa Code (1897), § 5080, which section provides that "houses of ill fame kept for the purpose of prostitution and lewdness, gambling houses or houses where drunkenness, quarreling, fighting or breaches of the peace are carried on or permitted to the disturbance of the others, are nuisances, and may be abated and punished," etc.

For similar statutes see as follows, to wit:

Maine. — Rev. Stat. (1883), c. 17, § 1.

Massachusetts. — Pub. Stat. (1882), c. 101, § 6.

Nebraska.—Comp. Stat. (1897), § 6873.

Ohio. — Bates' Anno. Stat. (1897), § 7025.

Rhode Island. — Gen. Laws (1896), c. 92, § 1.

Tennessee. — Code (1896), § 6870.

See also *supra*, note 3, p. 961.

For another form under the *Iowa* statute see State *v.* Odell, 42 Iowa 75.

In an indictment for keeping a disorderly house as a common nuisance, the allegation of the various different purposes for which the premises were used, constituting the means by which the nuisance was created, are mere matters of description, and although each of them may be criminal in its nature, yet not being charged as distinct offenses, but only as forming the elements which make up the single offense of a nuisance, which is the offense charged in the indictment, their enumeration does not render the indictment bad for duplicity. Com. *v.* Kimball, 7 Gray (Mass.) 328; Com. *v.* Ballou, 124 Mass. 26; State *v.* Stanley, 84 Me. 555.

Scienter. — It is not necessary to allege in the indictment, in terms, that the illegal practices mentioned were carried on with the knowledge or con-

[(*Caption as in Form No. 200.*)][1]

The Grand Jury of the county of *Blackhawk*, in the name and by the authority of the state of *Iowa*, accuse *Andrew J. Alderman* and *Eliza Alderman* of the crime of nuisance in keeping a house of ill-fame, committed as follows: The said *Andrew J. Alderman* and *Eliza Alderman*, heretofore, to wit: on the *1st* day of *January*, A. D. 1871, in the county aforesaid, and on divers other times and days between said day and the day of this indictment, and continuing from said *1st* day of *January*, 1871, to the day of finding of this indictment, did keep, and still continued to keep, a house of ill-fame, for the purpose of prostitution and lewdness, and did then and there permit divers persons of both sexes in said house to commit fornication and adultery to the disturbance of others and to the common nuisance of all the good people of the state.

[(*Signature as in Form No. 200.*)][1]

Form No. 7689.

(Precedent in State *v.* Stevens, 40 Me. 559.)[2]

[(*Commencing as in Form No. 7678, and continuing down to* *][1] the jurors, for the state aforesaid, upon their oath present, that *William L. Stevens*, of *Bangor*, in the county of *Penobscot*, *laborer*, on the *first* day of *September*, in the year of our Lord one thousand eight hundred and *fifty-two*, and on divers other days and times between that day and the day of the taking of this inquisition, at *Bangor*, aforesaid, did keep and maintain, and doth yet keep and maintain a house of ill fame, resorted to for the purpose of prostitution and lewdness, against the peace of said state, and contrary to the form of the statute in such case made and provided.

Form No. 7690.

(Precedent in Com. *v.* Ashley, 2 Gray (Mass.) 356.)[3]

[(*Commencing as in Form No. 7679, and continuing down to* *)][1] at *New Bedford*, in the county of *Bristol*, on the *first* day of *June* in the year eighteen hundred and *fifty-three*, and on divers other days and times between that day and the day of finding this indictment, a certain house of ill fame, resorted to for the purpose of prostitution and lewdness, unlawfully did keep and maintain, against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

[(*Signature as in Form No. 7679*).][1]

sent of the defendant. It is sufficient to allege that the defendant kept and maintained such a nuisance, after setting out the different acts, etc., which by the statute constitute a common nuisance. State *v.* Stanley, 84 Me. 555.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. It was held in this case that the indictment need not describe the street whereon the house was situated, and that as the keeping of such a house is made a statutory offense, it is not necessary for the indictment to conclude that the act was to the common nuisance of the public. The statute under which the indictment was drawn is substantially the same as Me. Rev. Stat. (1883), c. 124, § 9. See also *supra*, note 3, p. 961.

3. This indictment was held sufficient without alleging that the house was resorted to by divers persons, men as well as women, or that the defendant

Form No. 7691.[1]

In the Name and by the Authority of the State of *Texas*:

The grand jurors, for the county of *Freestone*, state aforesaid, duly organized as such at the *February* Term, A. D. 1*898*, of the *District* Court for said county, upon their oaths in said court present that *John Doe*, on or about the *first* day of *January*, A. D. one thousand eight hundred and *ninety-eight*, and anterior to the presentment of this indictment, in the county of *Freestone* and state of *Texas*,* did then and there unlawfully keep[2] a house for the purpose of public prostitution, and as a common resort for prostitutes and vagabonds, he the said *John Doe* being the owner (or *lessee* or *tenant*)[3] of said house, against the peace and dignity of the state.

John Smith, Foreman of the Grand Jury.

Form No. 7692.

(Precedent in State *v.* Nixon, 18 Vt. 71.)[4]

State of *Vermont*, } The grand jurors for the people of the State
Chittenden County, ss. } of *Vermont* upon their oath present, that *George Nixon*, late of *Burlington* in the county of *Chittenden*, on the *first* day of *May*, in the year of our Lord one thousand eight hundred and *forty-four*, and on divers other days and times between that day and the day of taking this inquisition, with force and arms, at *Burlington* aforesaid, in the county of *Chittenden* aforesaid, feloniously a certain house of ill fame, commonly called a bawdy house, resorted to for the purposes of prostitution and lewdness, unlawfully and wickedly did keep and maintain, and in the said house, for filthy lucre and gain, divers evil disposed persons, as well men, as women and whores, on the days and times aforesaid, as well in the night as in the day, there unlawfully and wickedly did receive and entertain,

kept it for lucre. The statute under which it was drawn is similar to Mass. Pub. Stat. (1882), c. 207, § 13. See also *supra*, note 3, p. 961.

Precedent. — In Com. *v.* Shea, 150 Mass. 314, a complaint drawn under this latter statute was sufficient which alleged that the defendant on a certain date, "and on divers other days and times between that day and the day of making this complaint, at said *Boston*, and within the judicial district of said court, did keep a certain house of ill-fame, there situate, then and on said other days and times there resorted to for the purpose of prostitution and lewdness, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

1. *Texas.* — Pen. Code (1895). art. 361. See also *supra*, note 3, p. 961.

2. **Did Keep.** — An information which charges that defendant "did then and there commit the offense of wilfully, knowingly, unlawfully and fraudulently keeping a disorderly house for the purpose of public prostitution," etc., is fatally defective in not charging the accused "did keep" a disorderly house. Tompkins *v.* State, 4 Tex. App. 161.

3. **Owner, Lessee or Tenant.** — An indictment which does not allege that the defendant is the owner, lessee or tenant of the house in question is fatally defective and does not charge the offense described by the code. Lamar *v.* State, 30 Tex. App. 693.

4. In this case it was held that the keeping a house of ill fame is a local offense and must be described, in an indictment, as committed in a particular town, and the prosecutor is confined, in his proof, to the town, and cannot, as in other cases, prove an offense within the county; but a more particular description of the house is not required. See also *supra*, note 3, p. 961.

For the present statute in *Vermont* see Vt. Stat. (1894), § 5067.

and in which said house the said evil disposed persons and whores, by the consent and procurement of the said *George Nixon*, on the days and times aforesaid, there did commit whoredom and fornication, whereby divers unlawful assemblies, riots, routs, affrays, disturbances and violations of the peace, and dreadful filthy and lewd offenses in the same house, on the days and times aforesaid, as well in the night as in the day, were there committed and perpetrated, to the great damage and common nuisance of all the good citizens of this State, to the evil example of all others in like cases offending, in manifest destruction and subversion of morality and good manners, contrary to the form, force and effect of the ninth section of the ninety-ninth chapter of the last Revised Statutes of this State, and against the peace and dignity of the State.

(2) Near a Church or Public Building.

Form No. 7693.[1]

State of *Missouri*, } ss. In the *Barton Circuit* Court,
County of *Barton*. } *February* Term, A. D. 1896.

The grand jurors for the state of *Missouri*, impaneled, sworn and charged to inquire within and for the county of *Barton* and state aforesaid, do present that *John Doe*, on the *first* day of *October*, in the year of our Lord one thousand eight hundred and *ninety-five*, in the city of *Lamar* and county and state aforesaid, and from that day until the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-six*, did then and there unlawfully and feloniously set up and maintain a common assignation-house (or *common bawdy-house*) on *Pacific* street, between *G* and *H* streets, in the city of *Lamar* and county and state aforesaid, and within *one hundred* yards of a certain building ordinarily used as a church for the purpose of religious worship, commonly known as the *Lamar Baptist Church*, and did then and there unlawfully and feloniously suffer and permit divers lewd persons, as well men as women, to resort to and be and remain together in the said common assignation-house (or *common bawdy-house*) aforesaid for the purpose of having illicit sexual intercourse, against the peace and dignity (*concluding as in Form No. 24*).

(3) On the Water.

Form No. 7694.[2]

(*Caption and commencement as in Form No. 3*) upon their oath present that *John Doe*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-eight*, and on divers other days and times between that day and the time of the finding of this indictment, at the city of *East St. Louis* and county of *St. Clair* aforesaid, did keep a boat for the purposes of prostitution, on the navigable waters of the *Mississippi* river, over and upon which this state has jurisdiction, contrary to the form of the statute (*concluding as in Form No. 3*).

1. *Missouri.* — Rev. Stat. (1889), § 3812. See also *supra*, note 3, p. 961.
2. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 38, par. 148. See also *supra*, note 3, p. 961.

b. Leasing.[1]

1. For statutes of the various states relating to the offense of letting or leasing a house for the purpose of having the same kept as a house for prostitution see as follows, to wit:

California. — Pen. Code (1897), § 316.

Connecticut. — Gen. Stat. (1888), § 1530.

Illinois. — Starr & C. Anno. Stat. (1896), c. 38, par. 147.

Indiana. — Horner's Stat. (1896), § 1994.

Iowa. — Code (1897), § 4941.

Kansas. — Gen. Stat. (1889), § 3813.

Maine. — Rev. Stat. (1883), c. 17, § 3.

Massachusetts. — Pub. Stat. (1882), c. 101, § 8.

Michigan. — How. Anno. Stat. (1882), § 9288.

Minnesota. — Stat. (1894), § 6575.

Montana. — Pen. Code (1895), § 566.

Nebraska. — Comp. Stat. (1897), § 6873.

North Dakota. — Rev. Codes (1895), § 7212.

Ohio. — Bates' Anno. Stat. (1897), § 7025.

Oklahoma. — Stat. (1893), § 2212.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 478, § 42.

Rhode Island. — Gen. Laws (1896), c. 92, § 5.

Wisconsin. — Stat. (1898), § 4589.

Wyoming. — Rev. Stat. (1887), § 996.

Requisites of Indictment, etc., Generally. — See *supra*, note 1, p. 953.

Allegation of Offense — *Generally.* — An indictment at common law for leasing to another a house with the intent of its being used as a common bawdy-house must contain a description of the crime and a statement of the facts by which it is constituted. Smith *v.* State, 6 Gill (Md.) 425. Under statutes, the indictment must follow the language of the statute.

Lessor Charged as Keeper. — At common law, an indictment against one who leases a house for bawdy purposes should charge him as the keeper of the house. State *v.* Lewis, 5 Mo. App. 471; People *v.* Erwin, 4 Den. (N. Y.) 129; Brockway *v.* People, 2 Hill (N. Y.) 558; Troutman *v.* State, 69 N. J. L. 33.

Time of Making Lease. — The time of making the lease should be alleged. Com. *v.* Moore, 11 Cush. (Mass.) 600. But it is not necessary to prove the time as laid. Com. *v.* Harrington, 3 Pick. (Mass.) 26.

Name of Lessee. — The name of the lessee should be stated, or a reason given for the omission. Com. *v.* Moore, 11 Cush. (Mass.) 600.

Term of Lease. — It is not necessary to state the time when the lease commenced or was at an end. Smith *v.* State, 6 Gill (Md.) 425; State *v.* Abrahams, 6 Iowa 117.

Location of House. — The failure to state the location of the house which was rented to be kept and used as a bawdy-house is not a fatal defect. Harlow *v.* Com., 11 Bush (Ky.) 610.

Charging Actual Intent — Tennessee. — An indictment which charges the defendant with letting to certain persons named a certain dwelling-house of his, "then and there well knowing that the said persons intended to use the said dwelling-house as a place of resort for the purpose of prostitution and lewdness, and the said dwelling-house was so used and occupied for the purposes aforesaid," is fatally defective as not charging an attempt to commit the offense, for in that case the charge must be that the premises were let for the illegal purpose, thereby charging an actual intent to aid in the unlawful purpose; a mere knowledge of the lessee's purpose is not sufficient in this state, although it might be sufficient in those states in which such knowledge renders a transaction illegal. State *v.* Wheatley, 4 Lea (Tenn.) 231.

Sufficient Form. — Where an indictment charged in substance that the defendant "unlawfully let, rented, hired and furnished a certain house to certain named females of lewd and lascivious habits, for the purpose of being kept as a house of ill-fame; and continued to let, rent and furnish said house to said persons, knowing that it was so used; and that he permitted and encouraged lewd persons to meet and assemble thereat for the purpose of committing fornication and adultery," it was held that the failure to state in the indictment the location of the house is not fatally defective and that the indictment sufficiently stated the offense. Harlow *v.* Com., 11 Bush (Ky.) 610.

Insufficient Form. — An indictment for letting a tenement, to be used for the purpose of prostitution, in the following language: "The jurors for the commonwealth of *Massachusetts* on their oath present, that *Charles Moore*,

Form No. 7695.

(Precedent in Smith *v.* State, 6 Gill (Md.) 425.)[1]

[State of *Maryland*, City of *Baltimore*, to wit.][2]

The jurors [of the state of *Maryland*, for the body of the city of *Baltimore*,][2] do on their oath present that *Martin Smith*, late [of said city of *Baltimore*,][2] on the *second* day of *September*, 1845, with force and arms, at [said city of *Baltimore*,][2] unlawfully, wilfully and knowingly did let a certain house, there situate, of him the said *Martin Smith*, to one *Dorcas Smith*, with an intent that the said *Dorcas Smith* should afterwards, and during the continuance of such lease thereof, there keep and maintain the said house as a common

of *Boston*, in the county of *Suffolk*, *trader*, on the *fifteenth* day of *April*, in the year eighteen hundred and *fifty-three*, and for a long time, to wit, *five* months before the said *fifteenth* day of *April*, being owner and proprietor, and having the custody, control, management, possession, and letting of a certain tenement in a certain part of said *Boston*, being a tenement at the corner of *Poplar* street and *Spring* street, in said *Boston*, did then and there, to wit, on said *fifteenth* day of *April*, and during said *five* months preceding, consent, permit, agree, prepare, and provide said tenement, to be kept, maintained, used, occupied, and tenanted by lewd, wanton, and dissolute persons, as well men as women, and for a bawdy-house, brothel, and house of ill-fame, to be resorted to for the purpose of prostitution and lewdness by them and by other wanton, lewd, and lascivious persons, and did then and there let out to hire, for his own wicked lucre and gain, said tenement, with his own knowledge and consent, that it should be used as and for a house of ill-fame, resorted to for prostitution and lewdness, and as a brothel and bawdy-house, and said tenement was so used then and there for said purposes, with his, said *Moore's*, full knowledge and consent, during said time and term of time, and hitherto and to the day of the taking of this inquisition, against the peace and dignity of the commonwealth and the laws thereof," was, on motion in arrest of judgment, held insufficient and bad: First, because there is no proper averment of the time of the commission of the offense. Such an averment is indispensable. In the allegation that "the defendant, on the *fifteenth* day of *April*, and during *five* months next before and preceding that day, was in possession of a certain described tenement, and then and there let out the same to hire," the reference by the words "then and there" is necessarily to the whole time mentioned, and not to any particular day. This is altogether too loose, vague and indefinite. The act was not a continuing one like the keeping of a house of ill fame, but was a single, distinct and separate transaction. A specific time ought to have been alleged, a day certain stated, and without such statement the indictment is defective and insufficient. Second, because it omitted to state the name of the person to whom the lease was made by the defendant, or that such person was to the jurors unknown, and that the lease was received and accepted by the individual to whom it was made. An acceptance of the lease was essential to the commission of the offense, which could not indeed be consummated without it. Third, the indictment was very inartificially constructed, because it contained in one count allegations descriptive of two distinct offenses, a part of them adapted to a prosecution for keeping a house of ill fame, and others appropriate to the letting of a tenement to be used as a place of resort by lewd and lascivious persons for the purpose of prostitution. Com. *v.* Moore, 11 Cush. (Mass.) 600.

1. It was held in this case that a person who leased to another a house with the intent of its being used as a bawdy-house is indictable, and that the indictment must contain a certain description of the crime and a statement of the facts by which it is constituted, and that it need not state when the lease commenced or when it is to expire. See also *supra*, note 1, p. 969.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

bawdy house; and that afterwards, and during the continuance of such lease thereof, to wit: on the day and year aforesaid, and on divers other days and times, between that day and the day of taking of this inquisition, at the City of *Baltimore* aforesaid, the said *Dorcas Smith* did actually keep and maintain the said house as a common bawdy house, to the great scandal of all the liege inhabitants of the said State, to the evil example of all others in the like case offending, and against the peace, government and dignity of the State. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *Martin Smith* afterwards, to wit — on the *second* day of *September*, in the year of our Lord 1845, with force and arms, at the City of *Baltimore* aforesaid, unlawfully and knowingly, did let out a certain other house, there situate, which said last mentioned house, he the said *Martin Smith*, then and there had the control of, and the power of letting out, to one *Dorcas Smith*, with intent that the said *Dorcas Smith* should afterwards, and during the continuance of such lease thereof, there keep and maintain the said last mentioned house, as a common bawdy house; and that afterwards, and during the continuance of such lease thereof, to wit, on the day and year aforesaid, and on divers other days and times, between that day and the day of taking this inquisition, at the City of *Baltimore* aforesaid, the said *Dorcas Smith* actually did keep and maintain the said last mentioned house as a common bawdy house, to the great scandal of all the liege citizens of the said State, to the evil example of all others, in the like case offending, and against the peace, government and dignity of the State.

Form No. 7696.[1]

(*Caption and commencement as in Form No. 3*) upon their oath present, that *John Doe*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-eight*, at the city of *Carrollton* and county of *Greene* aforesaid, did unlawfully lease and let a certain house and premises there situate, as follows, to wit: (*Here describe the premises*), to one *Samuel Short* for the term of *twelve* months from the said last mentioned date, to be used by the said *Samuel Short* for the purpose of keeping and maintaining a house of ill fame and place for the practice of prostitution and lewdness, to the encouragement of idleness, fornication and other misbehavior, he the said *John Doe* then and there well knowing that the said house and premises were to be used for the purposes aforesaid, to the common nuisance of all the people, contrary to the form of the statute (*concluding as in Form No. 3*).

c. Permitting Property to be Used as Such.[2]

1. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 38, par. 147. See also *supra*, note 1, p. 969.

2. **For statutes** relating to the offense see *supra*, note 1, p. 969.

Precedents. — In Crofton *v.* State, 25 Ohio St. 249, the indictment, which was drawn under § 1 of the act of April 11, 1856 (Bates' Anno. Stat. Ohio (1897), § 7025), was held sufficient. After stating the time and place of the alleged offence, the indictment charged as follows: "He, the said *E. C. Crofton*, whose more full christian name is to the grand jurors unknown, then and there being the owner of a

Form No. 7697.

(Precedent in Mansfield *v.* State, (Tex. Crim. App. 1894) 24 S. W. Rep. 902.)[1]

[(*Commencing as in Form No. 7691, and continuing down to* *)][2] was the owner, lessee and tenant of a certain house there situate, and did then and there knowingly permit the keeping in said house of a disorderly house, to wit, a house kept for prostitution, and where prostitutes were permitted to resort and reside, for the purpose of plying their vocation, [against the peace (*concluding as in Form No. 7691*).][2]

3. Tippling-house.

a. Keeping Without License.

Form No. 7698.

(Precedent in U. S. *v.* Columbus, 5 Cranch (C. C.) 304.)[3]

District of Columbia, *Washington* county, to wit: The jurors of the United States for the county aforesaid upon their oath present, that *Charles Columbus*, late of the county aforesaid, *yeoman*, on the *fifteenth* day of *December*, in the year of our Lord eighteen hundred and *thirty-six*, at *Washington* county aforesaid, and on other days and times between that day and the day of taking this inquisition, with force

certain house there situate, unlawfully and knowingly did then and there permit one *Mitchell*, a female, whose christian name is to the grand jurors aforesaid unknown, to use and occupy said house for the purpose of keeping therein, then and there, a house of ill-fame, and therein, then and there, to keep divers, to wit, *five* female persons, whose names are to the grand jurors aforesaid unknown, for the purpose of prostitution, with intent that they, the *five* female persons aforesaid, whose names are to the grand jury aforesaid unknown, should therein, then and there, have illicit carnal intercourse and commit whoredom with divers, to wit, *ten* men whose names are to the grand jury aforesaid unknown, contrary," etc.

An indictment drawn under Ind. Rev. Stat. (1894), § 2080, alleged that Frederick Graeter did, on a day therein named, unlawfully permit a certain frame building situate on lot numbered forty-one, in the city of Vincennes, which he had theretofore let to one Mollie Avery to be kept as a house of ill fame and resorted to for the purpose of prostitution, then and there well knowing that it was so kept, etc. In a motion in arrest of judgment defendant objected to the form and sufficiency of the indictment, the reasons assigned being that it does not disclose the terms of the letting, the time when the tenancy commenced, nor that the person to whom the building had been theretofore let was at the date of the alleged offense, or within two years prior thereto, the tenant of the defendant; but it was held that on a motion in arrest, if the indictment is found to contain all the essential elements of a public offense, even though to some extent defectively stated, it will be held sufficient; the motion was denied. Graeter *v.* State, 105 Ind. 273.

An indictment which contains three counts, the first two of which charge that the defendant leased a house, knowing that the lessee intended to use it as a place, or resort, for the purpose of prostitution and lewdness, and the third charged him with letting it in like manner, and knowingly permitting such lessee to use the same for such purpose, does not charge two distinct offenses. State *v.* Abrahams, 6 Iowa 117.

1. This form is sufficient under Tex. Pen. Code (1895), art. 361.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. This indictment was held to be a good indictment at common law for keeping a disorderly house.

and arms, kept a certain unlawful, disorderly, and ill-governed house in the city of *Washington* in the said county, as a common tavern, without any lawful authority or license therefor, did take upon himself to keep and maintain; and the said house did then and there, at the days and times aforesaid, keep as a common tippling-house; and did therein openly sell spirituous liquors to all persons calling for the same, and allow the same to be drunk by such persons, in and about said house at all times, both at day and at night, and on all days, both Sundays and other days; and did permit certain idle and ill-disposed persons, to the jurors aforesaid unknown, to assemble together in his said house, and then and there continue drinking and tippling to the common nuisance of the good people of the United States, to the evil example of all others, the corruption of the public morals, and against the peace and government of the United States.

F. S. Key, United States Attorney, *District Columbia.*

Form No. 7699.

(Precedent in State *v.* Brady, 16 R. I. 52.)[1]

[(*Commencing as in Form No. 30*) did then and there unlawfully][4] keep and maintain a certain grog shop and tippling shop and building, place, and tenement, used for the illegal sale and the illegal keeping of intoxicating liquors, and for the habitual resort of intemperate, idle, dissolute, noisy and disorderly persons, to the great damage and common nuisance of all good citizens of this State, against the form of the statute [(*concluding as in Form No. 30*).][2]

b. Keeping Licensed House in Disorderly Manner.

Form No. 7700.

(Precedent in Collins *v.* State, 58 Ind. 5.)[3]

[(*Commencing as in Form No. 22*) upon their oath present][4] that one *John Collins*, late [of *Connersville* in the county of *Fayette* aforesaid, in the state aforesaid,][4] on the *1st* day of *June*, A. D. 1875, at [*Connersville*, in the county and state aforesaid,][4] who was then and there licensed according to the provisions of an act of the Legislature of Indiana, approved March 17th, 1875, to sell spirituous, vinous and malt liquors, in a less quantity than a quart at a time, to be drank upon the premises where sold, did then and there unlawfully, from said *1st* day of *June*, A. D. 1875, continuously up to the time of making this presentment, keep a house where spirituous, vinous and malt

1. This is the second count of an indictment which was held not multifarious.

2. The matter to be supplied within [] will not be found in the reported case.

3. This indictment was held sufficient under a statute identical with Horner's Stat. Ind. (1896), § 2097. See also Huber *v.* State, 25 Ind. 175.

Description of Premises. — See Fletcher *v.* State, 54 Ind. 465.

4. The words enclosed by and to be supplied within [] will not be found in the reported case.

liquors were sold, bartered and given away, to be drank upon the premises where sold as aforesaid, in a disorderly manner, in this, that he did then and there, during said time, suffer, permit and encourage divers persons to come to, and remain in and about, said house, by day and by night, drinking, carousing, swearing, hollowing, cursing, yelling, fighting and misbehaving[1] [themselves,][2] to the disturbance and annoyance of[3] divers good citizens of said county [contrary to the form (*concluding as in Form No 22*).][2]

c. Employing Women to Draw Custom.

Form No. 7701.

(Precedent in State *v.* Brown, 7 Wash. 11.)[4]

[(*Title of court and cause as in Form No. 2450.*)][2] Comes now *R. E. Moody*, the prosecuting attorney of *Jefferson* county, State of *Washington*, and by this information informs against, charges and accuses *Charles H. Brown* of maintaining a public nuisance committed as follows, to wit: The said *Charles H. Brown* then and there being did unlawfully on the *5th* day of *September*, A. D. 18*92*, keep a house located in the city of *Port Townsend*, county of *Jefferson*, State of *Washington*, on the easterly side of *Water* street between *Quincy* and *Adams* streets in said city, and which said house is commonly known as the *Merchants' saloon*, [and did then and there in said house employ women of evil name, fame and conversation to draw custom, dance and for purposes of prostitution, and did then and there cause and procure the said women for the purpose of drawing custom and for the purposes of prostitution as aforesaid, to dance and deport themselves in a lewd, lascivious and boisterous manner, and in such a manner as tended to draw, and did draw, together crowds of disorderly persons, and in such a manner as to thereby then and there debauch the morals of the persons then and there resorting to the said house;][4] all of which is to the injury and common nuisance of all the people, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of *Washington*.

[(*Signature as in Form No. 2450.*)][2]

1. **Acts Constituting Disorder.**— In a prosecution under this statute, the acts constituting the disorder must be specified. Hosea *v.* State, 47 Ind. 180; Mains *v.* State, 42 Ind. 327.

2. The words enclosed by and to be supplied within [ ] will not be found in the reported case.

3. **Omission of "Of."** — The fact that the word "of" is omitted in the expression "to the common nuisance of divers of," etc., is immaterial error. State *v.* Rhodes, 2 Ind. 321.

4. The information in the above case, drawn under Hill's Anno. Stat. Wash. (1891), § 2894, and following the language of the statute, was held insufficient for failing to show further that the character of the women alleged to have been employed, or the manner of their deportment, and quality and character of conversation, was such as tended to draw together crowds of disorderly persons, or to debauch the morals of those resorting to the place. The portion of the above form enclosed in [ ] has been added to supply this defect.

4. Theatre Employing Women to Draw Custom.

Form No. 7702.

(Precedent in Callaghan *v.* State, 36 Tex. Crim. Rep. 536.)[1]

[(*Commencing as in Form No. 7691, and continuing down to* *)][2] was the owner and manager of a theatre and dance-house where spirituous, vinous and malt liquors were kept for sale, and that he did unlawfully and knowingly employ and keep and have in his service in said theatre and dance-house lewd women, prostitutes and women of bad reputation for chastity, [against the peace (*concluding as in Form No. 7691*).][9]

5. Opium Joint.

Form No. 7703.[3]

(*Commencing as in Form No. 4061*) charge and accuse *John Doe*, of the county and state aforesaid, of the offense of keeping an opium joint, for that the said *John Doe*, on the *first* day of *January*, 1898, at the city of *Macon*, in the county aforesaid, did unlawfully set up, keep and maintain a house (*or place of any description*) for the smoking of opium, contrary (*concluding as in Form No. 4061*).

II. CIVIL ACTION.

1. To Recover Penalty for Violation of Ordinance.[4]

Form No. 7704.

(Precedent in Greensburgh *v.* Corwin, 58 Ind. 519.)[5]

[(*Title of court and cause as in Form No. 5915.*)][2]

The city of *Greensburgh* complains of said defendant, late of said city, and says, that said defendant, on the *9th* day of *September*, 1875, at the city and county aforesaid, did then and there violate section 3 of an ordinance of said city, passed by the common council thereof, on the 21st day of May, 1868, viz.:

Section 3. Any person who shall keep any brothel or house of ill fame in said city, by keeping therein any person or persons for the purpose of prostitution, or shall suffer any such to resort thereto for that purpose, any such person so offending shall, on conviction thereof, be fined in any sum not less than one nor more than fifty dollars.

That said *Susan Corwin* did, on said day, and on divers other days prior thereto, keep a house of ill fame and prostitution within said city of *Greensburgh*, *Decatur* county, State of *Indiana*. Wherefore the plaintiff demands judgment for *fifty* dollars.

[(*Signature and verification as in Form No. 5915.*)][2]

1. This indictment is sufficient under Tex. Pen. Code (1895), art. 362.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. *Georgia.* — 3 Code (1895), § 393.

4. **Action Against Owner of Premises.** — In an action under the Winn law (91 Ohio Laws 300) to recover a penalty from the owner of a building used as a house of ill fame, the petition need not allege defendant's knowledge of such use. State *v.* Allen, 6 Ohio Dec. 43, 3 Ohio N. P. 201.

5. It was held in this case on demurrer that the complaint sufficiently

Form No. 7705.

(Precedent in Green *v.* Indianapolis, 22 Ind. 192.)

State of *Indiana*, *Marion* County, ss.

The City of Indianapolis, plt., v. *Molly Green*, deft. } Before *John Caven*, mayor of the city of *Indianapolis*.

The City of Indianapolis complains of *Molly Green*, late of said city, and says that *Molly Green*, on the *27th* day of *June*, 18*63*, at the city and county aforesaid, did then and there violate section nine of an ordinance of said city passed by the common council thereof, on the 4th day of May, 1859, a copy of which is herewith filed.[1] The said defendant did unlawfully keep a house of ill-fame and prostitution in said city of *Indianapolis*, county of *Marion*, State of *Indiana*, wherefore the plaintiff demands judgment for *50* dollars.

R. J. Ryan, City Attorney.

[(*Verification.*)][2]

2. To Abate and Enjoin as a Nuisance.

Form No. 7706.

(Precedent in State *v.* Crawford, 28 Kan. 727.)[3]

[State of *Kansas*, *Shawnee* County. } ss. In the *District* Court in and for the County and State aforesaid.

The State of Kansas, on the relation of A. H. Vance, County Attorney for Shawnee County, plaintiff, against *Lester M. Crawford and G. N. Boutell*, defendants. } Petition.

A. H. Vance, county attorney of *Shawnee* county, in the state of *Kansas*, who prosecutes for said state, comes now here in behalf of

describes the offense, and that the action is a civil and not a criminal action, and is authorized by Ind. Rev. Stat. (1876), p. 273, § 19.

1. By-law Part of Complaint. — In an action to recover the penalty for the violation of a by-law or ordinance of a city, a copy of the by-law or ordinance must be made a part of the complaint and filed with it. It is as important that a by-law sued on be set out as it is that a written instrument should be. In this case a copy of the ordinance was not filed and the court held that the record did not show a cause of action for that reason.

2. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

3. This case was decided by the supreme court of *Kansas* at the July term, 1882, at which time it was held that an action in equity would not lie to abate and enjoin a nuisance of this character, because by section 13 of the Prohibitory act of 1881 an adequate remedy at law was provided by which such nuisances could be "shut up and abated." But by Kan. Laws (1887), c. 165, § 4 (Kan. Gen. Stat. (1889), § 2533), section 13 of said Prohibitory act was so amended as to authorize the attorney-general, county attorney, or any citizen of the county where such nuisance exists or is kept or is maintained, to maintain an action in the name of the state to abate and perpetually enjoin the same, and providing that an injunction shall be granted at the commencement of the action and that no bond shall be required. See also Kansas *v.* Ziebold, 123 U. S. 623.

A similar statute exists in *Iowa*. See Iowa Code (1897), § 2406.

said state and gives the said court here to understand and be informed that][1] the said *Lester M. Crawford* is the owner in fee of certain premises situate in the city of *Topeka*, in the county of *Shawnee*, and state of *Kansas*, to-wit, number *one hundred and ninety-four* and *one hundred and ninety-six* (*194* and *196*), on *Kansas* avenue, in said city, known as "*Crawford's Opera House*," and leases or rents the *south* room of the *first* story thereof, to-wit, number *one hundred and ninety-six*, on *Kansas* avenue as aforesaid, to the said *G. N. Boutell*, and permits the said *G. N. Boutell*, and has for several months last past, permitted said *G. N. Boutell*, to occupy and use said rooms as hereinafter set forth; that said room is, and for several months last past has been, kept by the said *G. N. Boutell* as a common saloon, and as a place for the sale and keeping for sale of beer, ale, wines, whisky, brandy, and other intoxicating liquors, to be there at a common bar used and drunk as beverages, and not for medical, mechanical, or scientific purposes, and the said *G. N. Boutell* is at said place constantly engaged in the sale of said liquors as aforesaid, and keeps large quantities of said liquors constantly on hand at said place for the purpose of selling the same over his said bar, there to be used and drank as beverages; that said place is for said purpose kept constantly open from shortly after daylight in the morning until about midnight at night; and the sale and keeping for sale of said liquors is the principal business done and carried on at said place.

That neither of said defendants is a druggist, and no permit has ever been granted or issued by the probate judge of said *Shawnee* county to said defendants, or to either of them, authorizing them, or either of them, to sell or barter said liquor; nor have said defendants, nor has either of them, any authority whatever to carry on said business or sell said liquors. On the contrary, said defendant *Boutell* makes no pretense of having any such authority, but purposely and contemptuously carries on said business at said place in open and defiant violation of law, and said place is and purports to be a common saloon and tippling-house, — of all of which things the said *Lester M. Crawford* has full knowledge, and leased said premises to the said *G. N. Boutell* for the express purpose of keeping therein a common saloon and tippling-house as before alleged; which said lease was made, and said *G. N. Boutell* first occupied said place as aforesaid, since the *first* day of *May*, 1*881*; that the said *G. N. Boutell* will continue to occupy said place, and to keep and use the same as a place for the sale of intoxicating liquors as aforesaid, and as a common saloon and tippling-house, indefinitely in the future, and the said *Lester M. Crawford* will continue to permit such use of said place, unless restrained and forbidden by the injunction and decree of this honorable court; that said place is a common nuisance of great injury to the public, which injury is irreparable and cannot be compensated in damages.

Wherefore, the said *A. H. Vance*, as county attorney of said *Shawnee* county, for and on behalf of the state of *Kansas*, prays:

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

1. That said premises, to-wit, the *first* story of number *one hundred and ninety-six*, *Kansas* avenue, in the city of *Topeka*, may be adjudged to be a common nuisance, and that an order may issue directing the sheriff or other proper officer to shut up and abate said place.

2. That said defendants may be perpetually enjoined from using or permitting to be used the said premises as a place where intoxicating liquors are sold or kept for sale, otherwise than by authority of a druggist's permit from the probate judge of said county.

3. That in the meantime the said defendants may be enjoined, until the further order of the court, from keeping open, or permitting to be open, the said *first* story of said *one hundred and ninety-six*, *Kansas* avenue, and from selling, bartering or giving away, and from keeping for sale, barter, or use, at, in, or about said premises, any malt, vinous, spirituous, fermented, or other intoxicating liquors, and from permitting such liquors to be sold, bartered, or given away, or to be kept for sale, barter, or use, at, in, or about said premises.

4. And said *A. H. Vance*, as county attorney of said *Shawnee* county, for and on behalf of the state of *Kansas*, prays that such other and further relief may be given as may be warranted in equity or at law, and the exigencies of the case may require.

[*A. H. Vance*,
County Attorney of the County of *Shawnee* and State of *Kansas*.][1]

Form No. 7707.

(Precedent in Carleton *v.* Rugg, 149 Mass. 551.)[2]

[To the Honorable the Justices of the *Superior* Court to be holden at *Lawrence*, within and for the County of *Essex*, on the *first Tuesday* of *September*, A. D. 1888.

Respectfully show *A. M. Allen* (*and nine others*, *naming them*), all of the city of *Haverhill*, in said county, that the said *A. M. Allen* (*and nine others*, *naming them*) are, and each and every one of them is, a legal and qualified voter in the said city of *Haverhill*.

And your petitioners further show][1] that a certain tenement in a building at the corner of *Locust* and *Essex* Streets in said *Haverhill*, which tenement is bounded as follows, southerly by *Essex* Street, easterly and northerly by land of *Mary F. Rugg* and others, and westerly by *Locust* Street, is used for the illegal keeping and sale of intoxicating liquors to the common nuisance of all good citizens; that the occupant of said tenement is *John E. King*; that the owners of said building are *Mary F. Rugg*, *Mary E. Rugg*, *Ella A. Chesley*, and *Willie E. Rugg*, all of *Haverhill*, in the county of *Essex*.

Wherefore your petitioners pray that your Honors will restrain, enjoin, and abate, said tenement as a common nuisance, and restrain

1. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. *Massachusetts.* — Stat. (1887), c. 380, § 1. Under the provisions of this act, a place or tenement resorted to for the purpose of prostitution, lewdness or illegal gaming may be enjoined and abated, as well as a place or tenement used for the illegal keeping and sale of intoxicating liquors.

and enjoin said owners, and occupant, their servants and agents, from continuing or permitting the continuance of said illegal keeping and sale of intoxicating liquors in said building.

[(*Signed by A. M. Allen*[1] *and nine others.*)][2]

1. This petition bore, among others, the signature of "A. M. Allen," and at the hearing thereon evidence was admitted that "Augustine M. Allen," a legal voter of the city of *Haverhill*, signed the petition by that name. Held, that the petition was sufficiently signed and that the evidence was properly admitted.

2. The matter to be supplied within [ ] will not be found in the reported case.

DISPENSARY LAWS.

See the title INTOXICATING LIQUORS.

DISTRESS.

By Geo. Carter Chaney.

I. For Rent, 981.
1. *Action of Distress*, 981.
a. *Affidavit*, 981.
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(*a*) *Rent Due and Unpaid*, 981.
(*b*) *Rent Not Due*, 984.
(2) *Counter Affidavit of Tenant*, 986.
b. *Warrant*, 987.
(1) *When Issued by Landlord*, 987.
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e. *Bond*, 995.
(1) *Of Plaintiff*, 995.
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f. *Sale of Perishable Property*, 996.
(1) *Application*, 996.
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CROSS-REFERENCES.

For other Forms for Collecting Rent, see the title LANDLORD AND TENANT.

For Forms in Actions of Replevin, see the title REPLEVIN — CLAIM AND DELIVERY.

For Forms in Actions of Trespass, see the title TRESPASS.

I. FOR RENT.[1]

1. Action of Distress.

a. Affidavit.[2]

(1) IN BEHALF OF LANDLORD.

(*a*) *Rent Due and Unpaid.*

Form No. 7708.[3]

State of *Florida*, }
Leon County. }

Before the subscriber, a county judge in and for said county, personally came *John Doe*,[4] who, being duly sworn, says that *Richard Roe* is indebted to him in the sum of *one hundred and fifty* dollars,[5] for the rent and use of the following property, to wit: (*Here describe the land*), from the *twenty-second* day of *January*, A. D. 1897, to the *twenty-second* day of *July*, A. D. 1897.

Given under my hand and seal this *twenty-ninth* day of *July*, A. D. 1897.

John Marshall, (SEAL)
County Judge.

1. Distress for Rent. — For statutes relating to distress for rent see as follows:

Colorado. — Mills' Anno. Stat. (1891), § 2562, prescribes what property shall be exempt on distress for rent, but in Herr *v.* Johnson, 11 Colo. 393, it was held that a landlord cannot distrain for rent in the absence of an express agreement therefor.

Delaware. — Rev. Stat. (1893), p. 868, c. 120, § 19 *et seq.*

Florida. — Rev. Stat. (1892), § 1764 *et seq.*

Georgia. — 2 Code (1895), §§ 3124, 4818 *et seq.*

Illinois. — Starr & C. Anno. Stat. (1896), c. 80, par. 16 *et seq.*

Kentucky. — Stat. (1894), § 2299 *et seq.*

Maryland. — Pub. Gen. Laws (1888), art. 53, § 8 *et seq.*

Mississippi. — The common-law process of distress is abolished by statute and a summary method of attachment and sale substitued therefor. Marye *v.* Dyche, 42 Miss. 347. For forms connected therewith see the title ATTACHMENT, ETC., vol. 2, p. 816 *et seq.*

New Jersey. — Gen. Stat. (1895), p. 80, § 11; p. 1207, § 1 *et seq.*

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1159, § 1 *et seq.*

Texas. — Rev. Stat. (1895), art. 3240 *et seq.*

Virginia. — Code (1887), §§ 2496, 2790 *et seq.*

West Virginia. — Code (1891), c. 93, § 7 *et seq.*

2. For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Affidavit, When Necessary. — Consult the list of statutes cited *supra*, note 1.

3. *Florida.* — Rev. Stat. (1892), § 1764. This affidavit stands in lieu of, and performs the functions of, an ordinary declaration. Smoot *v.* Strauss, 21 Fla. 611.

Where Filed. — The affidavit must be filed in the court in the county where the land lies, having jurisdiction of the amount claimed. Fla. Rev. Stat. (1892), § 1764.

4. Who May Make. — The affidavit may be made by the landlord, his agent or attorney, executor or administrator. Fla. Rev. Stat. (1892), § 1764.

5. Rent. — The affidavit must state the amount or quantity and value of the rent due for the land, and whether it is payable in money, cotton, or other agricultural products or things. Fla. Rev. Stat. (1892), § 1764.

Form No. 7709.[1]

Georgia, *Fulton* County.

Personally appeared before me * *John Doe*,[2] who, being duly sworn, says that *Richard Roe*, of said state and county (or *who has property in said county*),[3] is indebted[4] to him in the sum of *one hundred* dollars[5] for rent,[6] now due and unpaid (or *and said tenant is seeking to remove his goods from the premises*).[7]

John Doe.

Sworn to and subscribed before me this *fifth* day of *July*, 1897.

Abraham Kent, J. P.

1. *Georgia.* — 2 Code (1895), § 4818.

Precedent. — See Holland *v.* Brown, 15 Ga. 113.

2. **Who May Make.** — Any person who may have rent due may, by himself, his agent or attorney, make the affidavit. 2 Ga. Code (1895), § 4818.

3. **Tenant Resident of County.** — Failure to allege that tenant resides in the county, or has property therein, is fatal; and a mere description in the affidavit and distress warrant of the rented property will not serve as a substitute for such allegation as a jurisdictional fact. Cohen *v.* Candler, 88 Ga. 207. But an affidavit alleging that debtor resides in the county is amendable by alleging that he has property there. Bryant *v.* Mercier, 82 Ga. 409.

4. **Justly Indebted.** — An affidavit that one is justly indebted to another so many dollars for rent is an affidavit that said rent is due. Scruggs *v.* Gibson, 40 Ga. 511; Wright *v.* Hawkins, 68 Ga. 828.

5. **Amount of Rent.** — An attorney should swear positively to the amount of rent due, and an affidavit in the following words, to wit: "personally came *James A. Harley*, attorney for *John Drake*, who, being duly sworn, deposes and says that to the best of his knowledge and belief *A. Dawson*, of said county, is justly indebted," etc., is insufficient. Drake *v.* Dawson, 66 Ga. 174.

Rent Not Payable in Money. — Where rent is not payable in money, the affidavit should show the estimated value of the articles. Wilkins *v.* Taliafero, 52 Ga. 208; Rosenstein *v.* Forester, 57 Ga. 94; Tucker *v.* Cox, 65 Ga. 700. But where the affidavit alleged that the defendant was indebted to the plaintiff in a certain sum for rent, and the evidence was to the effect that the defendant contracted to pay a certain number of bales of cotton, which were shown to be worth the sum aforesaid, there was not such a variance as to require a nonsuit. Renew *v.* Redding, 56 Ga. 311. And if the value is not alleged, and the court allows it to be proved, certiorari will not lie. Urquhart *v.* Urquhart, 46 Ga. 416.

Where the value of the specific commodity is subject to fluctuation, the statement of the amount of the specific debt, and that it is supposed to be of a particular value, is sufficient. Thus it was held sufficient where the plaintiff claimed that defendant was "justly indebted to him in the sum of *twenty-five hundred and thirteen* pounds of lint cotton, for rent for the year 1879, said rent being now due and unpaid, the value of said amount of cotton supposed to be *two hundred and seventy-five* dollars." Tucker *v.* Cox, 65 Ga. 700.

6. **Demand for Rent.** — An affidavit to obtain a distress warrant for rent, whether on a general or special lien, need not allege demand. Almand *v.* Scott, 83 Ga. 402. See also Colclough *v.* Mathis, 79 Ga. 394.

Contract for Rental. — Where the affidavit claims a definite sum to be due for rent, the terms of the rent contract need not be set out. Driver *v.* Maxwell, 56 Ga. 11. But where the proceeding is by an assignee of the lessor, the affidavit must set out and describe both the assignment and the contract. Lathrop *v.* Clewis, 63 Ga. 282.

Description of Premises. — It is not necessary for the affidavit to specify the particular premises out of which the rent arises. Scruggs *v.* Gibson, 40 Ga. 511.

7. **That Tenant is to Remove Property.** — Where rent is due, such an allegation is surplusage. Wright *v.* Hawkins, 68 Ga. 828. Otherwise it is necessary in the affidavit. Anders *v.* Blount, 67 Ga. 41.

Immature crops cannot be levied on separately on the land from which they are grown, except where a debtor absconds and removes from the county and state; and such grounds for levy-

Form No. 7710.

(Bullitt's Civ. Code Ky. (1895), p. 719.)[1]

Commonwealth of *Kentucky*,
County of *Jefferson*.

John Doe says that *Richard Roe* owes him for the rent of land in *Jefferson* county, and payable in money, *one hundred* dollars, which became due on the *first* day of *January*, 1898.

John Doe.

Signed and sworn to by said *John Doe* this *first* day of *May* before me, a justice of the peace for *Jefferson* county.

Abraham Kent.

Form No. 7711.

(Precedent in Cross *v.* Tome, 14 Md. 249.)[2]

Cecil County, to wit: — Be it remembered, that on the *26th* day of *June*, 1855, before me, the subscriber, a justice of the peace[3] of the State of *Maryland*, in and for the said county, personally appeared *Andrew B. Cross*,[4] and made oath on the Holy Evangely of Almighty God that *James Whitelock*, his tenant, is justly and bona fide indebted[5] to him in the sum of *$591*,[6] for rent in arrear and already due[7] to him, and that he hath not received, either directly or indirectly, any part or parcel of the said rent claimed to be due and in arrear, or any security or satisfaction for the same, [except the credits given,] to the best of his knowledge and belief.[8]

Sworn before

Samuel Peaco.

ing on growing crops, if they exist, should appear in the process or the levy, otherwise the levy will be void. Scott *v.* Russell, 72 Ga. 35.

1. *Kentucky.* — Stat. (1894), § 2301.

2. *Maryland.* — Pub. Gen. Laws (1888), art. 53, § 8. The affidavit prescribed by this act need not be literally pursued, but it is sufficient if it be substantially followed. Cross *v.* Tome, 14 Md. 249.

3. **Where Made.** — The affidavit shall be made on oath before some justice of the peace of the county where the premises lie, or where the landlord or his agent may reside. Md. Pub. Gen. Laws (1888), art. 53, § 8.

4. **Who May Make.** — Every landlord, or his agent who may be authorized to distrain for rent due him, may make the affidavit. Md. Pub. Gen. Laws (1888), art. 53, § 8.

5. **Justly and Bona Fide Indebted.** — These words are required by the statute. Md. Pub. Gen. Laws (1888), art. 54, § 8.

6. **Amount Due.** — The affidavit shall specify the amount which the landlord may claim to be due in dollars and cents, where the distress is for a certain money rent, or that he is justly and bona fide entitled to the quantity or proportion of the produce claimed, where the distress is for grain or produce. Md. Pub. Gen. Laws (1888), art. 53, § 8.

7. **Rent in Arrear and Already Due.** — The claim must be for rent in arrear and already due. Md. Pub. Gen. Laws (1888), art. 53, § 8.

8. **That Landlord Has Not Received Rent.** — The affidavit must state that the landlord hath not received, directly or indirectly, any part or parcel of said rent claimed to be due, or any arrear, except, if any, the credits given, to the best of his knowledge and belief. Md. Pub. Gen. Laws (1888), art. 53, § 8. The words in the prescribed affidavit, "except the credits, if any, which have been given," apply to a case where credits have been stated in the account, which may be done, but they do not make it necessary to state debits and credits. Cross *v.* Tome, 14 Md. 247.

Form No. 7712.[1]

The State of *Texas*, }
County of *Bexar*. }

This day personally appeared *John Doe*,[2] who, being duly sworn, on oath says that *Richard Roe*, the defendant, is indebted to the plaintiff in the sum of *one hundred and twenty-five* dollars,[3] for rent, and he further swears that the distress warrant now prayed for is not sued out for the purpose of vexing and harassing[4] the defendant.

John Doe.

Sworn to and subscribed before me, this *fifth* day of *November*, 1*897*.

Abraham Kent, Justice of the Peace,
Precinct No. *2*, *Bexar* Co., *Texas*.

Form No. 7713.[5]

(Robinson's Va. F., p. 151.)

Henrico county, to wit:

This day *John Doe*[6] personally appeared before me, a justice of the peace for the said county, and made oath that the sum of $*100*[7] is in arrear to him from *Richard Roe* for one half year's rent of a tenement in the said county, reserved upon contract, and that he verily believes no part thereof hath been paid.

Given under my hand this *tenth* day of *January*, 1*898*.

Abraham Kent, Justice of the Peace.

(*b*) *Rent Not Due.*

Form No. 7714.

(Precedent in Wilkins *v.* Taliafero, 52 Ga. 209.)[8]

1. *Texas.* — Rev. Stat. (1895), § 3241. The affidavit is sufficient if it states that the amount sued for is for rent; that it was then due, and that the warrant was not sued out for the purpose of vexing or harassing the defendant. These facts entitle the plaintiff to the writ. Murry *v.* Blanchard, 2 Tex. App. Civ. Cas., § 479.

2. **Who May Make.** — The affidavit may be made by the plaintiff, his agent or attorney. Tex. Rev. Stat. (1895), § 3241.

3. **Amount Due.** — The affidavit should state the exact amount due, and an affidavit that defendant "is indebted to plaintiff in the sum of *one hundred and twenty-six* dollars or thereabouts for rents and supplies furnished," etc., to the defendant is not sufficient to authorize the issuance of a distress warrant. Jones *v.* Walker, 44 Tex. 200.

4. **Vexing and Harassing.** — An affidavit that the distress warrant is not sued for the purpose of "injuring and harassing" the defendant fulfils practically the statutory requirement that an affidavit shall be made that the warrant was not sued out for the purpose of "vexing or harassing." Biesenbach *v.* Key, 63 Tex. 79.

5. *Virginia.* — Code (1887), § 2790.
West Virginia. — Code (1891), c. 93, § 10.

6. **Who May Make.** — The affidavit may be made by the person claiming rent or by his agent. Va. Code (1887), § 2790; W. Va. Code (1891), c. 93, § 10.

7. **Amount of Rent.** — The amount of money or other thing to be distrained for shall be specified in the affidavit. Va. Code (1887), § 2790; W. Va. Code (1891), c. 93, § 10.

8. The question made in this case was whether the affidavit was sufficiently certain to authorize a distress warrant. As to the cotton, it was admitted to be sufficiently within the rule laid down in Toler *v.* Seabrook, 39 Ga. 14, but it was contended that the promise to "fix the kitchen," which had been damaged by

[*Georgia*, *Muscogee* County.][1]

Before me, a justice of the peace in and for the county of *Muscogee*, personally came *Charles B. Taliafero*, who being sworn, deposeth and saith, that *John O'Pry* rented from him his farm in said county for this year, and agreed to pay him for the rent of the same, *four and one-half* bales of cotton, first class, each to weigh *five hundred* pounds, and the *half* bale *two hundred and fifty* pounds, and to pay the same out of the first cotton gathered on his place, and by the middle of *November next*; and also promised to fix that part of the kitchen on said place that had been injured by the fire, and the said cotton would now be worth $*528.75*, and the said repairs would be worth $*200.00*. He further saith that said *O'Pry* is seeking to remove his goods from the said premises; he further saith that he claims from said *O'Pry* $*728.75*, made up of said two sums, as rent, and that he prays a distress warrant for the same, the said *O'Pry* having failed to make said repairs or pay said cotton.

C. B. Taliafero.

Sworn to and subscribed before me *October 28th*, 1*869*.

Charles Coleman, J. P.

Form No. 7715.

(Precedent in Hopkins *v.* Pedrick, 75 Ga. 707.)[2]

Georgia, *Brooks* County.

Personally came *J. F. Pedrick*, who on oath says: *L. T. Pedrick*, of said county of *Brooks*, his tenant, is indebted to him in the sum of *one hundred and thirty-eight 75-100* dollars, the value of *fifteen hundred* pounds of lint cotton, value *9 1-4* cents per pound, for rent of farm for the year 1*884*; said farm situated in said county, *6 1-2* miles north of *Quitman*, between the farms of *D. D. Sinclair* and *J. B. Underwood*; that affiant demands payment for said rent from said *Pedrick* before the same was due, for the reason that said *L. T. Pedrick* was seeking to move his property from said farm, and did move the same, as aforesaid; payment of said rent was refused and is still unpaid; that affiant could not make a demand for the payment of the rent aforesaid since the same became due, for the reason that said *L. T. Pedrick* fled this state, and has been continuously a citizen of *Florida*. Affiant makes this affidavit within *twelve* months of the time the said rent, to wit, $*138.75*, became due; that a distress warrant for the purpose of enforcing his special lien for rent may issue against the said *L. T. Pedrick*, to be levied upon the crops made during the said year 1*884* upon the lands rented, as aforesaid.

J. F. Pedrick.

Sworn to before me this *December 29*, 1*884*.

W. B. Bennett, J. C. C., *B.* C.

fire, was so uncertain as to make the warrant void. It was held, however, that there was no material distinction between the cotton and the "fixing the kitchen." Consult also annotations to Form No. 7709, *supra*.

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. Consult, generally, the annotations to Form No. 7709, *supra*.

Form No. 7716.

(Precedent in Berry *v.* Powell, 77 Ga. 79.)[1]

Georgia, *Polk* County.

Before me in person came *Ivy F. Thompson*, attorney and agent for *Thomas Berry* and *Alfred Shorter*, who, on oath, says that *M. J. Powell*, of said county, is justly indebted to *Thomas Berry* and *Alfred Shorter* for the rent of their land in said county adjoining the lands of *J. O. Waddell* and *W. G. Reed*, for the year 18*81*, *twelve* bales of cot ton, each to weigh *five hundred* pounds, of average grade, each of the value of *fifty-five* dollars, and in all, the sum of *six hundred and sixty* dollars; that the said rent is not due, but a part of the crop made on said farm the present year has been removed from the premises by said *M. J. Powell*, and those under him, and sold without the payment of the rent, or any part thereof, and that they are seeking to remove the said crops from the premises.

A personal demand has been made on said *Powell* for the payment of said rent, verbally and in writing, by *Thomas Berry* and *A. Shorter*, and by their agent, since said crops were being removed, and payment thereof was refused. This distress warrant is taken out within *twelve* months from the time the said rent became due. Said *Berry* and *Shorter* claim a special lien on the cotton, cotton seed, corn and fodder raised on said land during the year 18*81*, and a general lien on all the other property of said *M. J. Powell* to secure the payment of said rent.

Ivy F. Thompson,
Att. and Agent for *Thomas Berry* and *A. Shorter*.

Sworn to and subscribed before me, *20th September*, 18*81*.
L. S. Ledbetter, N. P. and J. P.

(2) Counter Affidavit of Tenant.

Form No. 7717.[2]

(*Commencing as in Form No. 7709, and continuing down to* *) *Richard Roe*, defendant in a certain distress warrant for *one hundred* dollars rental, issued by said justice of the peace in favor of *John Doe*, and on oath says, that the sum distrained for is not due.

(*Signature and jurat as in Form No. 7709.*)

1. It was held that the affidavit in this case was full and contained all the allegations necessary to authorize a distress warrant for rent, and also to show that the landlord had both a special lien on the crops made on the land rented to the tenants and a general lien on the property of the debtors, and that such lien might be enforced by distress warrant and not as provided in the code for other liens. Consult also the annotations to Form No. 7709, *supra*.

2. *Georgia*. — 2 Code (1895), § 4819.

Where a landlord's affidavit alleges certain rent due, it is a sufficient counter affidavit to allege that the sum or part thereof is not due. Anders *v.* Blount, 67 Ga. 41; Girtman *v.* Stanford, 68 Ga. 178; Wright *v.* Hawkins, 68 Ga. 828; White *v.* Mandeville, 72 Ga. 705. But the only counter affidavit receivable is "that the sum, or some part thereof, distrained for is not due." Holland *v.* Brown, 15 Ga. 113. An affidavit that defendant "does not hold the premises, either by lease or rent from ——, nor any other person holding under him

b. Warrant.

(1) When Issued by Landlord.

Form No. 7718.

(Precedent in Lapointe *v.* Stewart, 16 Ill. 291.)[1]

To *Moses Hanks*, of *Cook* County, Greeting:

Whereas, *John Lapointe*, of *Chicago*, *Cook* County, is justly indebted to *Alpheus Stewart*, of *New York*, and *John F. Temple*, of *Chicago*, for the use of said *Alpheus Stewart*, in the sum of $*309.00*,[2] *three quarters'* rent[3] of the premises known as a portion of lot *2*, *B. 70*, *School Section Addition* to *Chicago*, being that portion of said lot No. *2*, fronting west on *Canal* street, in the city of *Chicago*,[4] accruing from the *first* day of *August*, 1*853*. Now, therefore, I do hereby authorize you to make distress according to law, for said rent, of the goods and chattels of said *John Lapointe*, to be found in your county. In

by lease or rent," is not sufficient. Lockett *v.* Usry, 28 Ga. 345. But where the plaintiff's affidavit is based on the fact that the tenant is removing his property, the counter affidavit should deny that fact. Beall *v.* Hill, 42 Ga. 172.

Florida. — See Rev. Stat. (1892), § 1766.

1. Precedent. — The warrant in Alwood *v.* Mansfield, 33 Ill. 452, which was held to be sufficient, was in the following form, to wit:

"To the sheriff of *Mason* county, *Illinois*, my bailiff, greeting: Distrain of the goods and chattels of *Hugh M. Alwood*, sufficient to make the sum of *four hundred* dollars, being the rent for *one* year, expiring on the *15th* day of *November instant*, on the following described real estate, situated in the county of *Mason*, in the State of *Illinois*, to wit: The S. E. qr. of sec. No. 8; the S. hf. of sec. 27; the N. hf. of sec. 34, the N. E. qr. of sec. 33, and the N. W. qr. of the S. W. qr. of sec. 34, all in T. 23 N. of R. 6 W. of 3d P. M., and make return hereof with an inventory of the property distrained to the clerk of the *Circuit* Court of said *Mason* county, and this shall be your warrant.

Dated *November 17*, 18*62*.

H. Mansfield."

2. Amount Claimed. — A landlord is limited in his recovery by the amount stated in his distress warrant, and he must show on the trial that he is entitled to the rent specified, and no more. Asay *v.* Sparr, 26 Ill. 115.

The plaintiff must aver in the warrant all matters which he wishes to prove. Thus, unless the warrant contains an allegation or charge that the defendant by good husbandry might have made a better crop, evidence to that effect is inadmissible. Bainter *v.* Lawson, 24 Ill. App. 634.

3. "Damages" for "Rent." — Calling the sum claimed by the landlord "damages" instead of "rent" does not vitiate the warrant. Accordingly, in Craig *v.* Merime, 16 Ill. App. 214, it was held to be error to quash a warrant in the following form, to wit:

"State of *Illinois*, } ss.
Coles County. }

John Millingham is hereby appointed my agent to distrain of the goods and chattels of *G. L. Merime*, of said county, *four and one half* tons of broom-corn, grown on the northeast quarter northwest quarter, and northwest quarter northeast quarter of section *20*, town *13* north, range *10* east, *Coles* county, *Illinois*, * * * owned by me, for amount of $*150* damages due me for the nonperformance of the conditions of the lease of *G. J. Merime* as my tenant, on said land, for the year 18*83*.

March 18, 18*84*.

James W. Craig."

4. Description of Premises. — According to the most approved precedents of distress warrants, no description of the demised premises therein is necessary, and it is surplusage to insert such a description in a warrant: and whether accurate or not, if inserted, can make no difference. Alwood *v.* Mansfield, 33 Ill. 452.

witness whereof, I have hereunto set my hand this *12th* day of *August*, 1*855*.

Alpheus Stewart, Landlord.
By *John F. Temple*, his Agent.[1]

Form No. 7719.[2]

Know all men by these presents, that I do hereby empower *John Fen* to distrain the goods and chattels of *Richard Roe* in the house and on the premises now occupied by him situate in the city of *Newark*, *Essex* county, *New Jersey*, being the dwelling-house numbered *721 Washington* street, or which may have been removed therefrom within *thirty* days, for the sum of *one hundred and fifty* dollars, being the rent due on the *twenty-ninth* of *December*, 1*897*.

Witness, my hand and seal this *second* day of *January*, 1*898*.

John Doe. (SEAL)

Form No. 7720.

(Grayd. Pa. F. (1845), p. 590.)[3]

Carlisle, *Pa.*, *January 10*, 1*898*.

To *Samuel Short*, my bailiff:

I hereby authorize and require you to distrain the goods and chattels in the dwelling-house, stable, and on the lot and premises of *Richard Roe*, situate on the *lower* side of *High* street, in *Carlisle*, *Cumberland* county, for *ninety* dollars, being for *eight* months' rent due to me for the same, and to proceed thereon for the recovery of said rent, as the law directs.

Witness my hand the date above written.

John Doe.

(2) When Issued by a Court.

Form No. 7721.[4]

In *County Judge's* Court, *Leon* County, *Florida*. } In the Name of the State of *Florida*.

To the Sheriff of *Leon* County:[5]

Whereas, *John Doe* has this day made oath before me that on the *twenty-ninth* day of *July*, A. D. 1*897*, one *Richard Roe* was, and still is, indebted to him in the sum of *one hundred and fifty* dollars, for the rent and use of the following property, to wit: (*Here describe property*), from the *twenty-second* day of *January*, A. D. 1*897*, to the *twenty-second* day of *July*, A. D. 1*897*, at *twenty-five* dollars per month, which said rent is payable in money.

1. **Seal.**—The warrant need not be under seal. Dennis *v.* Maynard, 15 Ill. 477.

2. See N. J. Gen. Stat. (1895), p. 1207, 1 *et seq.*

3. A distress in *Pennsylvania* is made either by the landlord in person or by some person deputed by him by warrant. 2 Troubat & Haly's Pa. Pr. 151. And a bailiff may make a distress upon a parol authority. Franciscus *v.* Reigart, 4 Watts (Pa.) 98.

4. *Florida.* — Rev. Stat. (1892), § 1765.

Rent and Advances. — The warrant may cover a claim for both rent and advances. Blanchard *v.* Raines, 20 Fla. 467.

5. **To Whom Addressed.**— The warrant shall be addressed to the executive officer of the court. Fla. Rev. Stat. (1892), § 1765.

Therefore, you are hereby commanded to levy upon the property of the said *Richard Roe* that may be liable for rent,[1] and collect the sum of *one hundred and fifty* dollars,[2] together with interest and costs;

And you are further commanded to summon the said *Richard Roe* to appear before me at my office in *Tallahassee*, said district and county, on the *ninth* day of *August*,[3] A. D. 1897, to answer the complaint of *John Doe*.

Herein fail not, or judgment will be given against him by default.

Given under my hand and the seal of said court, this the *twenty-ninth* day of *July*, A. D. 1897.

John Marshall, County Judge.[4]

Form No. 7722.

(Precedent in Wilkins *v.* Taliafero, 52 Ga. 209.)[5]

Georgia, *Muscogee* County.

To the sheriff of said county or his deputy:[6]

Whereas, *Charles B. Taliafero* has this day made oath before me, that *John O'Pry* rented his place or farm for this year, and was to pay him *four and a half bales* of cotton by the middle of *next November*, for the same, and was also to do repairs on the kitchen, and the said cotton and repairs would be worth $*728.75*, and that the cotton has not been paid or the repairs done. These are therefore to command you to levy on any property of said *O'Pry*, whether to be found on said premises or elsewhere, a sufficiency to make the sum of

1. On What Property Levied. — The warrant shall direct the levy to be made on property liable to be distrained for rent. Fla. Rev. Stat. (1892), § 1765.

2. Amount to be Collected. — The warrant shall command the collection of the amount claimed in the affidavit. Fla. Rev. Stat. (1892), § 1765.

3. Date of Appearance.—The defendant must be summoned to appear before the court at a date fixed in the writ, and not more than ten days from the issuance thereof. Fla. Rev. Stat. (1892), § 1765.

4. Who Issues. — The warrant is issued by the clerk, or by the judge if the court have no clerk. Fla. Rev. Stat. (1892), § 1765.

5. *Georgia.* — 2 Code (1895), § 4818.

Where an affidavit to obtain a distress warrant sufficiently states the facts upon which such a warrant may lawfully issue, it is not necessary for the warrant itself to set out the reasons why rent was due, as set forth in the affidavit. If in other respects the warrant contains all facts legally requisite, the failure of the warrant so to do does not render it invalid. Callaway *v.* Phillips, 95 Ga. 801. But the warrant must state facts; thus, where a distress warrant alleged that the debt was past due and the defendant was removing the rents and crops from the rented premises, but the plaintiff's evidence showed that the debt was not due, the proceedings should have been dismissed. Scott *v.* Russell, 72 Ga. 35.

Precedent. — In Hopkins *v.* Pedrick, 75 Ga. 706, the distress warrant, which was sufficient, was as follows, to wit:

"*Georgia* — *Brooks* County.

To the sheriff, his deputy, constable or county court bailiff of said county:

J. F. Pedrick having made oath before me that *L. T. Pedrick* is indebted to him in the sum of $*138.75* for the rent for the year 18*84* of the farm of the said *J. F. Pedrick*, situated in said county, *6 1-2* miles north of *Quitman*, and between the farms of *D. D. Sinclair* and *J. B. Underwood*. These are, therefore, to command you that you levy on and sell, as provided by law, a sufficiency of the crops of said *L. T. Pedrick*, raised and grown during the year 18*84* upon the lands rented, as aforesaid, to make the sum," etc.

6. To Whom Addressed. — The code provides that the warrant may be executed by any constable duly qualified. 2 Ga. Code (1895), § 4818.

$*728.75*, besides costs, by the sale of the property so levied on, and have you the said money at the next *superior* court to be held in and for the said county.

In witness whereof I have hereunto set my hand, on this *28th October*, 1*869*.

Charles Coleman, J. P. (SEAL)

Form No. 7723.

(Bullitt's Civ. Code Ky. (1895), p. 719.)[1]

John Doe, plaintiff,
against
Richard Roe, defendant. } Distress–Warrant.

The Commonwealth of *Kentucky* to the sheriff of *Jefferson* county.[2]

It appearing from the affidavit of the above named *John Doe* (or *from the affidavit of Samuel Short, the agent of the above named John Doe*), that the above named *Richard Roe* owes him for the rent of land in *Jefferson* county, payable in money, *three hundred* dollars, which became due on the *first* day of *January*, 1*898*, you are hereby commanded to distrain the personal property in your county, not exempt from distress for rent, of the said *Richard Roe*, and of *Leonard A. Ford*, the assignee (or *under-tenant of said Richard Roe*), found on the leased premises, or so much thereof as will satisfy the said debt, with interest at the rate of *six* per centum per annum thereon from the day aforesaid and the cost of this proceeding.

Witness *John Marshall*, judge of the *Jefferson Quarterly* Court (or *justice of the peace*), this *first* day of *February*, 1*898*.

John Marshall, J. *Jefferson Q.* C. (or *J. P.*)

Form No. 7724.

To *William Blackford*, Constable or Bailiff, Greeting:[3]

You are hereby authorized to distrain any goods or chattels found on the premises occupied by *James Whitelock* in the city of *Elkton* in the county of *Cecil*, to satisfy and pay unto *Andrew B. Cross* the sum of $*591.00*[4] rent due, as per annexed account;[5] and for so doing this shall be your sufficient authority.

1. *Kentucky.* — Stat. (1894), § 2302.

2. **To Whom Addressed.** — The warrant may be directed to the sheriff, marshal of the town, or a constable of the county. Ky. Stat. (1894), § 2302.

3. **To Whom Addressed.** — The warrant of distress may be directed to the sheriff, who may execute it by one of his sworn deputies. Giles *v.* Ebsworth, 10 Md. 333; Myers *v.* Smith, 27 Md. 91.

4. **Amount Due.** — A distress is not vitiated by more rent being distrained for than is due. Jean *v.* Spurrier, 35 Md. 110.

5. **Annexed Account.** — To every warrant authorizing any bailiff to levy a distress for rent there shall be prefixed or annexed the account of such landlord stating in dollars and cents the amount of rent claimed to be due and in arrear, when the contract is for a certain money rent, or a statement specifying the quantity or proportion of produce agreed upon between the landlord and tenant as the rent of the premises, when the distress is for grain or produce, together with an affidavit thereon, in substance as required in the preceding section. (See *supra*, Form No. 7711.) Md. Pub. Gen. Laws (1888), art. 53, § 9.

This account must state against whom it runs. Joynes *v.* Wartman, 5 Md. 195. And when the rent therein claimed became due. And an account against a tenant as follows: "To balance of

Given under my hand this *twenty-sixth* day of *June*, 1897.
Abraham Kent, J. P.[1]

Form No. 7725.[2]

The State of *Texas*, } No. *213*.
County of *Bexar*. } *Justice's* Court, Precinct No. *2*.
The State of *Texas*, to the Sheriff or any Constable of *Bexar* County, Greeting:[3]

Whereas, *John Doe* has made oath before me that *Richard Roe* is indebted to him in the sum of *one hundred and twenty-five* dollars for the rent and use of the house numbered *520 Washington* street, *San Antonio*, and has also made oath that this distress warrant is not sued out for the purpose of vexing and harassing the defendant, and has given bond[4] as required by law; now, therefore, you are hereby commanded that you seize so much of the property of the said *Richard Roe* as shall be of value sufficient to satisfy said demand, and the same in your possession safely keep, unless the said *Richard Roe* replevy the same according to law.

Herein fail not, but have you this writ, with your return thereon, showing how you have executed the same, before me at my office in *San Antonio* in said county, at a regular term of the *Justice's* Court for Precinct No. *2* in said county of *Bexar*, to be held on the *twenty-fifth* day of *November*, A. D. 1897.[5]

Given under my hand, this the *fifth* day of *November*, A. D. 1897.
Abraham Kent, Justice of the Peace,[6]
Precinct No. *2*, *Bexar* County.

quarry rent, due Dec. 31st, 1855, on the quarry at Rock Run, Cecil county,— $591," was held sufficient; but it is not necessary, by the act of 1834, c. 192, to state in the account the terms of renting, nor to set down the items showing the whole amount originally payable under the contract, and the credits thereon. Cross *v.* Tome, 14 Md. 247.

In the affidavit accompanying the distress warrant the amount of rent due was stated to be "two hundred and fifty ———," and the account annexed to the distress warrant stated it to be for "two hundred and fifty dollars." Held, that the omission of the word "dollars" in the affidavit was cured by the account. Jean *v.* Spurrier, 35 Md. 110.

1. Signature. — A distress warrant directed distress to be made to satisfy rent due A as per account, which was made out in A's name and sworn to by him. The warrant was signed by the justice of the peace before whom the affidavit was made, with the letters "J. P." appended to the signature. Held, that if the person signing the warrant was in fact the agent of the landlord, the warrant was a sufficient authority to the constable, although not signed in terms as agent, or for the landlord, by name. Jean *v.* Spurrier, 35 Md. 110.

2. *Texas.* — Rev. Stat. (1895), § 3242.

3. To Whom Addressed. — The warrant shall be issued to the sheriff or any constable of the county. Tex. Rev. Stat. (1895), § 3242.

4. Bond. — For the form of the bond see *infra*, Form No. 7732.

5. Where Returnable. — The warrant is returnable before the justice issuing same, unless the amount in controversy exceeds two hundred dollars, in which case it is returnable to the county court, unless the amount in controversy exceeds five hundred dollars. If the amount exceeds five hundred dollars, it is returnable to the county or district court, as the plaintiff, in such writ, may direct. If the amount in controversy shall exceed one thousand dollars, exclusive of interest, the writ shall be made returnable to the district court. Tex. Rev. Stat. (1895), § 3242.

6. Issued by Whom. — The warrant shall be issued by the justice of the peace with whom the oath and bond are filed. Tex. Rev. Stat. (1895), § 3242.

Form No. 7726.[1]

County of *Henrico*, to wit:
To *John Lynch*, *Sheriff* of the said *County*:

Whereas, *John Doe* hath this day made oath before me, *Abraham Kent*, a justice of the said *county*, that he verily believes that *Richard Roe*, his tenant, is justly indebted to him in the sum of *one hundred* dollars for rent reserved upon contract for a certain tenement situated in said *county*.

These are, therefore, in the name of the *commonwealth* to require you forthwith to distrain so much of the goods and chattels of the said *Richard Roe* in and upon the said premises, or which may have been removed therefrom, not more than *thirty* days,[2] as shall be sufficient to satisfy the rent due and in arrear as aforesaid, and the costs of distress, and for your so doing this shall be your authority.

Given under my hand and seal this *tenth* day of *May*, 1*898*.

Abraham Kent, J. P. (SEAL)

Form No. 7727.

(Precedent in Beach *v.* O'Riley, 14 W Va. 57.)[3]

State of *West Virginia*, *Kanawha* Co., ss.
To *A. Cave*, Const., of *Kanawha* County:

Whereas *Andrew H. Beach* hath this day made oath before me, *J. T. Brodt*, a justice of the peace for the county aforesaid, that he verily believes that *Philip O'Riley*, his tenant, is justly indebted to him, the said *A. H. Beach*, in the sum of $*750.00* for rent reserved and due upon contract, for a certain messuage and tenement known as the *Kanawha House* (now the *St. Nicholas*) situate on *Kanawha* street, city of *Charleston*, *Kanawha* county, *W. Va.*,[4] being for the rent from the *9th* day of *May*, 1*874*, to the *9th* day of *November*, 1*874*, and being the same premises now occupied by said *O'Riley*. These are, therefore, to require you [in the name of the State of *West Virginia*,][5] forthwith to distrain so much of the goods and chattels of the said *Philip O'Riley*, in and upon said messuage andt enement, or which have been moved therefrom not more than *thirty* days,[2] as shall be sufficient to satisfy the rents due and in arrears as aforesaid, and the costs of this distress; and for so doing this shall be your authority.

Given under my hand this *19th* day of *October*, 1*874*.

J. T. Brodt, J. P.
Kanawha Co., *W. Va.*

1. *Virginia.* — Code (1887), § 2790.
West Virginia. — Code (1891), c. 93, § 10.
See also Form No. 7727, *infra*.

2. **On What Property Levied.** — The distress may be levied on any goods of the lessee or his assignee or undertenant found on the premises, or which may have been removed therefrom not more than thirty days. Va. Code (1887), § 2791; W. Va. Code (1891), c. 93, § 11.

3. See *supra*, note 1.

4. **Description of Premises.** — A description of the leased premises in a distress warrant as "a certain messuage and tenement situated in the city of *Huntington* in *Cabell* county, *West Virginia*, rented by *The Central Land Company* to *F. J. Calhoun*," was held sufficient. Central Land Co. *v.* Calhoun, 16 W. Va. 362.

5. The words enclosed by [ ] have been inserted to make this warrant conform to the constitution of *West*

c. Inventory.

Form No. 7728.[1]

An inventory of the several goods and chattels of *Richard Roe*, distrained by me, *John Lynch*, on the *twelfth* day of *January*, A. D. 1*898*, in the county of *Cook*, where the said *Richard Roe* resides, by virtue of the warrant and authority, and in behalf of, *John Doe*, landlord, for the sum of *one hundred* dollars, being the amount of rent due to the said landlord on the *first* day of *January*, A. D. 1*898*, for the premises in the warrant mentioned, to wit, the house No. *1152 Washington* street, in the city of *Chicago*, in said county.

(*Here describe the property distrained.*)

John Lynch, Sheriff of *Cook* County.

d. Notice or Summons.[2]

(1) Generally.

Form No. 7729.

(Precedent in Whitton *v.* Milligan, 153 Pa. St. 377.)[3]

Virginia, which requires that all process shall run in the name of the state, it being held in this case that a writ, the caption of which is "State of *West Virginia*, *Kanawha* county, ss: To *A. Carr*, Constable," and which in the body of the writ does not command "in the name of the State of *West Virginia*," is not a writ running in the name of said state as required by the constitution thereof. Beach *v.* O'Riley, 14 W. Va. 56.

1. In some states, the person distraining is required immediately to file, either with a justice of the peace or in the proper court, a copy of the distress warrant, together with an inventory of the property levied upon. See, for example, Starr & C. Anno. Stat. Ill. (1896), c. 80, par. 17; and consult list of statutes cited *supra*, note 1, p. 981.

The inventory should clearly inform the tenant what goods are distrained, but the lessor need not measure or weigh a large amount of goods in a store. Richards *v.* McGrath, 100 Pa. St. 389.

2. When Necessary. — Where the statute does not require any other notice, a seizure of the property in the possession of the tenant is held to be sufficient notice to the owner. Blanchard *v.* Raines, 20 Fla. 467.

Notice is required before a sale can be made in the following states, to wit:

Delaware. — Rev. Stat. (1893), p. 869, § 25, p. 871, § 32.

Georgia. — 2 Code (1895), § 4818.

Illinois. — Starr & C. Anno. Stat. (1896), c. 80, par. 18.

Kentucky. — Stat. (1894), § 2309.

Maryland. — Keller *v.* Weber, 27 Md. 660.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1161, § 10.

Texas. — Rev. Stat. (1895), art. 3247.

Virginia. — Code (1887), § 2795.

West Virginia. — Code (1891), c. 93, § 15.

Omission to give notice does not render the distress unlawful; it is only necessary to warrant a sale of the goods distrained. McKinney *v.* Reader, 6 Watts (Pa.) 40.

To Whom Given. — Notice may be given to the tenant or to the owner of the goods distrained. Caldcleugh *v.* Hollingsworth, 8 W. & S. (Pa.) 302.

Appraisement. — As to when appraisement is necessary, and proceedings therefor, consult the statutes cited *supra*, note 1, p. 981, and also the following cases: Tripp *v.* Grouner, 60 Ill. 474; Curtis *v.* Bradley, 75 Ill. 180; Cahill *v.* Lee, 55 Md. 319; Richards *v.* McGrath, 100 Pa. St. 389; Kerr *v.* Sharp, 14 S. & R. (Pa.) 402.

3. This form of notice was held sufficient. It is also given in Graydon's Pa. F. (1845), p. 403.

[To *Harold Whitton, 1013 Chestnut* st., *Philadelphia, Pa.*][1]

Take notice that by authority and on behalf of your landlord, *William Milligan*, I have this day distrained the several goods and chattels specified in the above schedule on the premises No. *1013 Chestnut* street in said city, for the sum of $*120*, rent due him, the said *William Milligan* as aforesaid, [and if you do not pay the rent so due and in arrear as aforesaid,][1] or replevy the same goods and chattels according to law within *five* days hereafter: I shall, after the expiration of the said *five* days from the date hereof, cause the said goods and chattels to be appraised and sold according to the act of assembly in such case made and provided.

Given under my hand the *2d* day of *February*, 1*888*.

[*William Blackford*, (SEAL)
Constable.][1]

Form No. 7730.[2]

State of *Illinois*, } ss. The People of the State of *Illinois*, to any Con-
Greene County. } stable of said County, Greeting:

Whereas, *John Doe*, has lately distrained the goods and chattels of *Richard Roe* for the sum of *two hundred* dollars, claimed to be due to him for the rent of certain premises leased to the said *Richard Roe*.

We therefore command you to summon the said *Richard Roe* to appear before *Abraham Kent*, one of the justices of the peace of the said county, at his office in *Carrollton* in the said county, on the *nineteenth* day of *January*, A. D. 1*898*, at *ten* o'clock *A.* M., to answer the complaint of the said *John Doe* for a failure to pay him a certain demand, not exceeding *two hundred* dollars, and do you make return hereof, as the law directs.

Given under the hand and seal of the said justice, the *twelfth* day of *January*, A. D. 1*898*.

Abraham Kent, Justice of the Peace. (SEAL)

(2) By Publication.

Form No. 7731.

(Grayd. Pa. F. (1845), p. 406.)[3]

Public notice is hereby given, that by virtue of an order from *Abraham Kent*, one of the justices of the peace in and for the city of *Reading*, will be exposed to public sale on *Friday* the *fifth* day of *November*, at the house of *John Doe*, *53 Walnut* street, in the city aforesaid, the following goods and chattels distrained for rent, as the property of *Richard Roe* of said *Reading*, viz: (*Here insert the articles*).

Due attendance will be given and the terms made known by the said *John Doe*.

John Doe.

1. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 80, par. 18.

Notice to nonresident is same as in attachment. Starr & C. Anno. Stat. Ill. (1896), c. 80, par. 18. For forms see the title ATTACHMENT, ETC., vol. 2, p. 303.

3. See *supra*, note 2, p. 993.

e. Bond.

(1) Of Plaintiff.

Form No. 7732.[1]

John Doe against *Richard Roe.* } No. *213.* In *Justice's* Court, Precinct No. *2*, *Bexar* County.

Know all men by these presents: that we, *John Doe*, as principal, and *Samuel Short* and *William West*, as sureties, do hereby acknowledge ourselves bound to pay to the defendant *Richard Roe* the sum of *one hundred* dollars, conditioned that the above bound *John Doe*, plaintiff, will pay the defendant in this suit such damages as he may sustain in case the distress warrant in this suit has been illegally and unjustly[2] sued out.

Witness our hands, this *fifth* day of *November*, 1897.

John Doe.
Samuel Short.
William West.

Approved:
Abraham Kent, Justice of the Peace,
Precinct No. *2*, *Bexar* Co., *Texas.*

(2) Of Defendant to Retain Property.[3]

Form No. 7733.[4]

(*Caption as in Form No. 7732.*)

Whereas, by virtue of a distress warrant, issued by *Abraham Kent*, justice of the peace in and for precinct No. *2*, of the county of *Bexar*, in favor of *John Doe* against *Richard Roe* for the sum of *one hundred and twenty-five* dollars, bearing date the *fifth* day of *November*, 1897, *William Blackford*, a constable of said county of *Bexar*, did on the *tenth* day of *November*, 1897, seize and take into his possession certain goods and chattels, to wit: (*Here describe the goods seized*), found on the premises now occupied by the said *Richard Roe*, and which property by the said *William Blackford*, constable, has been appraised at

1. *Texas.*— Rev. Stat. (1895), art. 3241. This bond must be filed with the affidavit (see *supra*, Form No. 7712 when application is made for the warrant.

The bond must conform strictly to the statute. Riggins *v.* Ford, 1 Tex. App. Civ. Cas., § 1286.

2. "**Illegally and Unjustly.**" — Both words must be used and the omission of either is fatal. Riggins *v.* Ford, 1 Tex. App. Civ. Cas., § 1286.

3. *Florida.* — Defendant shall give bond payable to plaintiff, with two good and sufficient sureties, to be approved by the officer issuing the writ, conditioned for the payment of the amount of value of the rent which upon trial may be found to be due. Fla. Rev. Stat. (1892), § 1766.

Georgia. — Party distrained may replevy the property by giving security for the eventual condemnation money. 2 Ga. Code (1895), § 4819.

Illinois. — Defendant may release property distrained by entering into bond in double the amount of the rent claimed, and payable to the landlord, with sufficient sureties, to be approved by the person making the levy. Starr & C. Anno. Stat. Ill. (1896), c. 80, par. 26.

Kentucky. — Defendant may have property restored upon giving bond and good security, to be approved by the officer. Ky. Stat. (1894), § 2310.

4. *Texas.* — Rev. Stat. (1895), art. 3244.

two hundred dollars, and has been permitted to remain in the possession of the said *Richard Roe*;

Now, therefore, we, *Richard Roe*, as principal, and *Samuel Short* and *William West*, as sureties, acknowledge ourselves bound to pay to *John Doe*, plaintiff in said attachment, the sum of *one hundred and twenty-five* dollars, conditioned, that if the defendant, *Richard Roe*, is condemned in the above entitled action, he shall satisfy the judgment which may be rendered therein, or shall pay the estimated value of the property, with lawful interest thereon, from the date of this bond.

Witness our hands (*concluding as in Form No. 7732*).

Form No. 7734.

(Precedent in Central Land Co. *v.* Calhoun, 16 W. Va. 363.)[1]

Know all men by these presents, That we, *F. J. Calhoun*, *Thos. H. Harvey* and *W. H. Harvey*, are held and firmly bound unto the *Central Land Company of West Virginia*, their executors, administrators, successors and assigns, in the sum of $*350*, for the payment whereof we bind ourselves jointly and severally, and each of us binds his heirs, executors and administrators. Sealed with our seals and dated this *14th* day of *September*, 1874.

The condition of the foregoing obligation is such, that whereas, the above named the *Central Land Company of West Virginia* has sued out a distress-warrant for rent against the said *F. J. Calhoun* for the sum of $*166.67*, which writ is directed to the sheriff of *Cabell* county, and by virtue thereof the following goods and chattels, to wit: All the household and kitchen furniture now in said tenement, have been taken by the said sheriff to satisfy said distress-warrant, the amount whereof at this time, including sheriff's fees and commission, is $*176.57*, and the said *F. J. Calhoun*, the owner of the goods and chattels so taken, desires the said goods and chattels should be suffered to remain in his possession and at his risk until the day of sale, and has offered to give sufficient security to the sheriff to have the same forthcoming at that time. Now, if the said *F. J. Calhoun* shall have the said goods and chattels forthcoming on the *29th* day of *September*, 1874, at *the front door of the court-house* of said county, it being the day and place of sale appointed by the sheriff, then the above obligation is void, otherwise to remain in full force.

F. J. Calhoun. (SEAL)
Thos. H. Harvey. (SEAL)
W. H. Harvey. (SEAL)

f. Sale of Perishable Property.

(1) Application.

Form No. 7735.[2]

(*Title of court and cause as in Form No. 7732.*)

1. A motion to quash this bond, on the ground that the description of the property named therein was too vague, was properly overruled.

2. *Texas.* — Rev. Stat. (1895), art. 3246. See also Starr & C. Anno. Stat. Ill. (1896), c. 80, par. 27.

To *Abraham Kent*, Esq., Justice of the Peace, Precinct No. *2*, *Bexar* County, *Texas*:

John Doe, plaintiff above named, shows that the property seized by *William Blackford*, constable of said county, by virtue of a warrant of distress issued by *Abraham Kent*, Esq., justice of the peace for said county, on the *fifth* day of *November*, 1897, is of a perishable kind, being *twenty* bushels of wheat, and he prays for an order to sell the same.

November 10, 1897.

John Doe.

(2) Bond.

Form No. 7736.[1]

(*Title of court and cause as in Form No. 7732.*)

Whereas the above named plaintiff, *John Doe*, has applied to *Abraham Kent*, Esq., a justice of the peace in the county of *Bexar*, for an order to sell *twenty* bushels of wheat seized by *William Blackford*, constable, on the *eighth* day of *November*, 1897, under and by virtue of a distress warrant issued by the said *Abraham Kent*, Esq., in favor of the said *John Doe* against *Richard Roe* for the sum of *thirty-five* dollars, bearing date the *fifth* day of *November*, 1897; now, therefore, we, *John Doe* as principal and *Samuel Short* as surety, acknowledge ourselves bound to pay the defendant *Richard Roe* such damages as he may sustain in case such sale be illegal and unjustly[2] applied for, and shall be unlawfully and illegally made.

Witness our hands (*concluding as in Form No. 7732*).

(3) Order.

Form No. 7737.[3]

The State of *Texas*, to the Sheriff or any Constable of *Bexar* County, Greeting:

Whereas, *John Doe* has applied to *Abraham Kent*, justice of the peace, precinct No. *2*, *Bexar* county, *Texas*, for an order to sell certain goods and merchandise, to wit: (*Here describe*), seized on the *tenth* day of *November*, 1897, by *William Blackford*, constable, by virtue of a distress warrant issued by the said *Abraham Kent* in favor of *John Doe* against *Richard Roe* for the sum of *one hundred and twenty-five* dollars, bearing date the *fifth* day of *November*, 1897, and the said *John Doe* having shown that said property is of a perishable kind, and given bond as required by law; now, therefore, you are commanded that you proceed according to law, and sell the above described property, as under execution, and hold the proceeds subject to any judgment that may be rendered in favor of the said *John Doe* against the said *Richard Roe* in said suit.

1. This bond is required by Tex. Rev. Stat. (1895), § 3246, whenever an application for sale is made by a person other than the defendant.

2. See *supra*, note 2, p. 995.

3. *Texas.* — Rev. Stat. (1895), art. 3246. See also Starr & C. Anno. Stat. Ill. (1896), c. 80, par. 27.

Herein fail not, and have you the said moneys, together with this writ, with your return thereon, showing how you have executed the same, before me at my office in *San Antonio*, at a regular term of the *justice's* court for precinct No. *2* in said county, to be held on the *twenty-fifth* day of *November*, 1897.

Witness my official signature, this *twelfth* day of *November*, 1897.

Abraham Kent, Justice of the Peace,
Precinct No. *2*, *Bexar* Co., *Texas*.

2. Action for Wrongful Distress.[1]

a. When No Rent Due.[2]

Form No. 7738.

(Precedent in Fishburne *v.* Engledove, 91 Va. 549.)[3]

In the *Circuit* Court of *Roanoke city*.

To *July* rules (*first Monday*).

A. D. Engledove complains of *T. T. Fishburne*, *R. H. Fishburne*, *John Engleby*, *Joseph T. Engleby*, *J. B. Fishburne*, *J. W. Coon*, *W. K. Andrews* and *W. O. Booker*, who have been summoned to answer said plaintiff in an action of trespass on the case, for this that heretofore, to-wit, on the *12th* day of *March*, 1891, the said plaintiff held, and was in possession of a certain tenement, consisting of the bar-

1. **Precedents.** — For other forms see as follows:

Where Distress is for More Rent than is Due. — Humph. Prec. 790.

Not Selling at Best Prices. — 2 Chit. Pl. (3d. Am. ed.) 341; Humph. Prec. 794.

Removing Distress Without Notice to Tenant. — Humph. Prec. 792; Am. Plead. & Lawy. Guide, p. 351.

Not Removing Goods in Reasonable Time. — 2 Chit. Pl. (3d. Am. ed.) 340.

For Not Leaving Overplus in Hands of Sheriff. — 2 Chit. Pl. (3d. Am. ed.) 342.

For Driving Distress Out of Hundred or County. — 2 Chit. Pl. (3d. Am. ed.) 337; Am. Plead. & Lawy. Guide, p. 344.

For Refusing to Restore Goods After Tender of Rent. — Am. Plead. & Lawy. Guide, p. 347.

For Distraining Beasts of Plow, and the Property or Premises.— Am. Plead. & Lawy. Guide, p. 342.

2. **When No Rent Due.** — It is provided in several states that if any distress and sale be made for rent demanded, when no rent is in arrear, the person upon whose demand such distress is made, or his executors or administrators, shall pay to the owner of the property so distrained or sold, or his executors or administrators, double the value of said property, to be recovered with costs in an action of debt, in which a less sum than that demanded may be recovered.

Delaware. — Rev. Stat. (1893), p. 871, c. 120, § 37.

Kentucky. — Stat. (1894), § 2312.

New Jersey. — Gen. Stat. (1895), p. 1209, § 11.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1162, § 12.

In other states, if property be distrained for any rent not due, the owner of such property may, in an action against the party suing out the warrant of distress, recover damages for the wrongful seizure, and also, if the property be sold, for the sale thereof.

Virginia. — Code (1887), § 2898.

West Virginia. — Code (1891), c. 103, § 3.

3. This declaration is drawn under Va. Code (1887), § 2898. Judgment in favor of the plaintiff was reversed owing to errors in the admission of evidence and because the damages awarded were excessive. See the substance of a similar declaration in Olinger *v.* M'Chesney, 7 Leigh (Va.) 660. See also *supra*, notes 1 and 2.

Precedents. — For other forms see 2 Chit. Pl. (3d. Am. ed.) 333; 8 Went. Pl. 429; 9 Went. Pl. 84; Holland *v.* Bird, 10 Bing. 15, 25 E. C. L. 14; Humph. Prec. 790; Am. Plead. & Lawy. Guide, p. 339.

room and dining-room of the *Exchange* Building, corner of *Jefferson* street and *Salem* avenue, in the city of *Roanoke*, as tenant thereof, and the said defendants contriving and wrongfully and injuriously intending to harass, oppress and injure the plaintiff, on the said *12th* day of *March*, 1*891*, by color of the statute, wrongfully and injuriously seized, took, and distrained divers goods and chattels of the plaintiff of great value, to-wit, of the value of $*975*, for certain rent, to-wit: The sum of $*400* alleged to be due to said defendants on the said *12th* day of *March*, 1*891*, for the rent of said tenement, whereas in truth and in fact at the time of making said distress no rent was in arrear or due to the said defendants for the said tenement, by means whereof the said plaintiff says that he has been obliged to incur and did incur great expense, and was deprived of great gains in his business, and suffered great and heavy losses therein.

And for this, that heretofore, to-wit: on the *12th* day of *March*, 1*891*, the said plaintiff held and was in possession of a certain tenement consisting of the bar-room and dining-room of the *Exchange* Building, corner of *Jefferson* street and *Salem* avenue, in the city of *Roanoke*, as tenant thereof of the said defendants,[1] yet the said defendants, contriving and wrongfully and injuriously intending to harass, oppress and injure the plaintiff on the said *12th* day of *March*, 1*891*, by color of the statute and in the name of the *Exchange Building Company*, wrongfully and injuriously seized, took, distrained and carried away divers goods and chattels of the plaintiff, to-wit: his bar fixtures, consisting of a counter, back bar and mirrors of great value, to-wit: of the value of $*975*, for certain rent, to-wit: the sum of $*400*, alleged to be due to the said defendants on the said *12th* day of *March*, 1*891*, for the rent of the said tenement, whereas, in truth and in fact, at the time of making said distress, no rent was in arrear or due to the said defendants, by means whereof the said plaintiff says that he has been obliged to incur and did incur, great expense, and has been deprived of great gains in his business, and has suffered and sustained great loss therein.

Nevertheless, the said defendants illegally caused said distress to be made and said goods and chattels to be distrained and carried away against the form of the statute[2] in such case made and provided and to the damage of the plaintiff $*10,000*, and therefore he brings his suit.

[*Jeremiah Mason*, p. q.][3]

1. Relation of Landlord and Tenant.— In an action upon the statute for wrongful distress for rent, when no rent is in arrear, the declaration must set forth the relation of landlord and tenant existing between the plaintiff and defendant; and if it does not, the declaration is bad on general demurrer. Jones *v.* Murdaugh, 2 Leigh (Va.) 448. But plaintiff need not state a demise in form, for it is sufficient to say the goods were taken *nomine districtionis*. Salter *v.* Brunsden, 4 Mod. 231.

2. Against Form of Statute.--If the plaintiff seeks to recover double damages for the wrongful seizure of his property, or double the value of his property wrongfully sold, under a distress warrant, he must distinctly declare under the statute; he must recite the statute, or conclude to the damage of the plaintiff, contrary to the form of the statute. Bell *v.* Norris, 79 Ky. 48; Fretton *v.* Karcher, 77 Pa. St. 425.

3. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

b. When Distress is Excessive.[1]

Form No. 7739.

(*Title of court and cause, and commencement as in Form No. 6941*) for that the plaintiff was the tenant of the defendant in a house in the city of *Frederick*, known as No. *146 Washington* street, at a certain rental to be paid by the plaintiff to the defendant; and that the defendant, for certain arrears of the said rent, made a wrongful distraint and sold[2] certain goods belonging to the plaintiff of a much greater value than the arrears of the said rental, together with the charges of the said distraint and of the sale and appraisement thereof, although a part of the said goods was then sufficient in value to have satisfied the said arrears and expenses, and the defendant might then have distrained the said part, and that the defendant did thereby make an excessive and unreasonable distress and sale for the said arrears. And the plaintiff claims (*concluding as in Form No. 6941*).

c. For Selling Too Soon.[3]

Form No. 7740.[4]

(*Caption and commencement as in Form No. 6936*) for that whereas the said *Richard Roe* heretofore, to wit, on the *tenth* day of *April*, A. D. 1897, at *New Castle*, in the county of *New Castle*, seized and took divers goods and chattels, to wit, *one* carriage and *one* driving harness, of the said *John Doe*, of great value, to wit, of the value of *one hundred and fifty* dollars, then found and being in and upon a certain farm, lands and premises, situate in *New Castle* aforesaid, in the county aforesaid,[5] in the name of a distress for certain arrears

1. **Precedents.** — For other forms see 8 Wentw. Pl. 439; Thompson *v.* Wood, 45 Q. B. 493, 45 E. C. L. 493; Am. Plead. & Lawy. Guide, pp. 344, 346.

2. No action will lie in *Maryland* for excessive distress, unless an excessive amount has also been sold. Hamilton *v.* Windolf, 36 Md. 309.

Delaware. — Any person taking an unreasonable distress shall answer in damages to the party injured, to be recovered in an action on the case. Del. Rev. Stat. (1893), p. 869, c. 120, § 24.

Pennsylvania. — If any landlord shall be convicted in any court of record of distraining for or selling more than to the amount of the balance, and of detaining the surplus in his hands, he shall forfeit to the tenant four times the amount so detained. Bright. Pur. Dig. (1894), p. 1162, § 13.

3. **Precedent.** — For another form see 2 Chit. Pl. (3d. Am. ed.) 339; Am. Plead. & Lawy. Guide, p. 351.

4. When a distress is taken for rent justly due, no subsequent irregularity shall make it a trespass or vitiate it, but the party injured by such irregularity may recover the damages sustained on occasion thereof, and no more, in a special action on the case, unless sufficient amends shall have been tendered before the action is brought, in which case there shall be no recovery. Del. Rev. Stat. (1893), p. 871, c. 120, § 38.

Similar provisions exist in the following states, to wit:

Kentucky. — Stat. (1894), § 2308.

New Jersey. — Gen. Stat. (1895), p. 1210, § 12.

Virginia. — Code (1887), § 2794.

West Virginia. — Code (1891), c. 93, § 14.

5. **Description of Premises.** — Where, in an action on the case for an excessive distress, the premises were averred to be in the parish of St. George the Martyr, Bloomsbury, and the proof was that the premises were in the parish of St. George, Bloomsbury, the variance was held to be fatal. Harris *v.* Cook, 2 Moo. 539, 4 E. C. L. 204.

of rent, pretended to be due and payable for the same, to him the said *Richard Roe*,[1] and then and there gave notice thereof to the said *John Doe*; yet the said *Richard Roe*, not regarding the statute in such case made and provided, and contriving, and wrongfully and unjustly intending, to injure the said *John Doe* in this behalf, and to deprive him of his said goods and chattels, and of the use, benefit and advantage thereof, and to prevent him from replevying the same afterwards, and before the expiration of *six* days next after such distress so taken and made, and such notice thereof so given as aforesaid, to wit, within the space of *six* days then next following, to wit, on the *twentieth* day of *April*, A. D. 1897, at *New Castle*, in the county aforesaid, wrongfully, unlawfully and unjustly did sell and dispose of the said goods and chattels, without the leave or license, and against the will of the said *John Doe*, whereby he, the said *John Doe*, was not only hindered and prevented from replevying the said goods and chattels so distrained as aforesaid, but was also deprived of such reasonable and sufficient time as in that respect is allowed by law, for the raising, obtaining and procuring money to pay and discharge the rent so pretended to be due and in arrear as aforesaid, and the costs of the said distress; and the said *John Doe* hath also thereby wholly lost and been deprived of the said goods and chattels, and of the use, benefit and advantage thereof, to wit, at *New Castle* aforesaid, in the county of *New Castle* aforesaid, to the damage (*concluding as in Form No. 6936*).

II. WRONGFUL DISTRESS, DAMAGE FEASANT.[2]

DECLARATION.[3]

Form No. 7741.

(9 Wentw. Pl. 56.)

(*Commencement as in Form No. 6934*) for that he the said *Thomas* heretofore, on the *second* day of *January*, *1790*, at *Portsmouth* in the county of *Hampshire*, with force and arms took and drove away the

1. **To Whom Rent is Due.** — In case for an irregular distress, it is necessary to state correctly to whom the rent distrained for is due, and a variance in this respect is fatal. Ireland *v.* Johnson, 1 Bing. N. Cas. 162, 27 E. C. L. 341.

2. **When Chattels May be Distrained Damage Feasant.** — For cases in which cattle or chattels may be distrained damage feasant see as follows:

Illinois. — Starr & C. Anno. Stat. (1896), c. 54, par. 21.

Iowa. — Code (1897), § 2313 *et seq.*

Maryland. — Pub. Gen. Laws (1888), art. 34, § 6 *et seq.*

Massachusetts. — Pub. Stat. (1882), c. 36, § 27 *et seq.*

Michigan. — How. Anno. Stat. (1882), § 8355.

Nebraska. — Comp. Stat. (1887), § 382 *et seq.*

New Hampshire. — Pub. Stat. (1891), c. 146, § 1.

New Jersey. — Gen. Stat. (1895), p. 1207, § 1 *et seq.*

New York. — Birds. Rev. Stat. (1896), p. 883, § 1 *et seq.*

Rhode Island. — Gen. Laws (1896), c. 129, § 1.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 1631–1636.

3. **For the formal parts** of a declaration in a particular jurisdiction consult the title DECLARATIONS, *ante*, p. 244.

For the form of a declaration for putting goods distrained in an improper place see Humph. Prec. 740.

sow and pigs, to wit, *one* sow and *fourteen* pigs of the said *John* then and there found, and being of a large price and value, to wit, of the price and value of *ten* pounds, and then and there impounded and caused and procured the same to be impounded, and to be kept and detained so there impounded for a long time, to wit, for the space of *twenty-four* hours then next following, and until the said *John* was forced and obliged to pay, and did then and there pay a large sum of money, to wit, the sum of *eighteen* shillings and *three*pence, to have the same redeemed and restored to him: And also for that he the said *Thomas* afterwards, to wit, on the *third* day of *January*, in the year aforesaid, at *Portsmouth* in the county of *Hampshire*, with force and arms seized, took and drove away other the sow and pigs, to wit, *one* other the sow and *fourteen* other pigs of the said *John* there then found, and being of a large price and value, to wit, being of the price and value of *ten* pounds, and kept and detained the same for a long time, to wit, for the space of *twelve* hours then next following, and other wrongs to the said *John* then and there did, against the peace of our lord the now king, and to the damage of the said *John* of *fifty* pounds; and therefore he brings his suit, etc.

PLEA.[1]

Form No. 7742.

(9 Wentw. Pl. 56.)[2]

(*Caption as in Form No. 2524.*)

And the said (*Here follows a plea of not guilty*).[3] And for further plea in this behalf as to the seizing, taking, having, and driving away the said sow and pigs in the first count of this declaration mentioned, and impounding the same, and causing and procuring the same to be impounded, and to be kept and detained so impounded for the said space of time in the said first count in the said declaration mentioned, and until the said *John* was forced and obliged to pay, and did pay a large sum of money, to wit, the said sum of money in the said first count of the said declaration mentioned, to have the same redeemed and restored to him; and also as to the taking, seizing, and driving away the said sow and pigs in the last count of the said declaration mentioned, and keeping and detaining the same for the said space of time in the said last count of the said declaration mentioned, and by the said *Thomas* above supposed to have been done, he the said *Thomas*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says (*actio non*); because he says that the said sow and pigs in the said first count of the said declaration mentioned, and the said sow and pigs in the said last count of the said declaration mentioned, are the same sow and pigs, and not other and different sow and pigs, and that the seizing, taking, and driving away the said

1. **For the formal parts** of a plea in a particular jurisdiction consult the title PLEAS.

2. See also Humph. Prec., p. 979.

3. For the form of the plea of not guilty in trespass see the title TRESPASS.

sow and pigs in the said first count of the said declaration mentioned, and keeping and detaining the same in the said first count of the said declaration mentioned, and the said seizing, taking and driving away the said sow and pigs in the said last count of the said declaration mentioned, and keeping and detaining the same in that count mentioned, are the same seizing, taking, driving away, keeping and detaining the said sow and pigs in the said declaration mentioned; and that the said time when, etc., in the said first count of the said declaration mentioned, and the said time when, etc., in the said last count of the said declaration mentioned, are one and the same time and not other and different times: And the said *Thomas* further says, that he the said *Thomas*, before and at the said time when, etc., was and still is lawfully possessed of a certain close called *Stonege Field*, situate, lying and being in the said parish of *Portsmouth*, in the county of *Hampshire*, and being so thereof possessed, and because the said sow and pigs in the said declaration mentioned at the said time when, etc., were in the said close of the said *Thomas* called *Stonege Field*, eating up, treading, depasturing the barley and grass of the said *Thomas* there then growing and being in the said close of the said *Thomas*, doing damage there to the said *Thomas*, he the said *Thomas*, at the said time when, etc., seized and took the said pigs in the said declaration mentioned, so being in the said close called *Stonege Field*, and doing damage there to the said *Thomas* as aforesaid, for and in the name of a distress for that damage, and gently led and drove away the said sow and pigs in the said declaration mentioned, as he lawfully might, out of the said close of him the said *Thomas* to a certain common open pound in the parish aforesaid, in the county aforesaid, and there impounded the same, and caused and procured the same to be impounded and be kept and detained so there impounded as such distress for the said damage for the said space of time in the said declaration mentioned, and until the said *John* did pay a certain large sum of money, to wit, the sum of *eighteen* shillings and *three*pence, in the said declaration mentioned, as a satisfaction for the damage so done to the said *Thomas* as aforesaid, and in order to have the said sow and pigs in the said declaration mentioned redeemed and restored to the said *John* as aforesaid, which are the said several trespasses in the introduction to this plea mentioned, and whereof the said *John* hath above complained against the said *Thomas*; and this (*concluding as in Form No. 2225*).

III. ACTION FOR RESCUE OF GOODS DISTRAINED.

Form No. 7743.[1]

(*Caption as in Form No. 6942.*)

And the plaintiff says that on the *first* day of *May*, 1*898*, at *Lincoln*, in said county of *Middlesex*, the plaintiff had taken a certain *mare* doing damage then in the lands of the plaintiff, and had impounded

1. *Massachusetts.* — Pub. Stat. (1882), c. 36, § 39. This form is based on the declaration in Oliver's Prec. (2d. ed.) 576.

the said *mare* according to law; and the said defendant, on the said *first* day of *May*, at *Lincoln* aforesaid, with force and arms, broke said pound, and took and led away said *mare* from and out of said pound, to plaintiff's damage (*concluding as in Form No. 6942*).

Form No. 7744.[1]

(*Caption and commencement as in Form No. 6936*) for that whereas heretofore, to wit, on the *first* day of *May*, 1898, at *New Castle* in the county of *New Castle*, the said *John Doe*, by *Samnel Short* his bailiff in that behalf, had taken in a certain close of him the said *John Doe*, situate at *New Castle* aforesaid, certain cattle, to wit, *three* cows, doing damage to him the said *John Doe*, there, and was then and there, by his said bailiff in that behalf, about to impound the said cattle for the cause aforesaid. Yet the said *Richard Roe*, well knowing the premises, but wrongfully and injuriously contriving and intending to injure the said *John Doe* and to deprive him of the benefit of the said distress afterwards, to wit, on the *first* day of *May* aforesaid, at *New Castle* aforesaid, unlawfully, and against the will of the said *John Doe* with force and arms rescued the said cattle, and took the same from the said *Richard Roe* and thereby prevented him the said *Richard Roe* from impounding the same, as he otherwise lawfully might and would have done, to wit, at *New Castle*, aforesaid; by means of which said premises he the said *John Doe* hath been and is greatly injured, and deprived of the said means of obtaining compensation for the damage so done and doing by the said cattle as aforesaid, to wit, at *New Castle* aforesaid, to the damage (*concluding as in Form No. 6936*).

1. If any pound-breach or rescous be made of property distrained, the party injured shall, in a special action on the case, recover double damages and costs against the persons making such pound-breach or rescous, or any of them, or against the owner of the property, if it comes into his possession or use. Del. Rev. Stat. (1893), p. 870, c. 120, § 31.

Similar provisions exist in the following states, to wit:

Kentucky. — Stat. (1894), § 2313.

New Jersey. — Gen. Stat. (1895), p. 1209, § 10.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1162, § 11.

An action under the *New Jersey* statute cannot be maintained unless the goods distrained had been impounded or otherwise secured. Newell *v.* Clark, 46 N. J. L. 363.

Illinois. — Any person who shall take or rescue any animal taken by damage feasant shall be liable to a fine of not less than three or more than five dollars for each animal so rescued, to be recovered on complaint before a justice of the peace of the county where such offense shall be committed, for the use of the school fund of the proper county. Starr & C. Anno. Stat. Ill. (1896), c. 54, par. 21.

DISTRINGAS, WRIT OF.

By Charles E. Harris.

I. To Enforce Judgment or Decree, 1005.
1. *Against Corporation*, 1005.
2. *For Specific Property*, 1005.
II. Distringas Nuper Vicecomitem, 1006.

I. To Enforce Judgment or Decree.

1. Against Corporation.

Form No. 7745.[1]

The State of *Tennesse*,
To the Sheriff of *Davidson* county:

Whereas, a decree was rendered by the *Chancery* Court at *Nashville* in favor of *John Doe* against the *Commercial Bank of Nashville*, for the sum of *one thousand* dollars and costs, and a writ of distringas ordered to issue to enforce said decree; You are, therefore, hereby commanded to distrain the choses in action, goods and chattels, lands and tenements of the said *Commercial Bank* within your county, and the same to keep until the further order of said court, unless said debts and costs are fully paid. Herein fail not, and make return how you have executed this writ at the next term of the said court, to be held at *the court-house* in *Memphis*, on the *fourth Monday* of *December next*.

Witness, *E. B. McHenry*, Clerk, and Master of said Court, the *fourth Monday* of *June*, 1890.

E. B. McHenry, C. & M.

2. For Specific Property.[2]

1. This form of writ is given in Gibson's Suits in Chancery, § 629. The writ is authorized by Tenn. Code (1896), § 4730.

2. A writ of distringas may issue on a judgment for specific property in the following states:

Alabama. — Civ. Code (1886), § 2723.

Mississippi. — Anno. Code (1892), § 3729.

Virginia. — Code (1887), §§ 3581, 3585, 3586.

West Virginia. — Code (1891), c. 140, § 2.

The following form of the writ is given in Grayd. Pa. F. (1845), p. 271:

"The Commonwealth * * * to the Sheriff * * * Greeting:

We command you that you distrain *Richard Roe* by all his lands and tenements in your bailiwick, so that neither he, nor any one for him, on them do lay their hands until you shall have other command from us. And that of the issues thereof you answer to us, so that you have his body before our justices, * * * to deliver unto *John Doe* a certain box with charters, etc., to wit: one

Form No. 7746.[1]

The *Commonwealth* of *Virginia*, to the sheriff of *Henrico* county, greeting: We command you that you distrain *Richard Roe*, by all his lands and chattels[2] in your bailiwick, so that neither he nor any one through him lay hands on the same until you shall have another command from us in that behalf, and that you answer to us for the issue of the same, so that he render to *John Doe two* bay mares[3] of the price of *one hundred* dollars each, which the said *John Doe* lately in our *Circuit* Court of *Henrico* county hath recovered against the said *Richard Roe*, if the said bay mares may be had, but if not, then the prices aforesaid of them, or of such of them as may not be had; whereof the said *Richard Roe* is convict as appears of record. And in what manner you shall have executed this our command, make known to us in our said court immediately after the execution thereof.

Witness, *Calvin Clark*, clerk of the *Circuit* Court of *Henrico* county, at *the court-house*, the *tenth* day of *February*, 1*896*, and in the *one hundred and twentieth* year of the *Commonwealth*.

(SEAL) *Calvin Clark*, Clerk.

II. DISTRINGAS NUPER VICECOMITEM.[4]

Form No. 7747.

(Grayd. Pa. F. (1845), p. 272.)[5]

The Commonwealth of *Pennsylvania*, to the Sheriff of the *City and* County of *Philadelphia*, Greeting:

charter by which * * * which said box, with the said charters, above specified in the same box contained, the aforesaid *John Doe* in our said court before our justices at ——— recovered against the said *Richard Roe*. And wherefore it is considered in our same court that the aforesaid *John Doe* do recover against the said *Richard Roe ten* pounds, in case that the box aforesaid with the charters aforesaid he can have; and if the same *Richard Roe*, the box aforesaid, with the charters aforesaid, cannot render, then that the same *John Doe* shall recover against the aforesaid *Richard Roe* for the same box and charters *twenty* pounds, and also ——— for the costs and charges of him, the said *John Doe*, by him in and about his suit in his behalf expended, whereof he is convict," etc.

1. *Virginia*. — Code (1897), § 3581. And see statutes cited *supra*, note 2, p. 1005.

2. **On What Property Levied.** — The sheriff, on a distringas, cannot distrain the very property to recover which process issued, nor can he seize and sell it to pay the damages mentioned. Jordan *v.* Williams, 3 Rand. (Va.) 501.

3. **How Distringas May be Superseded and Executed for Value.** — In *Virginia*, if a distringas issue, the court, on the motion of either party, may order it to be superseded as to the specific thing, and to be executed in lieu thereof for the alternative value. Such value, if not fixed in the judgment, may be ascertained by the jury to be forthwith impaneled. Va. Code (1887), § 3586; see also Garland *v.* Bugg, 5 Munf. (Va.) 166.

4. **Distringas Nuper Vicecomitem.** — This writ lies where a writ of fieri facias has been sued out and the sheriff, after returning that he has levied but that the goods remain in his hands for want of buyers, goes out of office. It is directed to the present sheriff commanding him to distrain the late sheriff to compel him to sell the goods. Arch. Pr. 585.

Distringas Vicecomitem. — This writ is directed to the coroner, and may be issued against the sheriff if he neglects to execute a writ of venditioni exponas. Arch. Pr. 584. It lies in *Pennsylvania*. Zane *v.* Cowperthwaite, 1 Dall. (Pa.) 312; Bright. Pur. Dig. Pa. (1894), p. 1914, § 19.

5. See Bright. Pur. Dig. Pa. (1894), p. 1914, § 19.

We command you that you distrain *Simon Stevenson*, Esq., late High Sheriff of the *city and* county of *Philadelphia*, by all his lands and chattels in your bailiwick, so that neither he, nor any one through him, may lay hands on the same, until you shall receive another command therefor. And that you answer to us of the issues of the same, so that he may expose to sale the goods and chattels which were of *Richard Roe*, late of his county, *yeoman*, to the value of *one hundred* dollars, which to *John Doe* lately, in our County Court *of Common Pleas*, before our justices at *Philadelphia*, were adjudged for his damages which he sustained, as well by occasion of the non-performance of a certain promise and assumption by the said *Richard Roe* to the said *John Doe* at your county made, as for his costs and charges by him about his suit in this behalf expended, whereof he was convict, as appears of record, and which, by virtue of a writ from us for that purpose, to him directed, he took, and for want of buyers remains unsold, as the said sheriff to our justices at *Philadelphia*, on the *first* day of *November last past*, returned. And have you the moneys so made before said justices at *Philadelphia*, at our County Court *of Common Pleas*, there to be held the *twenty-seventh* day of *December next*, to satisfy the said *John Doe* for his damages aforesaid, and have you then there this writing.

Witness: The Honorable *John Marshall*, president judge of our said court, at *Philadelphia*, the *fifteenth* day of *November*, in the year of our Lord one thousand eight hundred and *fifty-six*.

Peter Parley, Prothonotary.

DISTURBING MEETINGS.

By Briscoe B. Clark.

I. In General, 1008.

II. Business Meetings, 1011.

III. Religious Meetings, 1012.

1. *Generally*, 1012.
2. *Other than Regular Meetings*, 1013.
3. *Regular Meetings*, 1014.
   a. *At Church*, 1014.
      (1) *Generally*, 1014.
      (2) *By Assaulting a Member of Congregation*, 1018.
      (3) *Within Certain Distance*, 1018.
   b. *Salvation Army*, 1018.

IV. School Meetings, 1019.

V. Women's Meetings, 1020.

I. In General.[1]

1. Requisites of Indictment, etc. — Generally. — For the formal parts of an indictment, information or criminal complaint in a particular jurisdiction consult the titles Indictments; Informations; Criminal Complaints; vol. 5, p. 930.

For statutory provisions against the disturbance of meetings see the following statutes:

Alabama. — Crim. Code (1886), §§ 4032–4034.

Arizona. — Pen. Code (1887), §§ 83, 507, 647.

Arkansas. — Sand. & H. Dig. (1894), § 1541.

California. — Pen. Code (1897), §§ 58, 59.

Colorado. — Mills' Anno. Stat. (1891), §§ 1371, 1372.

Connecticut. — Gen. Stat. (1888), §§ 1506, 1520.

Idaho. — Rev. Stat. (1887), § 6820.

Indiana. — Horner's Stat. (1896), § 1988.

Iowa. — Code (1897), § 4959.

Kansas. — Gen. Stat. (1897), c. 100, § 318.

Kentucky. — Stat. (1894), § 1267.

Louisiana. — Rev. Laws (1897), § 929.

Massachusetts. — Pub. Stat. (1882), c. 207, §§ 21–24.

Michigan. — How. Anno. Stat. (Supp. 1890), §§ 9295, 9300.

Minnesota. — Stat. (1894), §§ 6521, 6522, 6968.

Mississippi. — Anno. Code (1892), §§ 1032–1035, 1043.

Missouri. — Rev. Stat. (1889), § 3785.

Montana. — Pen. Code (1895), §§ 79, 161, 533, 740.

Nevada. — Gen. Stat. (1885), §§ 4670, 4671.

New Hampshire. — Pub. Stat. (1891), c. 271, §§ 6–9.

New York. — Birds. Rev. Stat. (1896), p. 888, § 1 *et seq.*

Ohio. — Bates' Anno. Stat. (1897), §§ 6896, 7040.

Oklahoma. — Stat. (1893), §§ 1890, 1891.

Oregon. — Hill's Anno. Laws (1892), §§ 1888, 1889.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1166, § 168.

Rhode Island. — Gen. Laws (1896), c. 38, § 12; c. 278, § 7.

South Carolina. — Crim. Stat. (1893), § 390.

Tennessee — Code (1896), §§ 6776, 6778, 6779.

Utah. — Rev. Stat. (1898), §§ 4236, 4300.

Vermont. — Stat. (1894), § 5044, 5045, 5049.

Virginia. — Code (1887), §§ 3805–3807.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7076.

West Virginia. — Code (1891), c. 149, § 18 *et seq.*

Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 4572, 4597, 4598.

Wyoming. — Rev. Stat. (1887), § 1032.

Use of Certain Words — *Wilfully.* — The indictment should allege that the disturbance was wilful. Brown *v.* State, 46 Ala. 175; Harrison *v.* State, 37 Ala. 154; State *v.* Stroud, 99 Iowa 16; State *v.* Townsell, 3 Heisk. (Tenn.) 6. But in State *v.* Stuth, 11 Wash. 424, it was held that the information need not expressly allege that the disturbance was wilful, where the facts alleged show that it was such.

Wilfully, Maliciously, Contemptuously. — Under the *Missouri* statute, the indictment must allege that the disturbance was either wilful, malicious or contemptuous. State *v.* Jones, 53 Mo. 486; State *v.* Hopper, 27 Mo. 599; State *v.* Bankhead, 25 Mo. 558. But either word alone is sufficient. State *v.* Karnes, 51 Mo. App. 293.

Mode of Disturbance — *Generally.* — The mode of disturbance should, in general, be alleged. State *v.* Hinson, 31 Ark. 638; Stratton *v.* State, 13 Ark. 688; State *v.* Minyard, 12 Ark. 156; State *v.* Butcher, 79 Iowa 110; Conerly *v.* State, 66 Miss. 96; Thompson *v.* State, 16 Tex. App. 159. And while an indictment merely alleging that defendant "did maliciously and unlawfully interrupt, molest and disturb a religious meeting," etc., without alleging the manner of the disturbance, was held insufficient to support a conviction. Jones *v.* State, 28 Neb. 495. It has also been held that failure to do so will not render the indictment subject to general demurrer. Hicks *v.* State, 60 Ga. 464. Or to quash on motion. State *v.* Stubblefield, 32 Mo. 563. See also Kindred *v.* State, 33 Tex. 67, wherein it was held that an indictment alleging that defendant "in the county aforesaid, at the church in *H.*, unlawfully and wilfully did disturb a congregation then and there assembled for religious worship, and conducting themselves in a lawful manner, contrary to the form of the statute," etc., sufficiently alleged the acts of disturbance.

By Actions. — If the disturbance is by action, the better practice is said to be to allege in general terms, without alleging the details, the general character of the disturbing acts State *v.* Hinson, 31 Ark. 638.

In State *v.* Bledsoe, 47 Ark. 233, the offense was sufficiently charged in the following language: "Unlawfully, maliciously and contemptuously did disturb and disquiet a congregation assembled at *Dunkard Church*, in said county, for religious worship, by talking and laughing, and by taking a lady's hat and placing it under him, as if he was then and there using the same as a chamber-pot; against the peace," etc.

An indictment describes sufficiently the mode of interruption or disturbance which charges that the offense was committed "by cursing and quarrelling and fighting and discharging a loaded pistol, and by boisterous conduct, and by otherwise indecently acting;" and under such indictment evidence is admissible which tends to establish the charge. Huffman *v.* State, 95 Ga. 469.

In Smith *v.* State, 67 Miss. 116, the offense was sufficiently charged in the words following: "did wilfully and unlawfully disturb the peace of a congregation assembled lawfully at *New Hope church* for religious worship, by striking and offering to fight *Robert Jennings*, and saying 'G——d d—— clan of hell,' and other offensive conduct and language to the jury unknown."

An indictment alleging that defendant disturbed the meeting by "assaulting one *H.*, a person then and there being," sufficiently alleges the manner of disturbance. State *v.* Karnes, 51 Mo. App. 293.

By Talking. — Words spoken need not be alleged. State *v.* Hinson, 31 Ark. 638; State *v.* Horn, 19 Ark. 579; State *v.* Ratliff, 10 Ark. 530.

By Sale of Articles. — Under Tenn. Code, § 4854, prohibiting the sale of any "article of traffic" within a specified distance of a religious meeting, an indictment need only specify the article sold in the words of the statute. Riggs *v.* State, 7 Lea (Tenn.) 475.

Duplicity. — Alleging several acts of disturbance will not render the indictment invalid for duplicity. State *v.* Stubblefield, 32 Mo. 563. Thus an indictment for disturbing religious worship "by talking and laughing," and

by indecent jests, is not bad for duplicity. It charges but one offense, and the words "by talking and laughing" are mere surplusage. State *v.* Bledsoe, 47 Ark. 233. And an indictment charging that the defendant, "being present at and when a religious society was convened and met together for the worship of Almighty God, did then and there interrupt, molest, and disturb said society and meeting, and the individual members thereof, by then and there in a loud, insulting, and boisterous manner talking," etc., is not defective as charging two distinct offenses in that it charges a disturbance of the society and also a disturbance of the individual members. State *v.* Ringer, 6 Blackf. (Ind.) 110.

In Com. *v.* Symonds, 2 Mass. 163, however, it was held that an indictment under section 7 of the Massachusetts act of March 8, 1792, punishing anyone behaving rudely and indecently on the Lord's Day in any house of public worship, and section 8 punishing any one disturbing a religious meeting, alleging that defendant did on the Lord's Day behave indecently and rudely in a certain house of public worship, and did interrupt the persons there assembled, was bad for duplicity.

Persons Disturbed. — Allegations as to the persons disturbed need not be made, and a failure to prove that all the persons whose names are given were disturbed is no variance. Hull *v.* State, 120 Ind. 153.

Locality of Disturbance. — Under Tenn. Code (1896), § 6776, prohibiting the disturbance of assemblages met for religious worship, by noises, etc., "at or near" the place of worship, it is not necessary to allege that the noises, etc., by which defendant was charged with having disturbed the meeting were made "at or near" the place of worship. Warren *v.* State, 3 Heisk. (Tenn.) 269, *overruling* Keith *v.* State, 5 Coldw. (Tenn.) 35.

Place of Worship — *Generally.* — The place of worship must be alleged and proved as alleged. Stratton *v.* State, 13 Ark. 688. But see State *v.* Smith, 5 Harr. (Del.) 490. And should be described with sufficient definiteness to establish its identity. State *v.* Kindrick, 21 Mo. App. 507. And where the statute prohibits the disturbance of assemblies for public worship at certain enumerated places, the indictment must allege that the meeting was held at one of the enumerated places. State *v.* McClure, 13 Tex. 23. Thus, in *Missouri*, an allegation that the place of disturbance was set apart for religious worship is necessary. State *v.* Kindrick, 21 Mo. App. 507. See also State *v.* Schieneman, 64 Mo. 386.

Name of Society Disturbed. — An indictment need not state the name of the society disturbed. State *v.* Ringer, 6 Blackf. (Ind.) 110. Sullivan, J., delivering the opinion of the court, said: "The second objection is equally untenable. It is not necessary to the existence of a society convened for public worship that it should be known by any distinctive or sectarian name. Men of different creeds may meet together to unite in public worship, and when so convened they form a society to which the statute extends its protection."

Sufficiency of Allegation. — In State *v.* Karnes, 51 Mo. App. 293, an indictment alleging that the defendant "did unlawfully and wilfully disquiet and disturb a congregation of persons met for religious worship within the place of meeting, to wit, at the *Methodist Episcopal church*, in the town of *Centralia*, in *Boone* county, *Missouri*, by then and there wilfully menacing, threatening, assaulting one *Henry W. Sageser*, a person then and there being," etc., sufficiently alleges that the congregation was met at a place set apart for religious worship.

See also Corley *v.* State, 3 Tex. App. 412; State *v.* Yarborough, 19 Tex. 161.

Insufficient Allegations. — An indictment for disturbing a meeting "engaged in religious worship" is not sufficient as an indictment for disturbing a meeting "assembled for religious worship." State *v.* Bryson, 82 N. Car. 576. But in State *v.* Yarborough, 19 Tex. 161, it was held sufficient to charge that the congregation was assembled for religious worship without charging that the congregation was engaged at the time in any religious service or ceremony, or had commenced such service or ceremony at the time of the disturbance.

An indictment charging defendant with disturbing a "religious assembly, commonly called a quarterly meeting conference," does not sufficiently allege that the meeting was a religious meeting. State *v.* Fisher, 3 Ired. L. (25 N. Car.) 111.

Form No. 7748.[1]

In the *Sullivan Circuit* Court of *Indiana* of the *February* term, 1896.

State of Indiana
against
Benjamin Howard and William Howard.

The grand jury of the county of *Sullivan*, upon their oath present, that on or about the *first* day of *January*, in the year 1896, at the county of *Sullivan* and state of *Indiana*, *Benjamin Howard* and *William Howard*, late of said county,* did then and there, by loud and unnecessary talking, abusive, profane and obscene language, by threatenings and violent actions, and other rude behavior, interrupt, molest and disturb a meeting of inhabitants of *Sullivan* county and state of *Indiana*, and of persons present thereat, and met together, then and there, for a lawful purpose,[2] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Indiana*.

Daniel Webster, Prosecuting Attorney.

II. BUSINESS MEETINGS.[3]

Form No. 7749.

(Precedent in Kidder *v.* State, 58 Ind. 69.)[4]

An information alleging that "in the county of *Sloane*, State of *Missouri*, *Richard Fugitt* and *George Garroutte* did unlawfully disturb," etc., a congregation of people met for religious worship, does not sufficiently allege the place of worship. State *v.* Fugitt, 66 Mo. App. 625.

The use of the word "congration" instead of "congregation" is a fatal defect. State *v.* Mitchell, 25 Mo. 420.

Other than Religious Meeting. — An indictment under the *Indiana* statute for disturbing a meeting other than those mentioned in the act must allege that the meeting was lawful. A description of the meeting as "a certain collection of divers inhabitants of the state of *Indiana*, met together as a singing school," is insufficient. State *v.* Zimmerman, 53 Ind. 360. And the indictment should also allege that the meeting was a collection of the inhabitants of the state, when the statute so describes the meeting. Cooper *v.* State, 75 Ind. 62. The indictment, however, need not allege the purpose of the meeting. Howard *v.* State, 87 Ind. 68.

1. This indictment is based on the affidavit in the case of Howard *v.* State, 87 Ind. 68, drawn under Ind. Rev. Stat. (1881), § 1988 (Horner's Stat. (1896), § 1998). The objection was made to the affidavit that it did not state the purpose for which the meeting was assembled, so as to enable the court to determine whether the purpose was lawful or not. The court, in overruling this objection, said that two distinct offenses were defined by the statute: one the disturbance of meetings for the particularly specified purposes, and the other the disturbance of any lawful meeting, and held that an allegation merely that the meeting was for a lawful purpose was sufficient to charge the latter offense. See also *supra*, note 1, p. 1008.

2. **For a Lawful Purpose.** — An indictment for disturbing a meeting other than those specifically mentioned in the statute must allege that the meeting was held for a lawful purpose. Thus an indictment alleging the disturbance of an assembly met together "as a singing school" was held bad for failure to allege that the purpose of the meeting was lawful, as an assembly met as a singing school might be for an indecent purpose, such as the singing of bawdy songs. State *v.* Zimmerman, 53 Ind. 360.

3. **Disturbing Town Meeting.** — For substance of an indictment for disturbing a town meeting, which was held to charge sufficiently an offense at common law, see Com. *v.* Hoxey. 16 Mass. 385.

4. On motion to quash, this indictment was held sufficient under Ind.

[(*Commencing as in Form No. 7748, and continuing down to* *)][1] unlawfully interrupted, molested and disturbed a certain collection of divers inhabitants of the State of *Indiana*, then and there met together for a lawful purpose, to wit, to transact certain business, and make investigation of matters pertaining to the business, of the *Methodist Episcopal Church* at *Zoar*, in said county, by then and there unlawfully talking in a loud and boisterous manner, and charging said meeting with being a mob, and using violent and abusive language, and causing great tumult among the people there assembled, and abusing the minister in charge and the presiding elder who was president of said meeting, [contrary to (*concluding as in Form No. 7748*).][1]

III. RELIGIOUS MEETINGS.[2]

1. Generally.

Form No. 7750.

(Ala. Crim. Code (1886), § 4899, No. 37.)[3]

The State of *Alabama*, } *Circuit* court, *April* term, 1897.
County of *Dale*. }

The grand jury of said county charge that, before the finding of this indictment,* *John Doe* wilfully interrupted or disturbed an assemblage of people met for religious worship, by noise, profane discourse, or rude and indecent behavior, at or near the place of worship (or *by fighting at or near the place of worship*), against the peace and dignity of the State of *Alabama*.

Daniel Webster, Solicitor for the *third* circuit.

Rev. Stat. (1876), p, 472. For the present statute in *Indiana* see Horner's Stat. Ind. (1896), § 1988. See also *supra*, note 1, p. 1008.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. Sufficient Indictments. — In Taffe *v.* State, 90 Ga. 459, an indictment alleging the disturbance to have been caused "by talking, and by loud talking, and by using profane language, and by using obscene language, and by then and there being intoxicated, and by otherwise indecently acting, striking matches, smoking pipe, making indecent and vulgar noises by laughing aloud," was held sufficient.

In Bush *v.* State, 5 Tex. App. 64, the indictment, which was held sufficient under Gen. Laws 13th Assemb., p. 43, charged "that heretofore, to wit, on the *1st* day of *December*, A. D. 1876, in the county of *Hamilton*, and State of *Texas*, *Walker Bush* and *C. C. Prater* did wilfully disturb a congregation assembled for religious worship, and conducting themselves in a lawful manner, by loud and vociferous talking and quarrelling."

And in Lockett *v.* State, 40 Tex. 4, an indictment alleging "that on the *thirtieth* day of *December*, A. D. 1872, in the county of *Bowie*, in said State of *Texas*, with force and arms, one *Abner Lockett* did by loud and vociferous talking and swearing, at a church known as and called *Sandy Grove*, wilfully disturb a congregation thereat assembled for religious worship, and conducting themselves in a lawful manner," was held good either under Tex. Crim. Code, art. 284, as it stood when the indictment was drawn, or under the statute cited just *supra*.

3. *Alabama.* — Crim. Code (1886), § 4033.

Sufficient Indictment. — In Harrison *v.* State, 37 Ala. 154, an indictment alleging that defendant "wilfully interrupted or disturbed an assemblage of people met for religious worship, by noise, profane discourse, rude and indecent behavior, or by fighting, at or near the place of worship," was held sufficient.

Form No. 7751.

(W. Va. Code (1891), c. 149, § 18.)

State of *West Virginia*, *Jefferson* county, to wit:

The grand jurors of the State of *West Virginia*, in and for the body of the county of *Jefferson*, on their oaths present that *Frank Foe*, on the *first* day of *January*, eighteen hundred and *ninety-seven*, in the county aforesaid, did wilfully interrupt, molest and disturb an assembly of the people then and there met for the worship of God, against the peace and dignity of the State.

2. Other than Regular Meetings.

Form No. 7752.

(Precedent in State *v.* Swink, 4 Dev. & B. L. (20 N. Car.) 358.)[1]

[*North Carolina*, } *Superior* Court *of Law*,
Rowan County. } *Fall* Term, 1*839*.][2]

The jurors for the State upon their oath present, that on the *twelfth* day of *August*, 1*839*, in the county of *Rowan* aforesaid, a number of the citizens of said county were peaceably assembled at the house of *Joseph Weant*, in said county, for religious worship, and for the purpose of offering prayers to Almighty God: and the said persons being then and there so assembled together for the purpose aforesaid, and actually engaged in divine worship, *Peter R. Swink* and *Johnson E. Swink*, well knowing the purpose of the said meeting, with force and arms, did then and there enter into said house, and by loud and abusive language, then and there, with profane oaths and violent actions, did disturb wantonly and intentionally the worship of the Almighty, and did disturb and molest the citizens then and there assembled for divine worship, to the great contempt of religion, to the common nuisance of the citizens of the State then and there being, and against the peace and dignity of the State.

[*Robert M. Saunders*, Solicitor.][2]

1. In this case the court held that the disturbance of a religious meeting, whether assembled at a public place of worship or at a private house, was a common-law offense. See also *supra*, note 1, p. 1008.

Precedent. — See also an indictment for disturbance of a congregation by profane swearing, in State *v.* Ratliff, 10 Ark. 530, in which case the court overruled a motion to quash based on the failure to allege the particular language used by the defendant. The indictment charged that defendant "with force and arms, at the town of *Smithville*, in the county of *Lawrence*, did contemptuously disturb a certain congregation of people, then and there assembled, in a certain house called *the court-house* (the said house not being a church) for religious worship, by then and there contemptuously and profanely swearing in the presence and hearing of said congregation so assembled for religious worship as aforesaid, and while said congregation were engaged in religious worship; to the evil example of all others in like case offending, contrary to the form of the statute," etc.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. Regular Meetings.

a. At Church.

(1) Generally.[1]

Form No. 7753.

(Precedent in State *v.* Hinson, 31 Ark. 638.)[2]

[*Faulkner Circuit* Court.

State of Arkansas against *Lucius Hinson.* } Indictment.][3]

The Grand Jury of *Faulkner* County, in the name and by the authority of the State [of *Arkansas*][3] accuse *Lucius Hinson* of the crime of disturbing a religious congregation committed as follows, viz: The said *Lucius Hinson*, on the *13th* day of *August*, A. D. 1876, in the county and State aforesaid, said day being the Sabbath day, unlawfully and contemptuously did disturb the congregation then and there assembled for religious worship in *Cypress Valley Church*, by acting and talking in a manner that was calculated to disturb, insult and interrupt said congregation. Such acting and talking being in the presence and hearing of said congregation, then and there assembled for religious worship, against the peace [and dignity of the state of *Arkansas.*

Daniel Webster, Prosecuting Attorney.][3]

1. Precedent. — In U. S. *v.* Brooks, 4 Cranch (C. C.) 427, the indictment, which was held to charge an offense at common law, charged that defendant "with force and arms unlawfully and irreverently did disturb and hinder the congregation of the *African meeting-house* in *Washington* county aforesaid, then and there in the said house assembled for, and engaged in, the worship of God, by cursing and swearing, and loud and profane talking and noise in and near the said meeting-house, and in the hearing of, and to the disturbance of, the said people then and there assembled for the purpose aforesaid, to the disturbance of the public peace, and against the peace of the government of the United States."

2. This indictment was drawn under Gantt's Dig., § 1624 (Sand. & H. Dig. Ark. (1894), § 1541). The indictment was good, the court holding that it was unnecessary to allege the character of the language or the words spoken. See also *supra*, note 1, p. 1008.

Precedent. — In State *v.* Horn, 19 Ark. 578, the indictment charged a disturbance by "profanely swearing and by talking and laughing aloud." It was held that this indictment was not bad for duplicity, the latter words being mere surplusage. The indictment charged that defendant "did, contemptuously, disturb a certain congregation of people then and there assembled, in a certain house known and called *Steep Bank Church*, for religious worship, by then and there contemptuously and profanely swearing and by talking and laughing aloud in the presence and hearing of the said congregation so assembled for religious worship, as aforesaid, and while said congregation was engaged in religious worship, to the evil example of all others in like cases offending, contrary to the form of the statute," etc.

3. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

Form No. 7754.

(Precedent in State *v.* Stubblefield, 32 Mo. 563.)[1]

[State of *Missouri*, County of *Christian.* } ss. In the *Christian Circuit* Court. *September* Term, A. D. 1860.][2]

The grand jurors [for the state of *Missouri*, impaneled, sworn, and charged to inquire within and for the body of the county of *Christian* and state of *Missouri*, upon their oath][2]* present that *Young Stubblefield* and *Martin Edwards*, both late of the county aforesaid, on the *first* day of *January*, in the year 1860, with force and arms, in the county aforesaid, did then and there wrongfully, maliciously and contemptuously[3] disquiet and disturb a certain congregation[4] and assembly of people met for religious worship [in the *Methodist Episcopal Church* in *Ozark*, in said county, a place set apart for religious worship][5] by making a noise, by rude behavior, by indecent behavior, and by profane discourse, within their place of worship, and so near to the same as to disturb the order and solemnity of the meeting, and did then and there wilfully, maliciously and contentiously menace, threaten and assault divers persons then and there being, contrary [to the form of the statute made and provided, and against the peace and dignity of the state.

Daniel Webster, Prosecuting Attorney.][2]

Form No. 7755.

(Precedent in Jones *v.* State, 28 Neb. 496.)[6]

[*The State of Nebraska* against *Owen Jones and Owen Parry.*] } Complaint for Disturbing Religious Meeting.

1. This indictment was drawn under 1 Mo. Rev. Code (1855), p. 630, § 30 (Mo. Rev. Stat. (1889), § 3785), and charged the offense in the words of the statute. It was objected that the indictment was bad for duplicity, but the court held the indictment sufficient, stating that the different acts charged to have been committed by the defendant constituted but the one offense of disturbing religious worship. See also *supra*, note 1, p. 1008.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to make the form complete.

3. **Wilfully, Maliciously, Contemptuously.**—The indictment must charge the disturbance to have been made "wilfully, maliciously, or contemptuously." State *v.* Jones, 53 Mo. 486; State *v.* Hopper, 27 Mo. 599; State *v.* Bankhead, 25 Mo. 558. But either word alone is sufficient. State *v.* Karnes, 51 Mo. App. 293.

4. **"Congration."**—In State *v.* Mitchell, 25 Mo. 420, an indictment charging the disturbance of a "congration" of people met for religious worship was held bad as an indictment for disturbing a "congregation" of people met for religious worship. Scott, J., said that "the letters composing 'congration' do not make an abbreviation commonly used in our language, nor do they make an abbreviation which is commonly used for the word 'congregation.' If 'congration' is not an abbreviation, then it is no word at all known in our language."

5. The allegation enclosed by [ ] has been added to cure the objections raised in State *v.* Kindrick, 21 Mo. App. 507, wherein it was held, following State *v.* Schieneman, 64 Mo. 386, 387, that the indictment should allege that the place of meeting was set apart for religious worship, and that it should describe the place of meeting. This case was also followed in State *v.* Fugitt, 66 Mo. App. 625. See further State *v.* Karnes, 51 Mo. App. 293.

6. This form was held to be sufficient to sustain a conviction. See also *supra*, note 1, p. 1008.

The State of *Nebraska*, } ss.][1]
County of *Gage*. }

The complaint and information of *David Edwards*, made before *Richard Whitten*, one of the justices of the peace in and for *Gage* county, *Nebraska*, who being first duly sworn, on his oath says that *Owen Jones* and *Owen Parry*, late of said county, at and within said county on the *11th* day of *December*, A. D. 1887, and on divers other Sundays before said date, did wilfully, maliciously, and unlawfully interrupt, molest, and disturb a religious society, to-wit, "*The Welsh Presbyterian church*," and the members thereof, which said members were met to perform the duties enjoined upon them and appertaining to them as members of said religious society, the said *Owen Jones* and *Owen Parry* not then and there being members of said religious society, having no right to be present at said meeting.

He therefore prays that the said *Owen Jones* and *Owen Parry* may be arrested and dealt with according to law.

David Edwards.

Subscribed in my presence and sworn to before me this *12th* day of *December*, 1887.

Richard Whitten. Justice of the Peace.

Form No. 7756.

(Precedent in People *v.* Degey, 2 Wheel. Cr. Cas. (N. Y. Gen. Sess.) 135.)[2]

[Court *of General Sessions* of the *City and* County of *New York*.
The People of the State of New York }
against } Indictment.][1]
John Degey. }

City and County of *New York*, ss. — The jurors of the people of the state of *New York*, in and for the body of the *city and* county of *New York*, upon their oath present, that *John Degey*, late of the *first* ward of the city of *New York*, in the county of *New York* aforesaid, *laborer*, on the *26th* day of *October*, in the year of our Lord one thousand eight hundred and *twenty-three*, being Sunday, with force and arms, at the *eighth* ward of the city of *New York*, in the county of *New York* aforesaid, in the *Ebenezer Baptist Church*, there, during the celebration of divine service, unlawfully, unjustly, and irreverently did disturb and hinder one *Jonathan Vanvelser*, then being the minister officiating in the said church, and then being in the discharge of his sacred functions, and in the performance of divine service, in contempt of the laws of this state, to the evil example of all others in like cases offending, and against the peace of the people of the state of *New York*, and their dignity.

[*Hugh Maxwell*,
District Attorney of the *City and* County of *New York*.][1]

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. This case was followed in People *v.* Crowley, 23 Hun (N. Y.) 412, and the validity of a similar indictment affirmed. See also *supra*, note 1, p. 1008.

Form No. 7757.

(Precedent in State *v.* Jasper, 4 Dev. L. (15 N. Car.) 323.)[1]

State of *N. Carolina*, } *Superior* Court *of Law*,
Franklin County. } *Spring* Term, 1833.

The jurors for the State upon their oaths present, that *Henry N. Jasper*, late of the county of *Franklin*, aforesaid, on the *third* day of *March*, (the said *third* day being the Sabbath day), in the year one thousand eight hundred and *thirty-three*, and during other days and times, both before and after the day aforesaid, being a person regardless of the duties and solemnities of the public worship of God, and of the due observation of the Lord's day at a certain *Baptist* meeting house, commonly called "*Haywood's meeting house*" in the county aforesaid, did wilfully interrupt and disturb a certain assembly of people there met for the public worship of God, within the place of their assembly, to wit, within the meeting house aforesaid, in the county aforesaid, on the *third* day of *March* aforesaid, the same being on the Sabbath day in the year last aforesaid, and on the said other days and times, by then and there talking and laughing in a loud voice, and by then and there making divers ridiculous and indecent actions and grimaces, and otherwise misbehaving himself, during the performance of divine service in said meeting house to the great disturbance and insult of the orderly people there, and on the said other days and times, then and there assembled, and against the peace and dignity of the State.

R. M. Saunders, At. Gen'l.

Form No. 7758.

(Precedent in Com. *v.* Daniels, 2 Va. Cas. 402.)[2]

Virginia, *Lewis* county, to wit:

The Jurors for the Commonwealth of *Virginia*, and for the body of the county of *Lewis*, upon their oath present that *William Daniels*, late of the county of *Lewis*, *yeoman*, on the *sixth* day of *October*, in the year of our Lord one thousand eight hundred and *twenty-two*, with force and arms, at a place commonly called the *Flat Woods*, in the county of *Lewis*, and within the jurisdiction of the *Superior* Court *of Law* for said county of *Lewis*, during religious worship, did, on purpose, maliciously, and contemptuously disquiet, and disturb, a certain congregation of *Methodists*, being then and there lawfully assembled, for the purpose of religious worship, in contempt of public worship, to the evil example of all others in like cases offending, contrary to the form of the Statute in that case made and provided, and against the peace and dignity of the Commonwealth.

1. It was held in this case that the disturbing of a congregation assembled for purposes of religious worship, by laughing and talking, and indecent actions and grimaces, during the performance of divine service, is a misdemeanor, and *per se* indictable. See also *supra*, note 1, p. 1008.

2. This indictment was drawn under Va. Rev. Code (1819), c. 141, § 4, p. 555, and charged the offense in the words of the statute. The objection to the indictment was that it failed to allege the means of the disturbance; and the court, in overruling the objection, said that no doubt it was a correct mode

(2) By Assaulting a Member of Congregation.

Form No. 7759.[1]

(*Commencing as in Form No. 7754, and continuing down to* *) present that *John Karnes*, late of the county aforesaid, on the *first* day of *August*, in the year 1897, with force and arms, in the county aforesaid, did wilfully, maliciously and contemptuously[2] disquiet and disturb a congregation[3] and assembly of people met for religious worship, at the *Methodist Episcopal Church*, in the town of *Centralia*, in said county, a place set apart for religious worship,[4] by then and there wilfully menacing, threatening and assaulting one *Henry M. Sageser*, a person then and there being, contrary (*concluding as in Form No. 7754*).

(3) Within Certain Distance.

Form No. 7760.[5]

The *district* court for the county of *Ramsey* and state of *Minnesota*:

The State of Minnesota
against
John Doe.

John Doe is accused by the grand jury of the county of *Ramsey*, by this indictment, of the crime of disturbing a religious meeting, committed as follows:

The said *John Doe*, on the *first* day of *May*, 1897, at the city of *St. Paul*, in this county, and within *one* mile of the place where a religious meeting is held, to wit, within *one* mile of the *First Presbyterian Church*, situated in the city of *St. Paul*, in the county and state aforesaid, there being then and there an assemblage of persons lawfully met for religious worship, did wilfully, maliciously, and unlawfully engage in and promote the racing of horses.

Dated at *St. Paul*, in the county of *Ramsey*, the *tenth* day of *September*, A. D. 1897.

A true bill.

Andrew Jackson, Foreman of the Grand Jury.

b. Salvation Army.

Form No. 7761.

(Precedent in State *v.* Stuth, 11 Wash. 424.)[6]

[*The State of Washington*
against
Otto Stuth.

Superior Court of the State of *Washington*, for the County of *Thurston*.][7]

of drawing an indictment to charge the means by which the disturbance was caused, still it was unnecessary to set out such means.

For the present statute in *Virginia* see Va. Code (1887), §§ 3805–3807. See also *supra*, note 1, p. 1008.

1. This indictment is based on the facts in State *v.* Karnes, 51 Mo. App. 293, and is drawn under Mo. Rev. Stat. (1889), § 3785. See *supra*, note 1, p. 1008.

2. See *supra*, note 3, p. 1015.

3. See *supra*, note 4, p. 1015.

4. See *supra*, note 5, p. 1015.

5. *Minnesota.* — Stat. (1894), §§ 6521, 6522. See also *supra*, note 1, p. 1008.

6. This information was sufficient under Wash. Pen. Code, § 95 (Ballinger's Anno. Codes & Stat. (1897), § 7076). See also *supra*, note 1, p. 1008.

7. The words enclosed by [ ] will not be found in the reported case, but

Comes now *Milo A. Root*, county and prosecuting attorney for *Thurston* county, *Washington*, and the court being in session and the grand jury not being in session, and gives the court to understand and be informed that *Otto Stuth* is guilty of the offense of disturbing a religious society, and the members thereof when met together for public worship, committed as follows, to wit:

He, the said *Otto Stuth*, at *Olympia*, in *Thurston* county, *Washington*, on or about the *18th* day of *February*, 1894, in and near a room then occupied by a large number of persons belonging to a religious society, known as the "*Salvation Army*," did use loud and profane language, and did smoke a cigarette, and did refuse to leave said room when requested so to do by the officer of said society in charge, and did by said language and conduct [wilfully][1] disturb said "*Salvation Army*" and the members thereof, they then and there being met for public worship.

[Dated at *Olympia*, in the county aforesaid, the *second* day of *March*, A. D. 1894.

(*Verification.*) *Milo A. Root*, Prosecuting Attorney.][2]

IV. SCHOOL MEETINGS.[3]

Form No. 7762.[4]

State of *Connecticut*, } Town of *Hartford*.
Hartford County. }

Before *Abraham Kent*, esquire, a justice of the peace for *Hartford* county, in said town. Comes *Samuel Short*, a grand juror in and for said town of *Hartford*, and on his oath of office, complaint and information makes, that at said town of *Hartford*, on the *tenth* day of *March*, 1896, *John Doe*, of the town of *Hartford*, in said county, with force and arms did wilfully interrupt and disturb an assembly, meeting and school then and there in session, and then and there met and assembled together in said town of *Hartford* for the promotion of a moral and beneficial object, to wit, a certain singing school, kept and taught for culture and improvement in sacred and church music, contrary to the form of the statute in such case made and provided and against the peace. Wherefore the grand juror

have been added to render the form complete.

1. **Wilfully.** — The indictment did not allege that the disturbance was wilful; and although the court held the objection that the failure to so allege did not vitiate the indictment, on the ground that the acts alleged showed in themselves that the disturbance was wilful, it would still be safe to so allege, and the word has therefore been inserted in the indictment.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. **Sufficient Indictment.** — In an indictment under Ga. Code (1882), § 4577*a*, for disturbing a school, the mode of interruption is sufficiently charged in the words following: "by cursing and quarreling and fighting and discharging a loaded pistol, and by boisterous conduct, and by otherwise indecently acting." Huffman *v.* State, 95 Ga. 469.

4. This form is drawn under Conn. Gen. Stat. (1888), § 1506, and is based on the facts in the case of State *v.* Gager, 28 Conn. 232, 26 Conn. 607, in which case, however, the complaint was fatally defective in not alleging that the school "was in session."

aforesaid prays process, and that the said *John Doe* may be arrested and examined touching the allegations contained in this complaint, and be thereon dealt with according to law.

Dated at *Hartford* this *tenth* day of *March*, A. D. 1*896*.

Richard Roe, Grand Juror.

V. Women's Meetings.

Form No. 7763.

(Ala. Crim. Code (1886), § 4899, No. 36.)[1]

(*Commencing as in Form No. 7750, and continuing down to* *) *Frank Foe*, by rude or indecent behavior, or by profane or obscene language, wilfully disturbed a woman at a public assembly met for instruction or recreation, against (*concluding as in Form No. 7750*).

1. *Alabama.* — Crim. Code (1886), §4032.

DIVIDENDS.

See the title STOCK AND STOCKHOLDERS.

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